JUSTICE, INDIVIDUAL EMPOWERMENT AND THE PRINCIPLE OF NON-REGRESSION IN THE EUROPEAN UNION

Dora Kostakopoulou

Introduction

Matthew Arnold, who wrote his poetry in the 19th century, defined 'civilisation' as 'the humanisation of man in society'.[1] Like the poet Coleridge,[2] he believed that states have positive duties to humanise and civilise their members. Both *humane* and *humanising* policies and discourses are thus the hallmarks of civilised polities. Conversely, dehumanising policies, discourses and practices are by definition uncivil and unjust since they fail to respect the unconditional worth of human personality. All persons' lives matter, and matter equally.[3] Accordingly, they must be respected equally.[4] For this reason, individuals in liberal democracies are endowed with rights. Some of these rights are absolute and inviolable, such as the right to human dignity, while other rights can be subject to certain limitations provided that their essential core remains intact. Finally, some rights, such as socio-economic rights, are in the main imperfect, that is, non-justiciable. But this does not diminish their importance in facilitating human living, co-living and flourishing, within a socio-political environment which is evaluated on the basis of how well it protects and promotes those rights.

Interestingly, although the EEC and Euratom Treaties in 1957 did not include any references to human rights, in the 'Declaration on European identity' adopted at the

[1]Jump, *Matthew Arnold* (Longmans, Green and Co, 1955), p. 7. Arnold published poetry, literary criticism and essays on education, political and literary studies. He died on 15 April 1888.
[2] Coleridge combined poetry with philosophy in the 19th century and influenced Arnold's work.
[3] Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978).
[4] Scanlon, *Why Does Inequality Matter*? (Oxford: Oxford University Press, 1918).

Copenhagen Summit in 1973 the Member States noted that the Community ought to 'measure up to the needs of the individual and preserve the rich variety of national cultures'.[5] Soon afterwards, the Commission adopted a Communication on 'The Protection of Fundamental Rights in the European Community'.[6]

In the decades that followed, the Court of Justice and other European Union institutions elevated human rights into a central position within the European Union legal order.[7] Initially, through its case law, the Court made human rights an integral part of the general principles of EU law.[8] The European Parliament contributed to the enhancement of fundamental rights by incorporating them into the Draft Treaty on European Union (17 February 1984) and by adopting the Declaration of Fundamental Rights and Freedoms of 12 April 1989.[9] These initiatives were followed by explicit Treaty references to the European Convention on Human Rights and to human rights resulting from the common constitutional traditions of the Member States at Maastricht[10] and Amsterdam[11] and the drafting of the EU Charter of Fundamental

---

[5] European Commission, 'Annex 2 to Chapter II, 7th General Report' (1973).
[6] Bul. EC, 1976, suppl. 5/76.
[7] The literature on fundamental rights in the EU is voluminous; for early accounts, see M. Zuleeg, "Fundamental Rights and the Law of the European Communities" (1971) 8 C.M.L. Rev. 446-461; P. Pescatore, "The Protection of Human Rights in the European Communities" (1972) 9 C.M.L. Rev. 73-79; P. Alston, J. Heenan and M. Bustelo (eds.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999); P. Pescatore, "The Context and Significance of Fundamental Rights in the Law of the European Communities" (1981) 2 HRLJ 295; A. von Bogdandy, "The European Union as a Human Rights Organisation: Human Rights and the Core of the European Union" (2000) 37 C.M.L. Rev 1307; F. Jacobs, "Human Rights in the European Union: The Role of the Court of Justice" (2001) 26 E.L. Rev 331; K. Lenaerts, "Fundamental Rights in the European Union" (2000) 25 ELRev. 575-600; J. Dutheil De la Rochere, "The EU and the Individual: Fundamental Rights in the draft Constitutional Treaty" (2004) 41 C.M.L. Rev. 345-354. For very recent account, see Adrienne Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Oxford: Hart, 2019).
[8] U. Scheuner, "Fundamental Rights in European Community law and in National Constitutional law" (1975) 12 C.M.L. Rev. 171-191; J. Schwarze, "The Administrative law of the Community and the protection of human rights" (1986) 23 C.M.L. Rev. 401-417; H. G. Schermers, "The European Communities bound by fundamental human rights" (1990) 27 C.M.L. Rev. 249-258; K. Lenaerts and J. A. Gutierrez-Fons, "The Role of the General Principles of EU Law" in A. Arnull et al. (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing, 2011), 179.
[9] O.J. 1989, C120/51.
[10] Treaty on European Union, 1992, O.J. C191/1, in force on 1 November 1993.
[11] Treaty of Amsterdam, 1997, O.J. C340, 10 November 2017, in force on 1 May 1999.

