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Rights and Powers in the European Union: Towards a Charter that is Fully Applicable to the Member States?

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Abstract
This contribution will tackle a central question for the architecture of fundamental rights protection in the EU: can we envision a Charter that fully applies to the Member States, even beyond the limits of its scope of application? To improve our understanding of the boundaries of the Charter and the potential for further expansion, I will examine the legal avenues through which the CJEU has extended the scope of application of EU fundamental rights in fields of state powers. While the latent pull of citizenship towards a more expansive application of the Charter has not been fully realized, the principle of effective judicial protection (Article 19(1) TEU) has recently shown potential for protection under EU law beyond the boundaries of the Charter. As will be argued, effective judicial protection may well become a doorway for full application of the Charter to the Member States. While such an outcome might currently seem politically unsound, I contend that a progressive case-by-case expansion of the applicability of the Charter to the Member States would be welcome from the standpoint of a robust notion of the rule of law in the EU.

Keywords: Charter, fundamental rights, scope of application, free movement, citizenship, effective judicial protection

I. INTRODUCTION

A little over ten years ago, the Treaty of Lisbon rendered the Charter of Fundamental Rights of the European Union ('Charter') legally binding as a source of primary EU law. Since its inception, however, the Charter has suffered from an internal paradox: its aspiration to strengthen fundamental rights protections for all EU citizens runs up against its limited scope of application *vis-à-vis* the Member States. Indeed, the very Preamble of the Charter acknowledges this tension.

If one of the main reasons behind the adoption of the Charter was making fundamental rights more visible to EU citizens, the limited protection of individual rights *vis-à-vis* state action generates confusion and frustration, and might contribute to the

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relatively low awareness of the Charter at the national level. According to the 2019 Eurobarometer, only 47% of the respondents had heard of the Charter. While a few more (48%) understood that the Charter was legally binding, only a small percentage of respondents (7%) were able to correctly make the distinction that the Charter applies to the EU Member States only when the Member States are implementing EU law (in addition to all actions of EU institutions and bodies).[1]

In any federal-type compound, the allocation of powers and the system for rights protection are inextricably intertwined.[2] Throughout the Charter drafting process, several Member States feared that a written bill of rights could increase or widen the competences of the EU in that field.[3] The preoccupation with preventing a binding Charter from expanding the powers of the EU was written into the Treaty of Lisbon (second subparagraph of Article 6(1) Treaty on European Union ('TEU')) and the Charter itself (Article 51(2)). At the same time, Article 51(1) of the Charter laid down that Member States shall be bound by the Charter 'only when they are implementing Union law'. This Article was the source of profound debate during the drafting process.[4] Indeed, the definition of the boundaries of the Charter *vis-à-vis* the Member States is crucial for the federal architecture of the system of rights protection, and correspondingly for the extent of the power of the Court of Justice of the European Union ('CJEU') to scrutinise state action under fundamental rights.

In that regard, it has been declared that the 'scope of application of the Charter is therefore the keystone which guarantees that the principle of conferral is complied with'.[5] Nonetheless, as will be shown, the scope of application of the Charter and the corresponding power of the CJEU to adjudicate fundamental rights now go well beyond the field of EU conferred powers.

This contribution will tackle a central question for the architecture of fundamental rights protection in the EU: can we envision a Charter that fully applies to the Member States, even beyond the limits of Article 51(1)? The response will be based on a critical analysis of the CJEU case law over the last ten years. I will examine the legal avenues through which the CJEU has extended the scope of application of EU fundamental rights, while empowering itself to monitor state action. Moreover, I will consider how much further the boundaries of the Charter can be pushed through the routes examined and whether such an expansion of applicability would even be desirable in terms of rights protection and the overall EU

[1] European Commission, Special Eurobarometer 487b 'Awareness of the Charter of Fundamental Rights of the European Union'(2019), p 4.

[2] P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39(5) *Common Market Law Review* 945; A Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (2005) 42(2) *Common Market Law Review* 367.

[3] Knook, note 2 above, pp 371–74.

[4] G de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 10 *European Law Review* 126, pp 136–37; Eeckhout, note 2 above, pp 954–58.

[5] K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8(3) *European Constitutional Law Review* 375, p 377.

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constitutional order. This analysis will improve our understanding of the boundaries of the Charter and the potential for further expansion.

The legal avenues through which the CJEU has extended the scope of application of the Charter are mainly the following: a broad interpretation of the notion of 'implementing' EU law (Part II); the gravitational force of free movement of persons in drawing Charter protection of 'moving' citizens in cross-border situations (Part III); the effectiveness of EU citizenship, even in situations that could be regarded as purely internal, when the enjoyment of the substance of rights conferred by EU citizenship is at stake (Part IV); and finally the principle of effective judicial protection in connection with the rule of law (Part V).

The link between fundamental rights and citizenship has offered opportunities to extend the protection of (moving and non-moving) citizens under the Charter.[6] The ideal of equality embedded in the notion of citizenship is a powerful argument to provide a common bill of rights for all EU citizens. And yet, the latent pull of citizenship towards automatically triggering the application of the Charter has not been fully realised.

Nonetheless, in the context of the 'rule of law' cases regarding domestic judicial reforms that have threatened judicial independence,[7] the principle of effective judicial protection enshrined in the second subparagraph of Article 19(1) TEU has shown potential for protection under EU law beyond the boundaries of the Charter. In that regard, I will argue that effective judicial protection may well become a doorway for full application of the Charter to the Member States over time. While such an outcome might currently seem politically unsound, given the moment of growing Euroscepticism and rising authoritarianism in the EU, I contend that it would be welcome from the standpoint of a robust notion of the rule of law.

II. IMPLEMENTING EU LAW: ARTICLE 51(1) OF THE CHARTER

According to Article 51(1) of the Charter, Member States are bound by the Charter 'only when they are implementing Union law'. And yet, the Explanations to the Charter,[8] which must be considered in its interpretation,[9] referred to the prior case law of the CJEU, according to which the Member States are bound by the Charter when they act within the field of application of EU law. The reference to the prior case law represents a broader formulation of applicability than the one in Article 51(1) of the Charter. In the end, the vagueness of the notion of 'implementing'

[6] S Iglesias Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?' (2014) 20(4) *European Law Journal* 464; M J Van Den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously' (2012) 39(2) *Legal Issues of Economic Integration* 273; S O'Leary, 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32(2) *Common Market Law Review* 519.

[7] *Commission v Poland*, C-619/18, EU:C:2019:531.

[8] 'Explanations relating to the Charter of Fundamental Rights' OJ C 303, 14.12.2007, pp 17–35.

[9] According to paragraph 3 of Article 6(1) TEU and Article 52(7) of the Charter.

