

ARTICLES

DO EUROPEAN UNION MEMBER STATES HAVE TO RESPECT HUMAN RIGHTS? THE APPLICATION OF THE EUROPEAN UNION'S "FEDERAL BILL OF RIGHTS" TO MEMBER STATES

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1. INTRODUCTION

The respect of fundamental rights is one of the cornerstones of the European Union (EU). It is a precondition of membership and it is listed among the core values of the Union.¹ According to Article 2 of the Treaty on the European Union (TEU), the EU "is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." Still, EU law contains no effective mechanism to compel Member States to respect fundamental rights and freedoms in general.² The recent controversies between the European Commission and some Member States revealed that the EU's limited powers do not enable the Commission to effectively intervene in cases where a Member State appears noncompliant with the above requirements.

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1. Copenhagen criteria, established by the European Council in Copenhagen on June 21-22, 1993 (Conclusions of the Presidency).

2. See e.g. Jakab, András, Application of the EU Charter by National Courts in Purely Domestic Cases (October 21, 2014). András Jakab / Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: Oxford University Press Forthcoming). Available at SSRN: <http://ssrn.com/abstract=2512865>; Michael Dougan: *Judicial review of Member State action under the general principles and the Charter: defining the "scope of Union law*, 52 *Common Market Law Review* 1201 (2015). [<https://perma.cc/LF2F-PGTJ>]

Recently, the Commission criticized a number of national measures, laws, and institutional reforms.³ Although some of these measures triggered waves of protest, not infrequently, the Commission was left with very weak legal tools once political means failed. Irrespective of whether the Commission's criticism was, in terms of substance, well-founded or not, these cases revealed that the EU's limited competences do not enable the "Guardian of the Treaties" to intervene in cases where a Member State ignores a core value.

It has to be noted that the absence of an effective mechanism of general application does not leave EU Member States without human rights checks thanks to the European Convention on Human Rights. At the same time, however, it must also be underscored that this human rights safety net does not do away with the need for a European "federal mechanism" for policing human rights abuses. The Council of Europe, under the auspices of which the European Convention on Human Rights was adopted and operates, is not an EU institution; but rather, a European regional organization completely independent of the European integration. Both the Convention and the judicial mechanism centering around the European Court of Human Rights were tailored to the needs of countries, almost half of which are not part of the European Union. Furthermore, the European Court of Human Rights damages the European Convention on Human Rights and the judgments of the Court do not necessarily have the kind of supremacy over national law that EU law has. Last but not least, the arsenal of the European Court of Human Rights appears not to extend to tools effectively addressing systematic violations of human rights, which contrasts the European Commission, which has the power to launch infringement procedures.

In this paper, the EU architecture of fundamental rights protection will be presented and examined. First, it will be demonstrated that the EU Charter of Fundamental Rights (the "EU bill of rights") applies predominantly to EU institutions (that is, "federal" institutions); it applies to Member States only when they act as the EU's "agents"⁴ (when they implement EU law). Although this approach may appear to be illogical, it does have its clear and legitimate reasons and it is far from unprecedented. In fact, it very much resembles the first century

3. See *e.g.*, Opinion on the Implementing Principles to the Slovak State Language Law Prepared by the European Commission's Legal Service (2010), available at <http://www.hhrf.org/hhrf/index.php?oldal=426>; the European Commission's Press Release of 6 July 2012 on Romania, expressing concerns "about current developments in Romania, especially regarding actions that appear to reduce the effective powers of independent institutions like the Constitutional Court", available at http://europa.eu/rapid/press-release_MEMO-12-529_en.htm; Statement from the President of the European Commission and the Secretary General of the Council of Europe on the vote by the Hungarian Parliament of the Fourth amendment to the Hungarian Fundamental Law (Brussels, 11 March 2013), available at http://europa.eu/rapid/press-release_MEMO-13-201_en.htm. [<https://perma.cc/U7QE-47J5>], [<https://perma.cc/7CFD-V2FC>], [<https://perma.cc/XQH6-BPKC>]