Rights. The latter was signed on 7 December 2000,[12] was amended on 12 December 2007 and became legally binding following the entry into force of the Treaty of Lisbon.[13]

According to Article 6(1) TEU,[14] the Charter has 'the same legal value as the Treaties'. It binds all EU institutions and the Member States when they implement, derogate from, and act within the scope of, EU law (Article 51 of the Charter).[15] The EU Charter thus reflects 'the most fundamental values that uphold the Union as a constitutional polis'[16] or a polity. Fundamental rights are also the building blocks of a political notion of European identity and EU citizenship since a 'Europe of citizens' is inseparable from a 'Europe of rights.[17]

Since both European Union citizenship and fundamental rights are mutually constitutive of a notion of 'European belonging' as AG Colomer has stated in *Petersen*,[18] how should one conceive of their relation? It is true that both institutions found explicit treaty recognition in the early 1990s.[19] It is equally true that both have evolved significantly since then. More specifically, their formal, that is, treaty-based, birth overlapped. Article 6 of the Treaty on European Union (the Maastricht Treaty) listed the ECHR and the common national

[12] Treaty of Nice, signed on 26 February 2001, O.J. C080, 10 March 2001, in force on 1 February 2001.
[13] The discussion here will not focus on the issue of the accession of the EU to the ECHR. For early accounts on this, see J. P. Jacque, "The Accession of the European Union to the European Convention on Human Rights and the Fundamental Freedoms" (2011) 48(4) C.M.L. Rev. 995-1023; T. Lock, "Walking on a Tightrope: the draft ECHR accession agreement and the autonomy of the EU legal order" (2011) 48(4) C.M.L. Rev. 1025-1054.
[14] See also Declaration No 1 on the Charter of Fundamental Rights of the European Union [2012] O.J. C 326/339.
[15] The Court of Justice has set out the requirements on the implementation of EU law by the Member States for the purposes of Article 51 of the Charter in *Cruciano Siragusa v Regione Sicilia* (C-206/13) EU:C:2014:126 at [25].
[16] K. Lenaerts and M. Desomer, "Bricks for a Constitutional Treaty of the European Union: values, objectives and means" (2002) 27 E.L. Rev. 377-404, at p. 380.
[17] The Stockholm programme, which was adopted by the European Council in Brussels on 10-11 December 2009, laid down a policy agenda for the period 2012-14 which was citizen-centred; Council of the European Union, The Stockholm Programme – An Open and Secure Europe serving the citizens, Brussels, 2 December 2009, 17024/09. See also the Commission's Communication on An Area of Freedom, Security and Justice serving the citizen: wider freedom in a safer environment, Brussels, 10 June 2009, COM(2009) 262/4.
[18] A.G. Colomer's Opinion in *Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich* (C-228/07) delivered on 15 May 2008. Compare, also, the Commission's Communication on Further strengthening the Rule of Law within the Union: state of play and possible next steps, COM(2019) 163 final, Brussels 3 April 2019, at p. 1.
[19] S. O'Leary, "The Relationship between Community Citizenship and the Protection of Fundamental Rights" (1995) 32 C.M.L. Rev. 519-554.

constitutional traditions which inspire the general principles of EU law while Article 8 EC established that 'every person holding the nationality of a member state shall be a citizen of the Union'. AG Colomer has noted that a driving force for the judicial evolution of EU citizenship since Maastricht and for endowing 'the case law with coherence and pragmatic authority' was the emergence of fundamental rights.[20]

The parallel development of the two institutions has given rise to the argument that some kind of structural overlap is needed. It has been argued that EU citizenship could only be a meaningful institution if it incorporated fundamental rights[21] and the European Parliament has supported this view.[22] Although this proposal could be criticised for erasing the specificity of these institutions since citizenship rights are the rights of members qua citizens while human rights affirm the universal value of human dignity, I fully support greater connectivity or the reciprocal interdependence between EU citizenship and fundamental rights. EU citizenship and fundamental rights are intrinsic in the EU legal order, normatively connected and mutually conditioned, that is, the increased significance of one institution is conditioned by the increased significance of the other. And both institutions rely heavily on effective judicial protection.

Without access to justice and effective judicial protection, both fundamental rights and citizenship rights are merely theoretical. If rights are not upheld, individuals are deprived of the oxygen they need in order to lead meaningful lives. Judges thus have a clear duty to ensure that the rights of individuals are affirmed and protected; they must ensure the highest level of protection of fundamental rights and of primacy of EU law. National courts and tribunals are

[20] A.G. Colomer's Opinion in *Petersen*, *supra* note 18, para 25.
[21] 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 C.M.L. Rev. at 489, 516. See also A. Von Bogdandy, "The European Union as a Human Rights Organization: Human Rights and the Core of the European Union", *supra* note 3.
[22] European Parliament, Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference – Implementation and development of the Union, 17 May 1995, O.J. C151/56.

legally obligated to act as guarantors of EU law.[23] If they fail to protect individuals' rights and to enforce them in a robust way, they do not only commit a very serious error of law but undermine the principle of legality underpinning constitutional democracies. In other words, they have an obligation to respect the 'constitutional fundamentals' and the values of the European Union (Article 2 TEU).

In this article, I wish to defend the case for 'marbled realities' in the EU, that is, the institutional interconnection of (i) fundamental rights, (ii) EU citizenship and (iii) effective judicial protection in order to remedy individual disempowerment and injustices. The notion of justice underpinning this article is the justice of rule, of rights and of righteousness in judicial protection. For when individuals are denied their fundamental rights and/or citizenship rights, no hope, no faith and no positive thinking can heal them. Healing is only possible by means of justice.

The 'marbled reality' of fundamental rights, EU citizenship and effective judicial protection[24] requires a tripartite reform which might, or might not, depending on one's geographical location, be seen to be difficult to achieve at present; namely, realising the full impact of fundamental rights in determining the meaning and scope of EU citizenship as set out in Article 9 TEU and 20 TFEU; ii) making the case for the incorporation of the principle of non-regression into the EU legal order; and, finally, iii) creating a path of direct access to the Court of Justice of the EU for all those individuals who experience serious and persistent breaches of their fundamental rights (- and EU citizenship rights).