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has left a wide margin for the CJEU to draw the Charter's contours. At the same time, the CJEU has been reluctant to apply the Charter in certain fields, such as the domestic austerity measures enacted in the context of the economic and financial crisis. The lack of clarity regarding the criteria for the Charter's applicability might undermine the consistency of the case law and the CJEU's legitimacy in the eyes of the holders of those rights.

A. The Long Shadow of the Notion of Implementing EU Law

Soon after the Charter acquired legally binding force, the CJEU was confronted with the interpretation of Article 51(1) of the Charter in *Åkerberg Fransson*.[10] The CJEU confirmed a broad interpretation of the term 'implementing' and it equated 'implementing' EU law and 'acting within the scope' of EU law:[11] 'Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable'.[12]

Generally, state measures adopted to fulfil an obligation under EU law shall be regarded as implementing EU law, even if that obligation is not totally specified.[13] As a result, a broad array of situations are covered by the Charter. To begin with, the Member States are clearly bound when they apply primary or secondary EU law, such as when the Member States take action to enforce treaty provisions or regulations.[14] Second, the Charter also applies to domestic legislation implementing directives, or domestic legislation concerning the matter governed by a directive, even if that piece of legislation was not expressly enacted to that end.[15] Third, the CJEU held that when Member States exercise their discretionary powers under EU

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

[11] 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(5) *Common Market Law Review* 1267, p 1277; X Groussot and I Olsson, 'Clarifying or Diluting the Application of the EU Charter of Fundamental Rights?—The Judgments in *Åkerberg and Melloni*' (2013) *II Lund Student EU Law Review* 7, pp 12–13; F Fontanelli, 'The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights' (2014) 20(3) *Columbia Journal of European Law* 193, pp 216–17.

[12] *Åkerberg Fransson*, note 10 above, para 21.

[13] K Lenaerts and J A Gutiérrez Fons 'The Place of the Charter in the EU Constitutional Edifice' in S Peers, T Hervey, J Kenner, and A Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing, 2014), emphasised that it suffices to determine the existence of such an obligation, regardless of whether EU law has specified the ways in which the States are to carry out that obligation.

[14] *Wachauf*, C-5/88, EU:C:1989:321.

[15] *Kücükdeveci*, C-555/07, EU:C:2010:21.

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law, they must be regarded as implementing EU law.[16] This would also be the case in situations of partial harmonisation.[17]

In addition, the Charter—Article 47—has also been applied to assess domestic procedural rules when the effectiveness of rights conferred by EU law—other than those set out in the Charter—was at stake.[18] Although procedural rules are a matter for the domestic legal order of each Member State under the principle of procedural autonomy, they are relevant for the effectiveness of rights conferred under EU law and thus become relevant for the 'implementation' of EU law.

Overall, the notion of implementing EU law has been so broadly understood that it covers many situations in which the Member States might be exercising their respective competences, such as in *Åkerberg Fransson*, as long as they can be regarded as fulfilling an obligation under EU law.

B. When Is the Connection to EU Law Not Sufficient?

At the same time, not just any connection to EU law has been deemed sufficient to trigger the application of the Charter. The necessary strength of the connection to trigger the Charter's application, however, is difficult to ascertain. In *Siragusa*, decided soon after *Åkerberg Fransson*, the CJEU emphasised that the concept of implementing EU law 'requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'.[19] In addition, the CJEU provided a set of criteria that were considered in previous judgments but absent in *Åkerberg Fransson*.[20] The CJEU thereafter resumed consideration of those criteria in cases such as *Iida*[21] and *Ymeraga*[22] in refusing the applicability of the Charter.

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[16] *N.S.*, Joined Cases C-411/10 and C-493/10, EU:C:2011:865, para 68. C Rauchegger, 'The Interplay Between the Charter and National Constitutions after *Åkerberg Fransson* and *Melloni*. Has the CJEU Embraced the Challenges of Multilevel Fundamental Rights Protection?' in S d Vries et al (eds), *The EU Charter of Fundamental Rights as a Binding Instrument Five Years Old and Growing* (Hart Publishing, 2015), pp 107–09.

[17] B de Witte 'The Scope of Application of the EU Charter of Fundamental Rights' in M González Pascual and A Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge, 2017), p 29.

[18] *DEB*, C-279/09, EU:C:2010:811, regarding domestic procedural rules that excluded legal persons from access to legal aid in a case in which the applicant sought to establish state liability under EU law; *Sánchez Morcillo*, C-169/14, EU:C:2014:2099, regarding domestic mortgage enforcement proceedings in connection to the effectiveness of consumer protection under Directive 93/12. In contrast, in *Torralbo Marcos*, C-265/13, EU:C:2014:187, paras 32–33, regarding national legislation that required payment of a fee to lodge an appeal, the CJEU refused jurisdiction since the main proceedings did not concern the interpretation or application of a rule of EU law, other than those set out in the Charter.

[19] *Siragusa*, C-206/13, EU:C:2014:126, paras 24–25.

[20] Ibid, para 25: 'Some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it'.

[21] *Iida*, C-40/11, EU:C:2012:691, para 79.

[22] *Ymeraga*, C-87/12, EU:C:2013:291, para 41.

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Moreover, in contrast to an expansive reading of the Charter, the CJEU has been reluctant to apply the Charter to national measures related to the Euro-crisis. The applicability of the Charter to national austerity measures adopted in the context of financial assistance programmes has been (and still is) a controversial issue.[23] The extent to which Member States implement EU law within the meaning of Article 51(1) of the Charter when they implement financial assistance conditionality is uncertain. The link to EU law might be questioned in light of the recourse to international law to adopt financial assistance mechanisms, such as the European Financial Stability Facility ('EFSF') and the European Stability Mechanism ('ESM'). Moreover, even if the EU link were established, the legal nature of such instruments as the Memoranda of Understanding ('MoU') could be an obstacle, as MoUs are purportedly non-binding and leave discretion to the Member States implementing the conditions for financial assistance.[24]

At first, the CJEU declared inadmissible the preliminary references brought by several Romanian and Portuguese courts involving national austerity measures implementing the respective MoUs.[25] The CJEU declared that it lacked jurisdiction since the domestic courts had failed to specify the link with EU law,[26] although it did not exclude the potential application of the Charter, the connection with EU law should be made explicit.

In this context, *Florescu*[27] represented an important shift.[28] This case brought by several judges in Romania focused on a law that precluded them from receiving their retirement pension on top of income derived from university teaching. This law was adopted to fulfil the commitments set out in a MoU concluded between the European Commission and Romania to reduce spending on public sector wages and therefore of the pension system. The CJEU held that despite the margin of discretion left to the Member State in implementing the conditions set out in a MoU, to the extent that the national measures are adopted to fulfil the MoU's objectives, which are sufficiently detailed and precise, the Member State is bound by the Charter.[29]

This was a landmark decision from the perspective of the Charter's application to austerity measures adopted by Member States and in particular to the conditions for

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[23] See C Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10(3) *European Constitutional Law Review* 393; A Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What Is the Role of the EU Charter of Fundamental Rights?' (2017) 54(4) *Common Market Law Review* 991.