4. See J. H. H. Weiler & Nicolas J. S. Lockhart, 'Taking rights seriously' seriously: The European Court of Justice and its Fundamental Rights Jurisprudence – Part I, 32(1) Common Market Law Review 51, 73 (1995).

of the United States constitutional architecture.⁵ It is to be noted that though the EU does have the means to call Member States to account in case they violate fundamental rights,⁶ this action is a “nuclear bomb,” however, and is hardly apt for handling human rights problems; not to mention that the application of this is almost politically unattainable (see section 2.1.). Second, it will be demonstrated how, in certain cases at least, the Commission “cooked from what it had” in that it used unconnected (that is, non-human-rights-related) provisions of EU law to shelter fundamental rights (*e.g.*, the free movement principles of the internal market to protect minority rights or the prohibition of discrimination based on age to protect the independence of the judiciary). The use of the “supportive by-effects” of these economic rights is novel but not fully unprecedented. In fact, it resembles how the U.S. Congress used its commerce power to protect civil rights. Third, it will be argued that although the present architecture is not the best of all possible worlds, the bifurcation of the “federal bill of rights” (the EU Charter of Fundamental Rights) has a solid basis and, though it does call for a “reform,” in terms of approach, this is the constitutional architecture the multicolored European federation needs.

2. DIRECT APPLICATION OF THE EU BILL OF RIGHTS TO MEMBER STATES: A PRECONDITION OF ACCESSION BUT NOT A CONDITION OF MEMBERSHIP?

The EU constitutional order encapsulates an interesting contradiction as to fundamental and minority rights. On the one hand, while EU law generally requires Member States to respect fundamental rights, no effective enforcement mechanism is attached to this general requirement. The nuclear bomb embedded in Article 7 TEU, allowing suspension of membership rights for human rights violations, is too brutal in terms of consequences and too unrealistic in terms of political feasibility. On the other hand, while there are a number of fundamental rights requirements in EU law, these are, for the most part, not applicable to Member States as such but to the Union. In other words, the Charter of Fundamental Rights applies to Member States only when they implement EU law.

2.1. THE NUCLEAR BOMB OF ARTICLE 7 TEU

Although, as noted above, Article 2 TEU contains a reference to the EU’s fundamental values, this provision remains a mere declaration. Although Article 7 TEU establishes a mechanism for cases where there is a clear risk of a serious breach by a Member State of the EU’s fundamental values, no judicial mechanism is attached to this provision; Article 7 simply enables the Council to

5. See John James Barcelo, *ECJ Review of Member State Measures for Compliance with Fundamental Rights*, in *UNION DE DROIT, UNION DES DROITS: MELANGES EN L’HONNEUR DE PHILIPPE MANIN 767* (Jean-Claude Masclet, Hélène Ruiz Fabri, Chahira Boutayeb & Stéphane Rodrigue eds., 2010), available <https://ssrn.com/abstract=1543222>

6. See the possibility to suspend membership rights under Article 7 TEU.

make a political decision in cases where it considers this to be warranted. And, most importantly, a meaningful sanction may be imposed only if it is supported by the Member States unanimously (with the exception of the Member State concerned, obviously).⁷ According to Article 7(2) TEU:

The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

Though, according to Article 7(3) TEU, once the “existence of a serious and persistent breach” has been established, sanctions may be imposed with qualified majority, the process does not get to this stage if the systematic violation of fundamental rights is not established unanimously.

Even though Article 7(1) TEU contains another tool, which may be used if supported by a majority of four-fifths of members of the Council, no sanction is attached to this; it merely enables the Council to determine that “there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 [TEU]”.

In short, although Article 7 TEU is, indeed, available as a tool of last resort, due to the unanimity requirement, it is, aside from extreme cases, politically infeasible.⁸ Furthermore, it does not provide for the direct applicability of the EU human rights standards in the Member States; it simply empowers the Council to suspend certain membership rights.