All three proposals are not devoid of empirical difficulties concerning their implementation since they stem from a normative vision which might not be acceptable to

[23] They have this obligation under Articles 2, 4(3) and 19(1) TEU and the EU Charter of Fundamental Rights.
[24] The right to a fair hearing and an effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights is both a general principle of EU law and a fundamental right; *Associacao Sindical dos Juizes Portugueses* (C-64/16) Judgement of the Court of 27 February 2018.

intergovernmentalists of various shades. Federalists, on the other hand, might be willing to embrace them. My point of departure is different though. Instead of valuing political structures and giving primacy to one of them, I am interested in the individual who is inhabiting them and who would ultimately judge them as valuable on the basis of how well they 'avail towards life'.[25] Assuming that the interest in creating an environment which empowers individuals to challenge the indignities, suffering and obstacles they experience is independent of opinion and/or ideological preferences for the primacy of either the nation-state or supranational arrangements, I hope my proposals will merit consideration even from those who oppose 'more Europe'.

EU citizenship and fundamental rights: rethinking the connection

The entanglement of Convention rights (ECHR) and EU free movement rights can be found in the Court of Justice's early jurisprudence. Since the *Stauder* judgment in 1969 and the *Internationale Handelsgesellschaft* case in 1970, fundamental rights have been part of the general principles of EU law,[26] and the Court has frequently invoked Article 8 ECHR, for instance, in the adjudication of cases concerning the family reunification of mobile Union citizens.[27] In line with Article 51(1) of the EUCFR,[28] fundamental rights can be relied upon to

[25] Ruskin's etymological enquiry into the Latin roots of the word 'value' led him to the verb 'valere' which means to be well or healthy. Something is valuable if it 'avails towards life'. Accordingly, Ruskin commented that something 'in proportion as it does not lead to life, or its strength is broken, it is less valuable: in proportion as it leads away from life, it is unvaluable or malignant'; *'Unto This Last' and The Two Paths* (Collins' Clear-Type Press, date in the preface 1862, p. 116-117). Dewey and the pragmatists in the US at the turn of the 20th century adopted a similar perspective.

[26] *Stauder v City of Ulm* (C-29/69) Judgement of 12 November 1969 and *Internationale Handelsgesellschaft* (C-11/70) Judgement of the Court of 17 December 1970. Lenaerts and Gutman have noted that general principle as reflection of 'federal common law'; "'Federal Common Law' in the European Union: A Comparative Perspective from the United States" (2006) 54 *The American Journal of Comparative Law* 7-16.

[27] For an overview of the case law, see C. Berneri, *Family Reunification in the European Union* (Oxford: Hart, 2017).

[28] The Charter is addressed to the institutions, bodies, offices and agencies of the Union and to the Member States when they are implementing Union law. See also Article 51(2) and 52 EUCFR on the scope and interpretation of rights and principles.

affirm citizenship rights that have been violated when, for example, the Member States deny the family reunion of Union citizens by imposing requirements which do not feature in the provisions of Directive 2004/38 (- the so called 'EU Citizenship Directive), such as, for example, the provision of a recent marriage certificate, and to strengthen citizens' rights by limiting the discretion of the Member States when they derogate from free movement and EU citizenship. In the latter case, fundamental rights provide additional layers of protection for EU citizens facing deportation.

1.1 Fundamental rights in Part 2 TFEU

Given the sedimentation of the entanglement between EU citizenship and fundamental rights, it would not be inconceivable to argue for, and to defend, the deepening of their connection. One could redeploy the existing institutional resources, that is, the established links between the Charter of Fundamental Rights and EU Citizenship, in order to create more opportunities for the enrichment of both institutions and, naturally, a better compliance system. For instance, why should not the rights to respect for private and family life (Article 7 EUCFR) and the protection of personal data (Article 8 EUCFR) find their way into the EU citizenship provisions? Another example of the redeployment of the existing norm to new ends could relate to the prohibition of collective expulsions (- an issue that emerged as a result of the forced eviction of Roma EU citizens in France and Italy at the close of the first decade of the 21st century) (Article 19 EUCFR). Why should not Article 19 EUCFR be part of the EU citizenship provisions? Arguably, such an addition would reflect the reality institutionalised discrimination against the Roma EU citizens and provide enhanced protection.

Writing in the 1990s, I also argued that a clause could be inserted in Part 2 TFEU stating that 'all Union citizens have an obligation to display solidarity with other Union citizens and

nationals of third countries. This obligation entails respect for each person's dignity and the rejection of any form of social marginalisation'.[29] More recently, relying on the inappropriate processes of 'Othering' of EU citizens living in the UK, I suggested the incorporation of Article 1 of the EUCFR on the protection of human dignity within Part Two TFEU, that is, within the Union citizenship provisions.[30] Such an amendment would not only give more substance to Union citizenship and would need no connecting factor with EU law for its applicability, but it would also link Part II TFEU with Article 2 TEU which includes respect for human dignity as a foundational value of the European Union. A Union which aims 'to promote peace, the values and the well-being of its peoples'[31] and is based on the rule of law and constitutional values cannot allow its citizens and their family members to be subject to xenophobia, disrespect, contempt and hatred, in short, to all those unacceptable manifestations of Othering which have taken place in the UK since the EU membership referendum on 23 June 2016. EU citizenship has evolved beyond a market integration instrument and thus it is no longer appropriate for EU citizens to proclaim: 'I move and thus I am an EU citizen'. Post-Brexit, they should be able to say: 'I am an EU citizen and must be treated with respect, dignity and in a non-discriminatory way across the European Union'.[32]