[24] Kilpatrick, note 23 above, pp 394–96.

[25] *Corpul National al Politistilor*, C-434/11, EU:C:2011:830; *Corpul National al Politistilor*, C-134/12, EU:C:2012:288, para 13; *Cozman v Teatrul Municipal Târgoviste*, C-462/11, EU:C:2011:831, para 15; *Sindicato dos Bancários do Norte and Others v BPN*, C-128/12, EU:C:2013:149, para 12.

[26] C Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35(2) *Oxford Journal of Legal Studies* (2015), pp 325–53, 349.

[27] *Florescu*, C-258/14, EU:C:2017:448.

[28] Already in *Ledra Advertising*, Joined Cases C-8/15 P to C-10/15 P, EU:C:2016:701, the CJEU held that EU institutions are bound by the Charter even when they adopt a MoU under the ESM Treaty, and thus outside the EU legal framework.

[29] Ibid, para 48.

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financial assistance. Notwithstanding, *Florescu* involved a MoU for balance of payment assistance under Regulation 332/2002 and thus clearly fell within the remit of EU law.[30] Could this reasoning prevail in the context of other financial assistance programmes, such as the European Financial Stabilisation Mechanism ('EFSM'), the EFSF, or the ESM?

In *ASJP*, decided after *Florescu*, one might have expected the CJEU to rule that the Charter applied, since the austerity measures were adopted in the context of the EFSM, which falls under EU law. Indeed, the Advocate General supported that conclusion. The CJEU, however, failed to specify whether the Charter was applicable to the case. Rather, it decided the case on the grounds of Article 19(1) TEU, which will be discussed below.[31] In the end, in *ASJP*, the CJEU left unanswered important questions regarding the potential application of the Charter in the context of the EFSM and forms of economic governance such as the Macroeconomic Imbalance Procedure and the European Semester.[32] The CJEU missed an excellent opportunity to set the standards for judicial scrutiny of national austerity measures under the Charter.

To conclude, the CJEU has interpreted the term 'implementing' rather broadly by conditioning it upon a sufficient degree of connection with EU law. By interpreting Article 51(1) of the Charter, the CJEU is at once drawing the boundaries of its own power to review state action under fundamental rights as well as its authority to interpret those rights. The rules to determine the necessary strength of the link with EU law are not clear-cut, which leaves determining the exact boundaries of the Charter largely in the hands of the CJEU. While over time the reasoning of the CJEU regarding the applicability of the Charter has become more explicit, it still tends to be rather sparse.[33] The CJEU should be more consistent regarding the relevant criteria and their application to the specific cases given the relevance of the boundaries of the Charter not only for the individuals seeking redress, but also for the federal bargain made by the Member States regarding the structure of the EU system of rights' protection.

In the field of the Euro-crisis, the CJEU's caution might be explained by deference towards political authorities in a field characterised by the complexity of the economic and monetary issues at stake, matters in which judicial decisions might have large scale budget and redistributive consequences. Notwithstanding, the reluctance to enforce the Charter in this field, which contrasts with the broad definition of its scope of application, risks undermining the consistency of the CJEU case law, which could negatively affect the court's legitimacy in the eyes of individuals who have suffered the cuts to social programmes.

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[30] M Markakis and P Dermine, 'Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: *Florescu*' (2018) 55(2) *Common Market Law Review* 643, pp 652–54.

[31] See Part V below.

[32] Ibid, pp 664–67.

[33] Rauchegger, note 16 above, pp 102–03, 131.

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III. THE GRAVITATIONAL FORCE OF FREE MOVEMENT

In the case law prior to the Charter, since *ERT*,[34] the CJEU had determined that state measures enacted to derogate from free movement according to the exceptions provided by Treaty provisions or other 'overriding requirements'[35] were bound by EU fundamental rights. In *Pfleger*,[36] the CJEU confirmed that, in those situations, the Member States were implementing EU law, within the meaning of Article 51(1) of the Charter.

From the perspective of individuals, Article 21(1) Treaty on the Functioning of the European Union ('TFEU') enshrines the right of citizens to move and reside freely within the territory of the Member States. Over time, free movement has superseded the confines of the internal market so that it cannot be regarded as circumscribed to the economically active citizens.[37] As has been argued, two rights lie at the core of federal citizenship: free movement across the States and the States' obligation to treat citizens from the other States in the Union on an equal footing with their own.[38] In the EU, those two rights are indeed found at the heart of citizenship cases where non-discrimination on grounds of nationality has been enforced in fields of state competence in order to eliminate obstacles to free movement.

In short, the question is the extent to which 'moving citizens' should be able to invoke Charter rights in cross-border situations, even in fields of state competence. This was the suggestion, back in 1993, of Advocate General Jacobs in *Konstantinidis*.[39] He argued that EU citizens should be entitled to invoke that status in order to oppose any violation of their fundamental rights and be treated in accordance with a common code of fundamental rights wherever they go.[40] Yet, the CJEU did not follow that position and, as will be argued, there are good normative reasons against free movement of persons as a trigger for the automatic applicability of the Charter.

A. Non-discrimination on Grounds of Nationality

Following Article 18 TFEU, the CJEU has afforded protection to moving citizens under the right to non-discrimination on grounds of nationality. The rationale is that, in order to ensure free movement, those who move to another Member State may not be treated less favourably than the nationals of the host Member State.

Although the prohibition of discrimination on grounds of nationality in Article 18 TFEU is circumscribed by 'the scope of application of the Treaties', the CJEU has

[34] *ERT*, C-260/89, EU:C:1991:254.

[35] *Familiapress*, C-368/95, EU:C:1997:325.

[36] *Pfleger*, C-390/12, EU:C:2014:281.

[37] E Spaventa, 'Seeing the Wood despite the Trees – On the Scope of Union Citizenship and Its Constitutional Effects' (2008) 45(1) *Common Market Law Review* 13.

[38] C Schönberger, 'European Citizenship as Federal Citizenship. Some Citizenship Lessons of Comparative Federalism' (2007) 19(1) *European Review of Public Law* 61, p 68.

[39] Opinion of Advocate General Jacobs in *Konstantinidis*, C-168/91, EU:C:1992:504.

[40] Ibid, para 46.

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enforced the right to non-discrimination in fields of state power, as long as free movement is at stake. Spaventa declared that 'since the link with the Treaty is provided by the mere fact of moving, there cannot be any benefit or rule which is excluded *a priori* from the scope of the Treaty'.[41] In that regard, state rules in fields of state competence, such as the use of foreign languages in criminal proceedings,[42] or the use of last names,[43] were scrutinised by the CJEU for violation of the prohibition of non-discrimination on grounds of nationality.