2.2. THE CHARTER OF FUNDAMENTAL RIGHTS: A FEDERAL BILL OF RIGHTS TO LIMIT THE FEDERAL GOVERNMENT

Although the Charter of Fundamental Rights contains a generous list of fundamental rights and freedoms, it is, in principle, applicable to the institutions and bodies of the EU and it applies to Member States only when and to the extent they are implementing EU law.⁹ Likewise, the general principles of law recognized by the Court of Justice of the European Union (CJEU), the precursors of the Charter of Fundamental Rights, established requirements that were applicable to EU actors but not to Member States.¹⁰ The rationale behind this approach is that the Charter was not meant to control Member States, but to limit

7. Wojciech Sadurskia, *Adding bite to a bark: the story of Article 7, E.U. enlargement, and Jörg Haider*, 16 *Columbia Journal of European Law* 385, 388-389 (2010).

8. *See* Nora Chronowski, *Enhancing the scope of the Charter of Fundamental Rights?*, 2014 *Jura* 13, 16 (2014).

9. *See* Beáta Bakó, *Unió alapjogok a tagállamokban. Az Alapjogi Charta alkalmazási és értelmezési problémái*, 11(1) *Iustum, Aequum, Salutare* 179, 186-190 (2015).

10. *See* Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 *Common Market Law Review* 945, 958-969 (2002).

the power of the “federal” government, as in a democratic society, no public authority may exist without human rights limits. The CJEU established very early that the EU has to respect human rights even if they are not explicitly provided for in EU law; this culminated in the Charter, which was likewise not intended to be a general human rights “watchdog” but a check on the EU’s “federal” government.¹¹

The scope of the Charter is based on the principle that the federal bill of rights applies to the federal government and the national bill of rights applies to the national government. According to Article 51(1) of the Charter of Fundamental Rights, “[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.” Article 51(2) emphasizes that the “Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”¹²

The CJEU constructed the scope of the Charter accordingly; and although the Court interpreted the term “implementing Union law” fairly widely in *Åkerberg Fransson*, the core principle of the EU constitutional architecture was not called into question.¹³

In *Sándor Nagy and others*,¹⁴ the CJEU faced a case where a provision of Hungarian law appeared to be clearly irreconcilable with a right guaranteed by the Charter: Hungary allowed the dismissal of civil servants without justification, which conflicts with Article 30 of the Charter, stating that “[e]very worker has the

11. See Filippo Fontanelli, The implementation of European Union law by Member States under Article 5 1(1) of the Charter of Fundamental Rights, 20(2) *Columbia Journal of European Law* 193, 197-198 (2014) (“The story of how EU law has come to take human rights seriously is well known. Very roughly, it became clear that the economic focus of European Community (EC) law would not prevent possible encroachment on fundamental rights of the individual, including the right to property, which is at the core of the common market. Because of the primacy-plus-disapplication combination noted above, member states’ courts—in particular, constitutional tribunals—stood up to avert the possibility that human-rights-blind Community law could displace fundamental rights guarantees. The risk was that the uniformity of EC law would be hostage to national preferences. To defuse this risk, the ECJ issued a reassurance and a promise. The reassurance was that Community law was inherently compatible with fundamental rights, in the form of general principles. The promise was that the ECJ would be tasked with reviewing, centrally, the validity of EC measures in relation to these ingrained principles, without any need for national courts to subject them to peripheral human rights review.”)

12. Cf. Koen Lenaerts, Exploring the limits of the EU Charter of Fundamental Rights, 8(3) *European Constitutional Law Review*, 375, 377 (2012) (“However, from the fact that the Charter is now legally binding it does not follow that the EU has become a ‘human rights organisation’ or that the ECJ has become ‘a second European Court on Human Rights’ (ECtHR)”).