1.2 Fundamental rights safeguards for non-mobile EU citizens: The Charter's limitations and proposals for reform

[29] D. Kostakopoulou, "Towards a Theory of Constructive Citizenship in Europe" (1996) 4(4) *Journal of Political Philosoph*y 337-358.
[30] D. Kostakopoulou, "When a Country is not a Home: The Numbered (EU Citizens) Others and the Quest for Human Dignity under Brexit" in M. Jesse (ed.), (Cambridge: Cambridge University Press, forthcoming).
[31] Article 3(1) TEU.
[32] Compare *Konstadinidis* (C-168/91) [1993] ECR I-1191and, in particular, para 46 of A. G. Jacobs's Opinion delivered on 9 December 1992 which stated that EU nationals are entitled to say 'civis europeus sum' and to invoke that status in order to oppose any violation of their fundamental rights. See also A. G. Maduro's Opinion in *Centro Europa 7 Srl* (C-380/05) delivered on 12 September 2007 [16].

While the above institutional recommendations for future reform can be considered to flow naturally from the linkage of EU citizenship and fundamental rights,[33] what is quite problematic is the possibility of an equal levelling up of the fundamental rights protection afforded to 'static' EU citizens, that is, to all those EU citizens who have not exercised their free movement rights by leaving the state of their nationality. Here, Articles 51 and 52 of the Charter seem to raise a wall in the process of fundamental rights protection in so far as those citizens at present cannot invoke a connection with Union law in order to rely on the Charter for the protection of their rights.[34] The ensuing differentiated treatment does not only contradict the fundamental status of EU citizenship but it also legitimises discrimination which the EU itself prohibits.

The Court has confronted citizenship 'dilemmas' and has dealt with questions about the impact of fundamental rights in determining the meaning and scope of EU citizenship since *Rottmann* and *Zambrano* in 2010 and 2011,[35] respectively, but has found it difficult to perforate the in-built restrictions of Articles 51 and 52 of the Charter which safeguard national regulatory autonomy and thus state sovereignty. A 'deprivation of the effective enjoyment of the rights conferred by virtue of their status as citizens of the Union'[36] would grant a derived right of residence to family members of minor 'static' EU citizens.[37] Unfortunately, the Court in

[33] Interestingly, the European Parliament had suggested the incorporation of fundamental rights within the EU citizenship provisions during the intergovernmental negotiations of the Treaty on European Union in 1991; Bindi Report on Union Citizenship, Doc. A 3-0139/91, 23 May 1991, 12.

[34] The Charter is binding on the Member States when they act within the scope of EU law; 'The Court has no power to examine the compatibility with the Charter of national legislation outside the scope of European Union law', *Akerberg Fransson* (C-617/10) [2013], Judgment of the Court of 26 February 2013, para 19. Compare also K. Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) 8 EuCons. 375; P. Eeckhout, "The EU Charter of Fundamental Rights and the Federal Questions" (2002) 39 C.M.L. Rev. 945–994; K. Lenaerts, "Respect for Fundamental Rights as a Constitutional Principle of the European Union" (2000) 6 *Columbia Journal of European Law* 1–25.

[35] *Janco Rottmann v Freistaat Bayern* (C-135/08) [2010] ECR I-1449; *Ruiz Zambrano v Office national de l'emploi (ONEM)* (C-34/09) [2011] ECR I-0000. Compare also 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 C.M.L. Rev. 1267.

[36] *Ruiz Zambrano*, ibid, [42].

[37] See Kostakopoulou, "Co-creating European Union Citizenship: Institutional Process and Crescive Norms" (2012-13) 15 *Cambridge Yearbook of European Legal Studies* 255-282; N. Nic Shuibhne "Integrating Union

Zambrano did not embrace AG Sharpston's suggestion for a step change in fundamental rights protection and tackling reverse discrimination based 'on lottery rather than logic'.[38]

But in *Rottmann*, the Court took issue with Germany's denationalisation of Mr Rottmann, who had lost his Austrian nationality *ex lege* when he naturalised in Germany and thus was going to be stateless, and felt that it had to intervene since the loss of EU citizenship was at stake.[39] That was a situation which 'by reason of its nature or consequences fell within the scope of EU law' and thus the Court ruled that Germany's denationalisation could not escape judicial review and the scrutiny of the proportionality test.[40] The Court had to intrude into states' reserved domain of jurisdiction in order to protect individuals and to ensure the effectiveness of EU law and the fundamental status of EU citizenship.