In cases regarding access to social benefits, however, the CJEU has taken a more cautious approach.[44] While *Martínez Sala*[45] represented a 'paradigm shift' in terms of detaching citizenship from economic activity,[46] in *Dano*[47] the CJEU held that economically inactive Union citizens who do not have sufficient resources to support themselves in the host Member State cannot demand equal treatment. To put it bluntly, the message of *Dano* is that only moving citizens who have sufficient resources deserve equal treatment. But the interpretation of when a person does not have sufficient resources as to become an 'unreasonable' burden on the social assistance system of the Member State is far from settled.[48] On the whole, while generally the mere exercise of movement is enough to claim the enforcement of the right to non-discrimination on grounds of nationality, the requisite of lawful residence may become a bar regarding the access to welfare rights, which shows the deficits of solidarity within the EU, as well as of the EU citizenship construct.

B. Free Movement as a Trigger for the Application of the Charter?

If the exercise of free movement enables citizens to invoke the right to non-discrimination on grounds of nationality—with some limits regarding welfare rights—may moving citizens invoke any Charter right?[49] Arguably, to avoid hampering free movement, not only should mobile citizens receive the same treatment

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[41] Spaventa, note 37 above, p 28.

[42] *Bickel and Franz*, C-274/96, EU:C:1998:563.

[43] *García Avello*, C-148/02, EU:C:2003:539.

[44] See D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52(1) *Common Market Law Review* 17.

[45] *Martínez Sala*, C-85/96, EU:C:1998:217.

[46] N Nic Shuibhne 'Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?' in D Kochenov (ed), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press, 2017), p 162. Subsequent cases contributed to facilitated access to social assistance under the principle of non-discrimination on grounds of nationality, such as *Grzelcyk*, C-184/99, EU:C:2001:458, paras 42–46; *Baumbast*, C-456/02, EU:C:2004:488, para 4; *Trojani*, C-456/02, EU:C:2004:488, para 34; *Brey*, C-140/12, EU:C:2013:565, para 77.

[47] *Dano*, C-333/13, EU:C:2014:2358.

[48] Thym, note 44 above, p 26.

[49] Eeckhout, note 2 above, p 972.

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as nationals, but they should also be able to claim the protection of any Charter right, regardless of whether the Member States are implementing EU law or not.

After the enactment of the Charter, the CJEU has enforced the right to private and family life (Article 7) *vis-à-vis* state action in cases regarding national rules for registering surnames and forenames where the only link with EU law was the exercise of (and potential obstacle to) free movement, such as *Sayn-Wittgenstein*[50] and *Runevič-Vardyn and Wardyn*.[51] In both cases, the CJEU declared that a person's name is a 'constituent element of his identity and of his private life, the protection of which is enshrined in Article 7 of the Charter'.[52] The exercise of free movement enabled the review of domestic rules in a field of state competence in light of the right to private and family life.[53] Moreover, the CJEU reasserted the importance of ensuring the protection of family life of citizens of the Union in order to eliminate obstacles to the exercise of free movement.[54]

In *Carpenter*,[55] the CJEU also enforced the right to family life to grant a derivative right of residence to a third-country national married to an EU citizen who often travelled to other Member States for work. The CJEU held that the deportation of Mrs Carpenter 'would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom'.[56] Post-Lisbon, the CJEU confirmed the *Carpenter* precedent regarding spouses of EU citizens who travel for work to other EU countries,[57] although it explicitly avoided relying on Article 7 of the Charter.

Article 21(1) TFEU could potentially offer an avenue for extending the enforcement of any Charter right in cross-border situations, even when the Member States were not implementing EU law. Free movement of persons is central for the EU integration project both from a legal and political standpoint.[58] If mobile citizens were able to invoke any Charter right, the exercise of free movement might be enhanced since the Charter would provide legal certainty regarding the rights protected when moving across Member States.

However, the CJEU seems reluctant to expand further the law of free movement of persons.[59] Indeed, there are compelling reasons against relying on free movement to extend Charter protection. At times, the connection to free movement might be

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[50] *Sayn-Wittgenstein*, C-208/09, EU:C:2010:806.

[51] *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291.

[52] *Sayn-Wittgenstein*, EU:C:2010:806, para 52; *Runevič-Vardyn and Wardyn*, EU:C:2011:291, para 66.

[53] *Runevič-Vardyn and Wardyn*, EU:C:2011:291, para 63.

[54] Ibid, para 90.

[55] *Carpenter*, C-60/00, EU:C:2002:434.

[56] Ibid, para 39.

[57] *S and G*, C-457/12, EU:C:2014:136.

[58] Thym, note 44 above, p 17.

[59] D Sarmiento and E Sharpston, 'European Citizenship and Its New Union: Time to Move On?' in D Kochenov (ed), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press, 2017), p 227.

incidental or weak, such as in *Bickel and Franz*, or *Carpenter*, which might expose the CJEU to the criticism that it has sought to expand its jurisdiction by enforcing Charter rights in fields of state competence. At the same time, the possibility of invoking non-discrimination on grounds of nationality has already been qualified on lawful residence for access to social benefits, which reveals the frailty of the ties of solidarity that are needed to ground a robust notion of transnational citizenship.

More importantly, rendering the Charter applicable on grounds of free movement would entail instrumentalising fundamental rights. It would put fundamental rights at the service of policy integration objectives, and as such the Charter would fall short of providing a common bill of rights for all EU citizens. In that regard, extending fundamental rights to mobile citizens would worsen the problem of reverse discrimination and expand the gap between mobile and static citizens *vis-à-vis* EU fundamental rights.[60] In the end, to premise Charter protection on free movement as the principal ground for citizens' rights would undermine a coherent construction of citizenship as the fundamental status of the nationals of the Member States.

IV. EU CITIZENSHIP AND THE GENUINE ENJOYMENT OF THE SUBSTANCE OF FUNDAMENTAL RIGHTS

As Shuibhne put it, 'reconciling the promise of rights with the constraints of conferral is an enduring challenge in the case law on Union citizenship'.[61] According to the CJEU, Union citizenship, enshrined in Article 20(1) TFEU, is meant to be the fundamental status of nationals of the Member States.[62] Moreover, the Charter's Preamble emphasises that the Union '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'.

Nonetheless, citizens may only claim Charter rights *vis-à-vis* state action when Member States are implementing EU law, or when the exercise of free movement is hindered. Apparently, in purely internal situations without any link with EU law, citizens may not invoke the Charter. Those situations will be governed by the law of the Member States and the protection afforded by the corresponding national constitution.