13. Case C 617/10 *Åkerberg Fransson*, (delivered on February 26, 2013) (not yet reported).

14. Joined Cases C-488/12 to C-491/12 and C-526/12 *Sándor Nagy and others* (delivered on October 10, 2013) (not yet reported).

right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.” However, the CJEU declared the case inadmissible since Hungary was not implementing EU law when adopting this legislation, so the Charter was not applicable due to Article 51.

In *Siragusa*, Mr. Siragusa made alterations to his property in a landscape conservation area without first obtaining landscape compatibility clearance.¹⁵ When applying for retrospective planning permission, he was ordered to restore the site to its former state. Mr. Siragusa argued that the acts of Italy impaired his right to property enshrined in Article 17 of the Charter. However, the CJEU came to the conclusion that the Italian authorities were not implementing EU law and confirmed that the purpose of the Charter is to ensure the protection of fundamental rights in the sphere of EU activity – that is, the Charter is not meant to shelter fundamental rights from Member States in general.¹⁶

31 [T]he objective of protecting fundamental rights in EU law, which is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States.

32 The reason for pursuing that objective is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law . . . However, there is nothing in the order for reference to suggest that any such risk is involved in the case before the referring court.

33 It follows from all the foregoing that it has not been established that the Court has jurisdiction to interpret Article 17 of the Charter

In the above scheme, the EU has relatively little power to enforce human rights requirements upon the Member States. While the Commission has a wide spectrum of political devices to influence Member States in matters having human rights implications, it has felt serious discomfort when these controversies turned into hard talks on legal arguments. The controversy related to the new Hungarian media law enacted in 2010¹⁷ is a notable example of this. Although the Commission initially worded a wide spectrum of objections to the new rules and got politically very much involved in this matter, legally, it could do very little.¹⁸

15. Case C-206/13 *Siragusa* ECLI:EU:C:2014:126.

16. *Id.* at Para 30.

17. Act CLXXXV of 2010 on Media Services and Mass Media (“2010. évi CLXXXV. törvény a médiaszolgáltatásokról és a tömegkommunikációról”)

18. *See e.g.*, Speech of Neelie Kroes, Vice-President of the European Commission responsible for the Digital Agenda, on Hungary’s new media law delivered on January 11, 2011, available at http://europa.eu/rapid/press-release_SPEECH-11-6_en.htm, which listed a much wider spectrum of issues than the one that was made part of the infringement procedure launched by the Commission at the end of the day, see European Commission – Press release: European

Commissioner Viviane Reding summarizes the case succinctly in one of her speeches:

[The Commission objected to the new Hungarian media law, since it raised] serious concerns, notably about the lack of independence of the new Hungarian media authority from the government. Here, the Commission was faced with the legal situation that the EU has only very minor competences with regard to the media. Press and radio are practically outside the scope of the EU Treaties, as is most media content. Only for the provision of cross-border audiovisual media services, certain minimum rules are included in the Audiovisual Media Services Directive. However, these rules do not include a legal requirement that each Member State establish an independent media regulator . . . This is why the Commission could only insist on some marginal changes to the Hungarian media law where these were related to audiovisual media services. On the key issue, the independence of the media authority and its role vis-à-vis the written press, the Commission had no power.¹⁹

2.3. COMPARATIVE OUTLOOK

Though the above approach, at least at first glance, might appear to be idiosyncratic, it is far from unprecedented. It clearly parallels the first century of U.S. constitutional law. Federal states have diverging approaches as to the application of the federal bill of rights to states (provinces). For instance, in Canada the federal bill of rights equally applies to the federal government and the provinces.²⁰ Under U.S. constitutional law, most fundamental rights valid against the federal government can also be invoked against states under the incorporation doctrine.²¹ However, the first century of U.S. constitutional law reveals a more federal approach as to the protection of fundamental rights.