It has not been surprising that, following *Rottmann* and *Zambrano*, scholars sought to re-inscribe national competences and the 'purely internal situations' doctrine within a framework that respects fundamental rights and EU law. Armin von Bogdandy's 'reverse Solange' proposal was such an attempt to deepen the interconnection between Union citizenship and fundamental rights.[41] He argued that 'beyond the scope of Article 51(1) of the Charter, Member States remain autonomous in fundamental rights protection as long as it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU'.[42] This is rebuttable presumption which could give rise to actions by Union citizens before

---

Citizenship and the Charter of Fundamental Rights" in D. Thym (Ed.), *Questioning EU Citizenship* (Oxford: Hart, 2017), pp. 209-239; Kostakopoulou and Thym "Conclusion: The Non-Simultaneous Evolution of Citizens' Rights" in D. Thym (ed.), *Questioning EU Citizenship*, pp. 309-322.

[38] A.G. Sharpston's Opinion at [88]. A.G. Sharpston posed the question whether Mr Zambrano could rely on the EU fundamental right to family life independently of any other provision of EU law at [139].

[39] *Rottmann*, *supra* note 37.

[40] Ibid, at [42].

[41] See Von Bogdandy et al., "Reverse Solange–Protecting the essence of fundamental rights against EU Member States", *supra* note 21; A. Von Bogdandy, M. Antpöhler, C. Dickschen, J. Hentrei, S. Kottmann and M. Smrkolj, "A European Response to Domestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine", in A. von Bogdandy and P. Sonnevend (Eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart, 2015), 248–267.

[42] Ibid, p. 514. Compare also C. Closa, D. Kochenov and J. H. Weiler, "Reinforcing the Rule of Law Oversight in the European Union", 2014/25 RSCAS Working Paper (2014).

national courts. More importantly, individuals could rely on their status as Union citizens irrespective of their mobility status in order to challenge systemic violations of fundamental rights which breach the values of the EU (Article 2 TEU). Accordingly, even purely internal situations would not escape the ambit of judicial review. Notably, A. G. Maduro had envisaged such a scenario of systemic shortcomings in the protection of fundamental rights in his Opinion in Centro Europa 7 Srl,[43] and provided a sound normative justification: 'the very existence of the European Union is predicated on respect for fundamental rights. Protection of the 'common code' of fundamental rights accordingly constitutes an existential requirement for the EU legal order'.[44]

Van den Brink reached a similar conclusion by arguing that the 'substance of rights doctrine' of EU citizens could be expanded to include fundamental rights. This would allow EU citizens to rely on fundamental rights in order to challenge infringements of their rights in purely internal situations which do not involve cross border movement.[45] Strus and Persak have also argued that in the same way that EU citizenship case law has transcended the requirement of cross border activity in specific cases, such as, *Garcia Avello*, *Zhu and Chen*, *Rottmann* and *Zambrano*, the Charter should apply to all national measures which have or would have a negative effect on the effectiveness of EU law.[46] This would extend the application of the Charter under Article 51, but it would also be consistent with Article 51(2) which refers to the obligation of the EU and the MS to 'respect the rights, observe the principles and promote the application of the Charter'. Building on *Fransson*, where the Grand Chamber stated that the

[43] A. G. Maduro, *supra* note 34, [20] –[22].
[44] Ibid, at [19].
[45] M. Van den Brink, "EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?" (2012) 39 *Legal Issues of Economic Integration* 273, pp. 280-282. Compare also S. Iglesias Sanchez, "Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?"(2014) 20 E.L. Rev. 464.
[46] J. Strus and N. Persak, "The Charter of Fundamental Rights and EU Citizenship: The Link with EU law Re-examined", in E. Guild, C. Gortazar Rotaeche and D. Kostakopoulou (Eds.), *The Reconceptualisation of European Union Citizenship* (Leiden: Brill, Nijhoff, 2014), pp. 323-341.

Charter applies even to a national provision or measure in 'a situation not entirely determined by European Union law',[47] they have argued that, 'if a Member State regulates or limits a particular fundamental right at national level, it should not act under the assumption that it can do so without paying any attention to EU law'.[48] This is because a piece of national legislation with a systemic reach in the area of fundamental rights can affect the effectiveness of EU law in many ways.[49] Recent political developments in certain Member States, such as Hungary and Poland have confirmed this.

The non-regression principle

I am fully supportive of the above proposals and believe that a sufficiently serious breach of fundamental rights, one of the foundational constitutional norms of EU law under Article 2 TEU, should trigger the application of the Charter. But one does not have to limit the applicability of Article 2 TEU to exceptional cases of systemic violations of fundamental rights. Sufficiently serious and persistent breaches of an individual's fundamental rights should be able to trigger the application of the Charter if they are not based on excusable errors and show an intolerable disregard for 'superior rules of law', such as fundamental rights. My second concern about the 'reverse Solange' proposal, which is both laudable and implementable since it requires no change in the Treaties, relates to the fact that much power is placed on national courts to decide how and when the presumption is rebutted and thus a preliminary ruling reference to the CJEU would be necessary. This might yield unjust outcomes and leave individuals, whose rights have been breached, completely disempowered if a national

[47] *Supra* note 36, [29].
[48] *Supra* note 46, p. 338.
[49] The Fundamental Rights Agency has reported that 'The Member States have not fully embedded a Charter culture in their administrative, legislative and judicial procedures' and that 'the Charter plays only a peripheral role in national law- and policy-making, and in domestic jurisprudence'; *Between Promise and Delivery: 10 Years of Fundamental Rights in the EU* (Luxembourg: Publications of the European Union, 2017), at p. 23.

court for a number of reasons decides not to play the role of the enforcer of EU law. In the subsequent discussion I will return to this concern. For present purposes, it is noteworthy that, given the rise in nationalistic populism in Europe and the fact that over the last five years rights are losing ground exactly when they ought to be gaining it,[50] the limitations of Article 51(1) of the Charter must be addressed. It is congruent with the general public interest of the EU to ensure the full effectiveness of fundamental rights protection and to defend the constitutional principles of the EU legal order which shield human dignity and common decency from retrogressions in the Member States.