The saga initiated with *Ruiz Zambrano*[63] revealed the potential of citizenship status to trigger the application of the Charter in otherwise purely internal situations. The CJEU, however, developed a very cautious approach in subsequent cases and, in spite of the hopeful development in *Chávez-Vílchez*,[64] the egalitarian drive of

[60] Iglesias, note 6 above, p 471; A Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35(1) *Legal Issues of Economic Integration* 43.

[61] Nic Shuibhne, note 46 above, p 169.

[62] *García Avello*, note 43 above, para 22.

[63] *Ruiz Zambrano*, C-34/09, EU:C:2011:124.

[64] *Chávez-Vílchez*, C-133/15, EU:C:2017:354.

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an increasingly robust notion of citizenship to provide a common bill of rights for all EU citizens has not been fulfilled.

A. The Effectiveness of EU Citizenship in Purely Internal Situations

In *Ruiz Zambrano*, the CJEU took a ground-breaking step for the construction of the notion of citizenship in situations lacking any cross-border link. The CJEU ruled that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[65] Specifically, it held that the refusal to grant a work and residence permit to a third-country national who was the father of two minor dependent EU citizens would have the effect of depriving the children of their Union citizenship, since if the father were expelled, they would be forced to leave the territory of the Union. The State was not implementing EU law, and the EU citizens concerned had never moved. The only link with EU law was the status of EU citizenship.[66]

Ruiz Zambrano was as promising as it was vague in terms of the potential to expand the scope of application of fundamental rights to EU citizens in purely internal situations[67] and many questions were left open: What are the rights conferred by the status of citizenship? Only those listed in Article 20 TFEU? Any Charter right? What situations amount to deprivation of the genuine enjoyment of the 'substance' of those rights?

In subsequent cases, the CJEU severely restricted the potential reach of *Ruiz Zambrano*. In *Dereci*,[68] it held that the criterion set in *Ruiz Zambrano* referred to 'situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole'.[69] Only in such extreme situations was the Charter to apply. In *Rendón Marín* and *CS*,[70] after confirming that the situation was such as that the expulsion of the parents would force Union citizens to leave Union territory, the CJEU confirmed the application of the Charter rights to private and family life (Article 7) and the protection of the child's best interests (Article 24(2)). The deprivation of the genuine enjoyment of the substance of rights conferred by EU citizenship,

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[65] Ibid, para 42.

[66] D Kochenov, 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe' (2011) 18(1) *Columbia Journal of European Law* 55; A Wiesbrock, 'Union Citizenship and the Redefinition of the "Internal Situations" Rule: The Implications of *Zambrano*' (2011) 12(11) *German Law Journal* 2077.

[67] M van den Brink 'The Origins and the Potential Federalising Effects of the Substance of Rights Test' in D Kochenov (ed), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press, 2017); D Kochenov, 'The Right to Have What Rights: EU Citizenship in Need of Clarification' (2013) 19(4) *European Law Journal* 502.

[68] *Dereci*, C-256/11, EU:C:2011:734.

[69] Ibid, para 66.

[70] *Rendón Marín*, C-165/14, EU:C:2016:675; *CS*, C-304/14, EU:C:2016:674.

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understood in *Dereci*'s terms, has become the controlling test to determine whether a situation falls within the scope of EU law. If the test is fulfilled, then the Charter shall apply.[71] The CJEU set the threshold very high to situations of (*de facto*) deprivation of citizenship.

Nonetheless, more recently, the CJEU has developed what might be regarded as a rights-based approach to citizenship for the interpretation of when a person is in the situation of being forced to leave the territory of the Union.[72] The *Chávez-Vílchez*[73] case was similar to *Ruiz Zambrano* in that it concerned several third-country nationals who were the mothers of Dutch citizens. The main difference was that the respective fathers also had Dutch nationality. Under the strict understanding of *Dereci*, one could argue that, were the mothers expelled, the children would not be forced to leave the territory of the Union, since they could stay with their fathers.

In its assessment, however, the CJEU emphasised the relationship of 'dependency' between the Union citizens and the third-country nationals who were taking care of them.[74] It argued that, in order to assess the relationship of dependency, the competent authorities must take account of the right to respect for family life (Article 7 of the Charter) in conjunction with the best interests of the child (Article 24(2) of that Charter).[75] In particular, the CJEU held that the fact that the other parent is 'able and willing to assume sole responsibility for the primary day-to-day care of the child was a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national'.[76]

It needs to be noted that the Charter was applied by the CJEU in *Chávez-Vílchez* even before deciding whether the case fell within the scope of EU law. Indeed, the CJEU took into account the protection of fundamental rights to decide whether EU citizens were 'forced to leave the territory of the Union'. In previous cases, such as *Rendón Marín*, the assessment on grounds of fundamental rights was only performed once it was established that EU citizens were in a situation in which they could be forced to leave the territory of the Union. In that regard, the understanding of the controlling test also changes. Previously the CJEU interpreted that a person was deprived of citizenship if that person was (*de facto*) being forced to leave the territory Union, regardless of whether a fundamental right is breached or not. Now the CJEU understands that a person might be deprived of the genuine enjoyment of citizens' rights if that person can stay in the EU, but his/her basic rights are seriously impaired.

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[71] A Torres Pérez, 'The Federalizing Force of the EU Charter of Fundamental Rights' (2017) 15(4) *International Journal of Constitutional Law* 1080, p 1087.

[72] D Sarmiento, 'El retorno de la ciudadanía de la Unión. Comentario a la sentencia *Chávez-Vílchez* (C-133/15) del Tribunal de Justicia' (2017) 63 *Revista Española de Derecho Europeo* 163.

[73] *Chávez-Vílchez*, note 64 above.

[74] Ibid, para 69.

[75] Ibid, para 70.

[76] Ibid, para 71.

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B. Towards Rights-Based Citizenship?

In light of the case law, to what extent may citizenship trigger the application of the Charter, even in purely internal situations? After *Ruiz Zambrano*, several scholars formulated thought-provoking proposals on how to understand the 'genuine enjoyment of substance of citizenship rights' test. Von Bogdandy et al interpreted Article 20 TFEU in connection to the rule of law (Article 2 TEU) and argued that citizens should be able to rely on Article 20 TFEU to seek redress in case of 'violations of the essence of fundamental rights which in number or seriousness account for systemic failure'.[77] Van den Brink argued that citizenship could extend the field of application of EU fundamental rights to purely internal situations such that any sufficiently serious infringement of a European citizen's fundamental right would fall within the ambit of Union law.[78]

Along those lines, *Chávez-Vílchez* could be understood as advancing a notion of rights-based citizenship in cases of serious impairment of fundamental rights. Citizenship (Article 20 TFEU) becomes the 'intrinsic connection'[79] between EU law and situations which fall *a priori* outside the scope of EU law. In the end, EU citizenship would require some minimum level of protection of fundamental rights. The absence of such minimum protection would be equivalent to being forced to leave the territory of the Union. The threshold would be still high, but citizens could rely on their status to seek redress of serious infringements of fundamental rights, even in purely internal situations.