In a Europe of rights, of citizens and of democracy, national measures and practices which are incompatible with fundamental rights cannot be accepted or tolerated on the ground that they are allegedly domestic issues because the link with EU law is missing. Nor can the Union legitimately say to millions of non-mobile EU citizens that they cannot say 'civis europaeus sum' and cannot use their EU citizenship status in order to oppose the breach of their fundamental rights in their home Member States.[51]

For this reason, in what follows I would like to argue for the formal recognition of the principle of non-regression in the EU legal order. That there exists a wider European Union interest in preventing violations of fundamental rights in national areas is indisputable: support can be derived from the objectives of the EU (Article 3 TEU), and in particular, its 'aim to promote peace, its values and the well-being of its peoples' (Article 3(1) TEU) as well as the Preamble to the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007, which forms part of primary EU law following the entry into force of the Lisbon Treaty (in force on 1 December 2009).[52] The Preamble states

[50] Compare, here, the Commission's 2017 Annual Report on the Application of the EU Charter of Fundamental Rights, COM (2018) 396 final.
[51] Opinion of A. G. Jacobs in *Konstadinidis*, *supra* note 31 at [46].
[52] Article 6(1) TEU and EU Charter of Fundamental Rights, O.J. C 83, 30.03.2010, 389.

that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice,'[53] and that 'the Union contributes to the preservation and to the development of these common values'.[54]

The words 'preservation' and 'development' are significant. Both words prevent deteriorative conditions and degradation in fundamental rights protection. In other words, the Charter's preamble rules out retrogressive steps. In addition, the preamblic reference to 'preservation and development' signals the existence of both negative and positive duties on the part of institutions (i.e., of the EU and the MS); namely, a negative duty to refrain from any action or omission to act which weakens or has negative effect on those values and a positive duty to give enhanced recognition to, and promote respect for, those values. These are not simply aspirational statements – they reflect legal obligations.

As the Court stated in *Andy Wightman and Others v Secretary of State for Exiting the European Union*:[55]

'62 It is also appropriate to underline the importance of the values of liberty and democracy, referred to in the second and fourth recitals of the preamble to the TEU, which are among the common values referred to in Article 2 of that Treaty and in the preamble to the Charter of Fundamental Rights of the European Union, and which thus form part of the very foundations of the European Union legal order (see, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission,* C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 303 and 304).

63 As is apparent from Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union and to which Article 50 TEU, on the right of withdrawal, is the counterpart, the European Union is composed of States

[53] Ibid, at p. 2.
[54] Recent judgements of the Court of Justice of the EU give concrete expression to the values of the EU (Article 2 TEU); see, for instance, *Tele2 Sverige AB v Post-och telestyrelsen* (C-203/15 and C-698/15) Judgement of the Court of 21 December 2016; *Associado Sindical dos Juizes Portugueses* mentioned above (*supra* note 26) at [30] – [32] and *PPU* (C-216/18) EU:C:2018: 586.
[55] Case C-621/18, Judgement of Court of 10 December 2018.

> which have freely and voluntarily committed themselves to those values, and EU law is thus based on the fundamental premise that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 35).'

In March 2014, the Commission's Communication on 'A new EU framework to strengthen the rule of law' commented on the complementarity of democracy, respect for the rule of law and fundamental rights. In particular, it noted that 'the rule of law is the backbone of any modern constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member States and the EU, and, as such, one of the main values upon which the Union is based…. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect for the rules governing the political and electoral process'.[56] Commissioner Reding also made it clear in 2013 that rule of law matters 'are no longer a 'domain reserve' for each Member State, but are of common European interest'.[57] Such official pronouncements highlight the links among the 'constitutional fundamentals' of the EU (human dignity, freedom, democracy, equality, the rule of law and respect for human rights) and lend support to a dynamic, constructivist understanding of the intimations of the principle of non-regression which is contained in the Charter and the Treaty on European Union.

The horizontal provisions of the Charter, that is, Articles 52, 53 and 54, also contain non-regressive clauses. Article 52(3), which sets the scope and interpretation of rights and

[56] COM(2014) 158 Final (Brussels, 11 March 2014) 2.4.
[57] V. Reding, 'The EU and the Rule of Law: What Next?', Speech delivered at CEPS, 4 September 2013.

principles, ensures that the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR. Of course, the EU can guarantee more extensive protection – a levelling up but not a levelling down is envisaged: 'in so far as this Charter contains rights which correspond to rights guaranteed by the Convention of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

In addition, Article 53 EUCFR aims at maintaining the level of protection of fundamental rights currently afforded within their respective scope by Union law, national law and international law: 'nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party…'. Article 54, reflecting Article 17 ECHR, prohibits 'any activity or performance of any act aimed at the destruction of any of the rights and freedoms recognised in the Charter or at their limitation to a greater extent than is provided for herein'. Interestingly, unlike Article 17 ECHR, Article 54 does not make any reference to 'states, groups or persons', but the prohibition of the destruction or further limitation of any of the rights and freedoms is, nonetheless, clear.

The non-regression principle features in the TEU, too. Article 3(1) states that the Union's aim is to promote its values and the well-being of its peoples. The word 'promote' is antithetical to possible deterioration or violation of the values. It also rules out Member States' disregard of them and even passive adherence to them. Similarly, 'promoting the well-being of its peoples' can never be congruent with a toleration of violations or restrictions of rights and of the unjust treatment of EU citizens. In its external relations as well, the Union 'shall uphold and promote its values and interests and contribute to the protection of its citizens' (Article

3(5) TEU). And when the values of the EU are violated, infringement proceedings can be initiated by the European Commission (Article 258 TEFEU). There is also a possibility of activating Article 7 TEU, the so called 'nuclear option', in order to sanction the defaulting Member State. Accordingly, a clear risk of a serious breach of fundamental rights by a Member State can, and ought to, give rise to sanctions irrespective of whether the jurisdictional test of Article 51(1) of the EUCFR (i.e., acting within the scope of EU law) applies. In reality this means that no Member State could invoke competence limitations built on 'purely internal situations' in order to resist the EU's intervention and the subsequent activation of Article 7 TEU. Article 2 TEU is binding EU law.

Even the provisions on enhanced co-operation, a mechanism incorporated into the TEU at Amsterdam in 1997 in order to facilitate flexible arrangements in the light of intergovernmentalist pressures and states' anxieties about the deepening of European integration, incorporate the non-regression principle. In particular, paragraph 2 of Article 20(1) TEU allows for enhanced co-operation only if 'it furthers the objectives of the Union, protects its interests and reinforces its integration process'. In others words, enhanced co-operation could not be triggered in order to facilitate retrogressive steps, such as backsliding or the undermining of European integration.

Giving formal legal recognition, and weight, to the principle of non-regression, that is, of non-deterioration in the level of protection of fundamental rights would, in effect, overcome the limitations of Article 51(1) EUCFR and 6(1) TEU[58] on the EU's human rights jurisdiction. Such an upgrade to von Bogdandy's 'Reverse Solange' proposal would also lower the threshold from grave, systemic violations of fundamental rights to individual cases of serious and

[58] According to 6(1) TEU, 'the provisions of the Charter shall not extend in any way the competences of the Union as defined by the Treaties'.

persistent breaches of them,[59] thereby safeguarding a high, common level of protection across the EU. More importantly, as no Treaty change is needed for the implementation of this proposal, citizens would not have to wait for years in order to be really placed at the centre of the EU's legal order and to enjoy a protection of their fundamental rights. They would immediately know that serious and persistent breaches of fundamental rights in domestic arenas would activate the EU's jurisdiction.

An encouraging sign in the evolving case law of the Court of Justice of the EU in the field of criminal judicial co-operation is its ruling in *Aranyosi and Caldararu* where the Court ruled that the executing authority of an European arrest warrant has a duty to examine the impact of the surrender of the individual concerned on his/her fundamental rights thereby departing from earlier case law which referred to the existence of systemic deficiencies in the Member State issuing the arrest warrant.[60] The Court paid attention to the need for an assessment not only of the law, but also of the practice of fundamental rights protection on an individualised basis. Similarly, in *Tjebbes* the Grand Chamber held that in cases of loss of Member State nationality owing to long term residence abroad, the competent national authorities and national courts must have due regard to the principle of proportionality which requires an individual examination of the consequences of that loss for the persons concerned and the members of their families from the point of view of EU law.[61] As the Court put it, 'As part of that examination of proportionality, it is, in particular, for the competent national

[59] This is in line with the textual wording of Article 7 TEU. Notably, the Meijer Committee has observed that a limited number of individual cases of rights infringements, if sufficiently serious, could be seen to constitute a systemic threat; 'Letter to Commissioner Reding: Note on the Commission Communication " A New EU Framework to Strengthen the Rule of Law", Ref. CM1406, 15.06.2014 (copy with the author).

[60] Joined Cases C-404/15 and C-659/15 PPU, Judgment of the Court of 5 April 2016. This does not mean that the Court's case law is, or has to be, linear. Compare, for instance, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry ('TSN') and Hyvinvointialan liitto ry* (C-609/17) and *Auto- ja Kuljetusalan Työntekijäliitto AKT ry ('AKT') and Satamaoperaattorit ry* (C-610/17) Judgement of the Court of 19 November 2019; *IN and JM v Belgische Staat* (C 469/18 and C 470/18) Judgement of the Court of 24 October 2019.

[61] M.G. Tjebbes, G.J.M. Koopman, E. Saleh Abady and L. Duboux v Minister van Buitenlandse Zaken (C-221/17) EU:C:2019:189, in particular [40]-[48].

authorities and, where appropriate, for the national courts to ensure that the loss of nationality is consistent with the fundamental rights guaranteed by the Charter, the observance of which the Court ensures, and specifically the right to respect for family life as stated in Article 7 of the Charter, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of the Charter.'[62]

Perforating the barrier of Article 51(1) EUCFR was the wish of the former Commission's Vice-President, Mrs Reding. In 2013, she stated that the abolition of Article 51 EUCFR would 'make all fundamental rights directly applicable in the Member States, including the right to effective judicial review."[63] It follows from the preceding discussion that such a revision of the Charter would be unnecessary since the same result be achieved by the legal recognition of the principle of non-regression. But the non-regression principle remains silent about the role of the Court of Justice of the EU in ensuring the effectiveness of fundamental, and citizenship, rights protection. In the remainder of the discussion I would like to consider this issue in more detail.