The CJEU could promote a rights-based approach to citizenship based on the suggested understanding of *Chávez-Vílchez*, but this judgment does not on its own give sufficient indication that the CJEU is prepared to do so. Indeed, extending the protection of fundamental rights through citizenship presents several drawbacks. Namely, using the degree of the severity of the breach to justify the application of the Charter would leave much room open to interpretation and the risk of further extending the scope of the Charter and the power of the CJEU *vis-à-vis* domestic courts for the adjudication of fundamental rights.

At the same time, to rely on EU citizenship as the avenue for fundamental rights' protection has an exclusionary potential,[80] since third-country nationals would not be entitled to seek redress for serious violations of Charter rights in purely internal situations, as opposed to EU citizens, deepening the differences in treatment between the two groups.[81]

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[77] A von Bogdandy et al, 'Reverse *Solange*—Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49(2) *Common Market Law Review* 489, p 513.

[78] Van den Brink, note 6 above, pp 287–89. See also M van den Brink 'The Origins and the Potential Federalising Effects of the Substance of Rights Test' in D Kochenov (ed), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press, 2017), pp 103–04.

[79] *Chávez-Vílchez*, note 64 above, para 64.

[80] S Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union'(1996) 33(1) *Common Market Law Review* 7; van den Brink, note 78 above, p 105.

[81] Yet, in practice, the case law enhancing citizenship rights has actually favoured the position of third-country nationals. S Iglesias Sánchez, 'Fundamental Rights Protection for Third Country

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Moreover, the citizenship road to a fully applicable Charter would obliterate the limits of Article 51(1) of the Charter, since Charter rights would become binding upon state authorities in purely internal situations. As indicated above, this Article was the result of a delicate political compromise to reach agreement on the federal structure of the system of rights protection in the EU. In that regard, instilling EU citizenship with such transformative power would require not only assertive action by the CJEU, but also a conscious political revision of the federative balance between the Union and the Member States in the field of fundamental rights.

V. EFFECTIVE JUDICIAL PROTECTION AND THE RULE OF LAW

As the CJEU declared in *ASJP*, 'the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law'.[82] In this judgment, the CJEU launched an innovative interpretation of the second subparagraph of Article 19(1) TEU that crystallised in *Commission v Poland*[83] and subsequent cases regarding judicial independence in the context of the so-called rule of law backsliding.[84]

In *Commission v Poland*, the Commission launched an infringement proceeding on account of a reform of the Polish Law on the Supreme Court that lowered the mandatory retirement age of judges. The case was beyond the scope of application of the Charter since the domestic legislation was not implementing EU law in any sense. Indeed, the Polish government argued that applying Article 19(1) TEU ran afoul of the principle of conferral since the organisation of the national justice system was a competence reserved exclusively to the Member States.[85] Nonetheless, the CJEU distinguished the scope of application of Article 19(1) TEU and Article 47 of the Charter, holding that the former 'relates to "the fields covered by Union law", irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter'.[86]

The CJEU held that the obligation enshrined in Article 19(1) TEU to provide remedies to ensure effective judicial protection of the rights conferred by EU law meant that Member States had to ensure that courts in the fields covered by Union law met the requirements of effective judicial protection, including judicial independence.[87]

(F'note continued)
Nationals and Citizens of the Union: Principles for Enhancing Coherence' (2013) 15 *European Journal of Migration and Law*137, p 153, argues that the prohibition of non-discrimination on grounds of nationality together with a reinforced fundamentality of the status of the citizenship of the Union could ensure a minimum level of protection for all.

[82] *Associaçao Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, para 36.

[83] *Commission v Poland*, note 7 above.

[84] *Commission v Poland (ordinary courts)*, C-192/18, EU:C:2019:924; *AK*, C-585/18, EU:C:2019:982.

[85] *Commission v Poland*, note 7 above, para 38.

[86] *ASJP*, note 82 above, para 29; *Commission v Poland*, note 7 above, para 50.

[87] *ASJP*, note 82 above, para 37; *Commission v Poland*, note 7 above, para 55.

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It was a daring move through which the CJEU empowered itself to monitor domestic rules on the organisation of the judiciary under the principle of judicial independence, even if the Charter were not to apply.[88] Thus, Article 19(1) TEU became a powerful instrument to oversee judicial reforms in the wake of rising authoritarianism not only in Poland, but also in other EU Member States, regardless of the Charter limits. In light of these recent judgments, we would do well to ask about the potential reach of Article 19(1) TEU and its interaction with the Charter.

A. The Scope of Article 19(1) TEU

According to the CJEU, the necessary determination of the 'fields covered by Union law' is whether domestic courts may be called upon to rule on questions concerning the application or interpretation of EU law'.[89] Thus, in order for the obligation to ensure effective judicial protection to apply, in terms of Article 19(1) TEU, it suffices that a court may potentially apply or interpret EU law. Indeed, it is not even necessary that the domestic court is applying EU law in the specific case or has done so in the past.[90]

As a result, all domestic courts may be bound by the principle of effective judicial protection under Article 19(1) TEU, since at some point they might rule on the application or interpretation of EU law. In the end, the scope of Article 19(1) TEU, and the corresponding power of the CJEU to oversee its compliance, virtually has no boundaries, given the penetration of EU law in the domestic legal orders of the Member States.

In order to contain the potential reach of Article 19(1) TEU from a substantive perspective, Advocate General Tanchev suggested that the obligation under Article 19(1) TEU ought to be confined to 'structural breaches which compromise the essence of judicial independence',[91] whereas individual or particular breaches of the independence of judges are to be dealt under Article 47 of the Charter, when applicable. Nonetheless, the CJEU has yet to circumscribe the content of Article 19(1) TEU in terms of the necessary severity or extent of the breach.

From a procedural standpoint, the CJEU has limited its intervention under Article 19(1) TEU in preliminary reference procedures. *Miasto Łowicz*[92] involved two preliminary references submitted by Polish judges in which the substance of the cases was unrelated to EU law, but the Polish government was very concerned with the outcome. The references expressed apprehension that disciplinary proceedings could be brought against the judges in the main proceedings depending on the content of their

[88] M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14(3) *European Constitutional Law Review* 622.

[89] *Commission v Poland*, note 7 above, para 56.

[90] L Pech and S Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in *ASJP*', (2018) 55(6) *Common Market Law Review* 1827, p 1840.

[91] Opinion of Advocate General Tanchev in *Miasto Łowicz*, Joined Cases C-558/18 and C-563/18, EU:C:2019:775, para 125.

[92] *Miasto Łowicz*, Joined Cases C-558/18 and C-563/18, EU:C:2020:234.