Unbounding judicial protection: making fundamental rights real and effective

While the legal recognition of the principle of non-regression in the protection of fundamental and citizenship rights would ensure that individuals can invoke their rights under EU law irrespective of jurisdictional issues, that is, irrespective of whether they could show that their situations falls within the scope of EU law and thus arguments put forward by states invoking national competences, it might be worth considering the possibility of opening avenues of

[62] Ibid, [45].
[63] Reding, 'The EU and the Rule of Law: What Next?', *supra* note 57.

direct access to the Court of Justice of the EU. It is true that, unlike the recognition of the principle of non-regression, such a reform would require a Treaty change and would trigger strong reactions on the part of certain Member States worrying about the federalisation of the European Union. However, considering that under the present system individuals complaining about serious and persistent violations of their fundamental rights can only request a preliminary ruling reference by national courts and tribunals under Article 267 TFEU thereby relying on the willingness of national judicial authorities to enforce EU law even when they are required by law to do so (Article 267(3) TFEU), it can be plausibly argued that their fundamental right to judicial protection (Article 47 EUCFR) is only conditional. A future constitutional innovation of allowing individuals direct access to the Court of Justice, thereby neutralising attempts by national courts and tribunals to shield illegalities and fundamental rights violations taking place in national arenas from wider scrutiny and effective judicial review, would have a truly empowering and protective effect. This scenario was contemplated by Commissioner Reding in 2013. She raised the possibility of "the EU Charter of fundamental rights becoming a 'federal standard' of respect for fundamental rights akin to the Federal Bill of Rights in the US, protecting any individual citizen against any public authority of any kind and in any area of substantive law".[64]

Intergovernmentalists would complain, here, that such a development might be a 'system-destroying' move since it would ignore the limits of the 'attributed powers' doctrine. But equally, if serious attention is devoted to institutional design, one could possibly contemplate a parallel system of indirect access to the Court under Article 267 TFEU and direct access to the Court, if the former national judicial gateway under Article 267 TFEU becomes blocked. If serious concerns about an unmanageable increase in the case-load of the Court exist,

[64] Ibid.

a leave system could be introduced thereby authorising the Court to decline to consider cases which do not meet the threshold of serious and persistent violations of fundamental rights or do not undermine the fundamentals of constitutional democracies.

I see many advantages in opening up a direct judicial channel at the European Union level. It would provide a guarantee of a consistently high and uniform level of protection of individuals' rights and would have a positive 'socialising effect' across the EU. It would sediment a rights-compliant culture in the EU and would empower individuals by improving their judicial protection. Undoubtedly, this reform would be the product of political choice and thus unavoidably will be surrounded by controversy about its merits and demerits. Critics might warn about a new wave of Euroscepticism and populist backlash. Notwithstanding the possibility of discursive games and ideological exploitation for narrow electoral interests, however, it might not be long before we recognise that any disadvantages inherent in this reform are less important than remedying the injustice resulting from the existing situation. After all, if one studies the historical process of European integration, (s)he can easily discern that every single reform and development, that is, a step forward, was criticised as an obstacle and hindrance to national interests and powers. National executives and politicians have a habit of portraying any 'addition' as an 'abstraction' at least until the matter is settled either through a treaty amendment or through a judicial intervention.

Conclusion

The European Union has evolved considerably since the mid-20th century and has raised the expectations of its citizens and residents.[65] We know very little about the future but, as things

[65] Compare, for example, European Parliament, Resolution on the situation of fundamental rights in the EU (2013-14), 8 September 2015 (2014/2254 (INI)), para. 21 and Resolution of 14 November 2018 on the need for a

look now, both the human person and the European Union need the support of the law and the strict adherence to the EU's values which include respect for fundamental rights.[66] In the foregoing discussion I argued that, as an obligation of justice, non-regression in fundamental rights protection should be given explicit legal recognition in the EU legal order and showed how existing normative and legal resources could be regarded to constrain regressions in the Member States. I also made a case for the expansion of the judicial remedies available to individuals when their fundamental rights are breached. The availability of more remedies for injustices which are not conducive to human beings' well-being, living and co-living cannot but enhance trust in institutions and a sense of European belonging. More importantly, it would show that a 'Europe of democracy' and a 'Europe of citizens' are not possible without a 'Europe of real and effective rights'.

When fundamental rights are challenged, threatened and violated, as they have been in the second decade of the 21st century, the only appropriate response would be to strengthen their protection – not to tolerate their erosion. For it is only when the rights, principles and values enshrined in the EU Charter of Fundamental Rights are protected and promoted, citizens and residents can expect to enjoy just institutional conditions, that is, institutional conditions that are conducive to human living, co-living and human flourishing.

comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886 (RSP)).

[66] This has been acknowledged by the Commission: see its Communications on Further strengthening the Rule of Law within the Union (COM(2019) 163 final, Brussels 3 April 2019) and on Strengthening the rule of law within the Union: a blueprint for action (COM(2019) 343 final, Brussels 17 July 2019).