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judgment. These concerns were prompted by recent legislative reforms of the disciplinary regime for judges in Poland, reforms which allegedly undermined judicial independence.

The CJEU found its balance by confirming its jurisdiction while rejecting admissibility because of the type of procedure and its object. Asserting its jurisdiction, the CJEU pointed out that 'the second subparagraph of Article 19(1) TEU is intended *inter alia* to apply to any national body which can rule, as a court or tribunal, on questions concerning the application or interpretation of EU law and which therefore fall within the fields covered by that law'.[93] The CJEU concluded that this was the case of the referring courts and that they therefore had to meet the requirements of effective judicial protection under EU law.[94] Notwithstanding, the CJEU declared the references inadmissible.[95] It emphasised the 'necessity' of the question referred for a preliminary ruling so that the referring court could 'give judgment' in the case before it.[96]

From a procedural perspective, the CJEU made a distinction between preliminary references and infringement actions. In the latter, such as *Commission v Poland*, the CJEU is asked to assess the conformity between domestic procedural rules and EU provisions directly, without need for any concrete dispute. While in the former, there must be a 'connecting factor' between the dispute and the provisions of EU law whose interpretation is sought, such that the CJEU's interpretation is objectively required to give judgment.[97] It concluded that there was no connecting factor in the Polish references.

However, one could argue that the interpretation of the rules on judicial independence was relevant to the referring courts passing judgment in the cases at hand, even if they were not required to apply Article 19(1) TEU to give a substantive solution to the case. If judicial independence were not secured, domestic courts might not be able to ensure the right to effective judicial protection of the individuals before them. In that regard, a judgment by the CJEU declaring the national rules on disciplinary proceedings to be incompatible with Article 19(1) TEU would bind all public authorities in Poland, and the referring judges would be able to render judgment with full guarantees for their independence.

While the CJEU confirmed the broad scope of Article 19(1) TEU in terms of its jurisdiction, it restricted the possibility for redress through the preliminary reference procedure.[98] The breaches of Article 19(1) TEU that may be remedied through the preliminary reference procedure would be limited to cases where the compatibility between domestic law and Article 19(1) TEU is the object of the dispute, such as

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[93] Ibid, para 34.

[94] Ibid, para 35.

[95] And yet, the CJEU acknowledged that the referring courts have satisfied the requirements under Article 94 of the Rules of Procedure, and in particular the requirement in paragraph (c). Ibid, para 42.

[96] Ibid, para 45.

[97] Ibid, para 48.

[98] L D Spieker, 'The Court Gives with One Hand and Takes Away with the Other: The CJEU's Judgment in *Miasto Łowicz* (*VerfBlog*, 2020 March 26), https://verfassungsblog.de/the-court-gives-with-one-hand-and-takes-away-with-the-other.

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in *ASJP* or *EscribanoVindel*.[99] This would also be the case when procedural rules might have an impact upon the jurisdiction or composition of the referring court, such as in *AK*.[100]

C. Towards a Fully Applicable Charter through the Principle of Effective Judicial Protection?

As mentioned above, the CJEU declared that Article 19(1) TEU concerned the fields covered by EU law, irrespective of whether the Member States were implementing EU law within the meaning of Article 51(1) of the Charter. Thus, the obligation to effective judicial protection in terms of Article 19(1) TEU may apply even if the Charter does not.

However, once a situation is deemed within the fields covered by EU law according to Article 19(1) TEU, for that same reason, it could be argued that the Member States are 'implementing' EU law and thus the Charter applies.[101] This argument would be supported by the broad interpretation of the notion of 'implementing EU law' endorsed in *Åkerberg Fransson*.[102] In situations in which the Member States are under the obligation to ensure effective judicial protection in terms of Article 19(1) TEU, those situations become governed by EU law and thus the Charter also applies. As such, the application of Article 19(1) TEU would trigger the application of the Charter.

In this regard, the argument recalls the evolution of the *Ruiz Zambrano* saga. Article 20 TFEU was interpreted to impose an obligation on the Member States to respect the genuine enjoyment of the substance of the rights conferred by EU citizenship in otherwise purely internal situations. Once that situation is brought within the scope of EU law, then the Charter also applies. Indeed, as seen above, the CJEU narrowly interpreted that the enjoyment of the substance of rights conferred by EU citizenship would be impaired only when a person is forced to leave the territory of the Union. In the context of the rule of law cases, the CJEU could interpret Article 19(1) TEU as only applying to structural or systemic breaches of judicial independence of a serious degree, as suggested by Advocate General Tanchev. However, confining the meaning of Article 19(1) TEU to systemic and serious infringements would undermine its effectiveness against current threats to the rule of law.

Thus, to the extent that Article 19(1) TEU imposes an obligation on the Member States to ensure that domestic courts fulfil the principle of effective judicial protection—as long as they might be called to apply or interpret EU law—it can be argued that in fulfilling that obligation the situation is brought within the scope of EU law and thus the Charter itself applies. As a result, Article 47 of the Charter would

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[99] *Escribano Vindel*, C-49/18, EU:C:2019:106.

[100] *AK*, note 84 above.

[101] A Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence' (2020) 27(1) *Maastricht Journal of European and Comparative Law*105, pp 116–17.

[102] *Åkerberg Fransson*, note 10 above, see Section II.A above.

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become directly applicable, rather than a hermeneutic tool to give content to the obligations under Article 19(1) TEU.[103] In such cases, the Member States would be obliged to comply not only with the principle of judicial independence, but all tenets of Article 47 of the Charter, such as the right to being advised, defended, and represented, or to a trial within reasonable time. As a consequence, all national courts that might potentially apply or interpret EU law would have to respect Article 47 of the Charter.

Moreover, Article 19(1) TEU might open the door for the enforcement of any Charter right. One could argue that the obligation to provide effective judicial protection in terms of Article 19(1) TEU would be impaired if domestic courts failed to protect any of the fundamental rights enshrined in the Charter. In other words, the lack of effective protection of Charter rights before domestic courts that might potentially interpret or apply EU law would become relevant under EU law for the sake of Article 19(1) TEU. This means that individuals would be able to invoke any Charter right whenever domestic courts were under the obligation to provide effective judicial protection in terms of Article 19(1) TEU. Still, in order to invoke the Charter through a preliminary reference in cases substantively unrelated to EU law, it would be necessary to show that a response of the CJEU was necessary to issue a judgment. At the same time, infringement actions against a Member State may potentially be brought before the CJEU by the Commission or another Member State for the violation of any Charter right if it could be argued that domestic courts failed to provide effective protection.

Indeed, in the United States, the due process clause of the Fourteenth Amendment was the instrument used by the Supreme Court for the incorporation of the federal Bill of Rights to the states. At its origins, the federal Bill of Rights was only binding upon the federal authorities.[104] The Fourteenth Amendment, which was introduced after the Civil War as part of the so-called Reconstruction amendments, prohibited states from depriving 'any person of life, liberty, or property, without due process of law'. The Supreme Court held that nearly all the rights enshrined in the Bill of Rights were among the personal rights and liberties protected by the due process clause from undue impairment by the states.[105] The incorporation of these rights to the states was a gradual and incremental process that unfolded case by case and right by right from the 1920s to the 1980s, and that eventually federalised the constitutional model of rights' protection.[106]

This is not to suggest that the CJEU should adopt a sweeping move to federalise the structure of rights protection in the EU in a brazen display of judicial activism at any point in the near future. In the current post-Brexit political scenario with its growing Euroscepticism and authoritarianism, and the shrinking sense of solidarity, such

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[103] *Commission v Poland,* note 7 above, paras 54, 57.

[104] A R Amar, *The Bill of Rights* (Yale University Press, 1998).

[105] R C Cortner, *The Supreme Court and the Second Bill of Rights. The Fourteenth Amendment and the Nationalization of Civil Liberties* (University of Wisconsin Press, 1981).

[106] W J Brennan, 'The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights' (1986) 61 *New York University Law Review* 535, pp 536, 543.

an act would face a genuine risk of backlash. Furthermore, the context in which the interpretation of Article 19(1) TEU was endorsed was particular to the phenomenon of rule of law backsliding in several Member States.

However, the link between the principle of effective judicial protection enshrined in Article 19(1) TEU and the rule of law (Article 2 TEU) offers a potential avenue gradually to extend the legal application of Charter rights beyond the limits of Article 51(1) of the Charter, following a case-by-case approach. Whether the CJEU is willing to extend its mandate further under the Charter remains to be seen.

Ultimately, we might ask if the incorporation of the Charter to the Member States would be desirable. My contention is that a robust notion of the rule of law as a shared value enshrined in Article 2 TEU justifies this kind of gradual strengthening of the judicial protection of fundamental rights against the action of domestic public authorities. It would enable the EU to provide a common set of rights to all individuals under its jurisdiction—whether moving or static citizens or even citizens and non-citizens—which would be enforceable before state and European courts. In this way, the sources of rights that individuals can invoke in any situation would expand. In addition, a fully applicable Charter would enhance the consistency of the system of rights protection and of the CJEU case law, given the current uncertainties as to whether the link to EU law is sufficient enough and whether EU citizens have been deprived of the substance of rights attached to citizenship. Moreover, the avenue offered by combining Article 19(1) TEU with Article 2 TEU would transcend the limits of Article 51(1) of the Charter without directly breaching it.

At the same time, a fully applicable Charter would represent a major transformation of the constitutional structure of rights protection in the EU towards greater federation and a strengthened role of the CJEU in the EU judicial architecture. Given the pluralist constitutional EU framework, in which the question regarding the location of the ultimate authority remains open,[107] the interaction between the Charter (even a fully applicable one) and domestic constitutions ought not be framed in terms of the absolute primacy of EU law. Progression towards a fully applicable Charter should be undertaken without neglecting the role of domestic constitutional courts as the ultimate guarantors of fundamental rights at the national level.[108] Constitutional courts are well-positioned to prevent standards of protection from lowering in the context of market-driven policies and also provide a locus for debate and contestation regarding the interpretation of rights within the institutional framework of a given

[107] M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11(3) *European Law Journal* 262, p 263; D Halberstam 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in JL Dunoff and J P Trachtman (eds), *Ruling the World?* (Cambridge University Press, 2009), p 330.

[108] Sarmiento and Sharpston, see note 59 above, p 235; A Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-Operative Constitutionalism"' (2015) 9(2) *Vienna Journal of International Constitutional Law* 151.

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political community.[109] Hence, ongoing and robust dialogue between domestic and EU courts in the adjudication of fundamental rights would remain necessary both to reach shared interpretive outcomes and to leave space for constitutional diversity.[110]

VI. CONCLUSIONS

This analysis of the CJEU caselaw over the last ten years has drawn attention to several routes through which scope of the Charter has expanded *vis-à-vis* state action without completely hollowing out the limits of Article 51(1) Charter. While Article 51(1) of the Charter is regarded as an expression of the principle of conferral, this analysis has shown that the Charter has deeply penetrated areas of state competence, such as rules on criminal procedure and criminal law, the use of names, and immigration legislation. Therefore, the principle of conferral no longer satisfactorily frames discussions over the scope of application of the Charter.

While the CJEU could continue stretching the meaning of 'implementing EU law', which is already fairly broad, Article 51(1) of the Charter would always represent an ultimate boundary. Moreover, broad interpretation of the scope of the Charter combined with the reluctance to apply it in certain fields of direct concern to individuals, such as the austerity measures adopted in the context of the financial and economic crisis, might result in inconsistent case law that would undermine the citizens' perception of the CJEU's legitimacy.

The drive towards equal citizenship could be an instrument powerful enough to trigger the application of the Charter, if coupled with the political willingness to make EU citizenship the fundamental status of the nationals of the Member States. Currently, the gravitational force of the right to free movement, which has been key in the process of integration, has lost some of its attraction for judges seeking to apply Charter rights in cross-border situations without firmer political support. Additionally, a rights-based approach to citizenship could potentially provide a common set of rights to citizens regardless of the exercise of free movement or whether the Member States are implementing EU law or not. The CJEU, however, has developed an extremely cautious approach since *Ruiz Zambrano* and adopted the understanding that the deprivation of the substance of citizenship rights was tantamount to being forced to leave the territory of the Union. Our reading of *Chávez-Vílchez* would make it possible for an enhanced notion of citizenship to trigger the application of Charter rights, but only when fundamental rights were seriously impaired.

In the end, the principle of effective judicial protection enshrined in Article 19(1) TEU may become the legal vehicle for the full incorporation of the Charter to the Member States. The scope of this clause, as interpreted by the CJEU, could well cover any domestic court, since any of them might at some point interpret or apply EU law, regardless of the limits of Article 51(1) of the Charter. The failure

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[109] J Komárek, 'National Constitutional Courts in the European Constitutional Democracy' (2014) 12(3) *International Journal of Constitutional Law* 525.

[110] A Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press, 2009).

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to protect Charter rights could be deemed an infringement of the effective judicial protection required under Article 19(1) TEU. Given the potential impact of such a move on the constitutional architecture of rights protection in the EU, taking a cautious case-by-case incremental approach would be necessary to avoid political backlash. Such an outcome, even if desirable from the perspective of the rule of law, would alter the federal bargain made by EU Member States in the field of fundamental rights. The progressive incorporation of the Charter to the Member States must involve robust dialogue between domestic and EU courts in the adjudication of fundamental rights to ensure the most protective interpretive outcomes for individuals without neglecting the EU's particular pluralist framework.

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