Although the U.S. Constitution in its original form established a couple of what may be considered human rights limits on states, the Bill of Rights' arsenal of human rights protection did not apply to states until the adoption of the

Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary (17 January 2012), available at http://europa.eu/rapid/press-release_IP-12-24_en.htm?locale=en, [https://perma.cc/G3C5-HC5Y], [https://perma.cc/C9BQ-5EHH]

19. Speech of Viviane Reding, Vice-President of the European Commission, EU Justice Commissioner (SPEECH/12/403): Observations on the EU Charter of Fundamental Rights and the future of the European Union. XXV Congress of FIDE (Fédération Internationale pour le Droit Européen). Tallinn, 31 May 2012. Available at http://europa.eu/rapid/press-release_SPEECH-12-403_en.htm [https://perma.cc/F6RE-XCQY]

20. Canadian Charter of Rights and Freedoms, R.S.C. 1985, S 32.

21. JACQUELINE R. KANOVITZ, CONSTITUTIONAL LAW 23 (12th ed. 2010).

Fourteenth Amendment after the Civil War.²² Until then, states were limited only by the rules of state constitutions. This was clearly established by the Supreme Court in *Barron v. Baltimore*.²³ The purpose of the federal Bill of Rights was to limit the federal “Leviathan,” and it was arguably based on the notion that no public power can exist without human rights limits. The genesis of the Bill of Rights underpins this interpretation: a few states refused to adopt the Constitution because it contained no bill of rights – arguably because no sovereign should exist without human rights checks.²⁴ This very much parallels the circumstances of the adoption of the EU Charter of Fundamental Rights, which was meant to subject the EU “federal” government to fundamental rights.

In the U.S., the Civil War engrained that there are certain common core values which have to be respected throughout the Union, as the ignorance of these qualifies as a “ground of divorce.” This recognition fueled the adoption of the Fourteenth Amendment, which provided for the applicability of a few federal fundamental rights to states. However, courts still maintained the general rule that, in principle, the federal Bill of Rights did not apply to states. In *United States v. Cruikshank*, the Supreme Court held that the right to assembly (as enshrined in the First Amendment)

was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National Government alone, . . . for their protection in its enjoyment . . . the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.²⁵

Nonetheless, in 1897, the Supreme Court in *Chicago, Burlington & Quincy Railroad Co. v. Chicago* used the Fourteenth Amendment to enforce “property protection” on states in the name of “substantive due process.”²⁶ The breakthrough was brought along in 1925, with *Gitlow v. New York*,²⁷ where the Supreme Court explicitly announced the doctrine of incorporation (in this case with express reference to the First Amendment).²⁸ This was followed by

22. See U.S. CONST. art. I, § 10.

23. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

24. GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 9-11 (Oxford University Press 2010).

25. *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

26. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

27. *Gitlow v. New York*, 268 U.S. 652 (1925).

28. As to *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, it could be plausibly argued that the purview of the Fourteenth Amendment was not extended, since the Court granted protection to something expressly listed in the Fourteenth Amendment (*i.e.*, ‘property’). However, in *Gitlow v. New York* the ambit of the Fourteenth Amendment was extended to something not expressly enumerated and the Court made it clear that it was incorporating the First Amendment into the Fourteenth Amendment. Cf. Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140, 152 (1949) (“The assertion of th[e] [substantive due process] doctrine, incidentally, gave to the Fourteenth Amendment an importance

numerous cases extending the application of the federal Bill of Rights to states. Accordingly, for nearly the first 150 years of U.S. constitutional history, the federal Bill of Rights did not apply (or applied to a very limited extent) to states. The constitutional experience that entailed a shift in this system was the recognition that if states did not agree with one another in upholding certain rights, the system would be unsustainable.

3. SNEAKING FUNDAMENTAL RIGHTS THROUGH THE BACKDOOR

As demonstrated above, the EU's competences are very limited when it comes to the direct enforcement of human rights upon Member States. And indeed, in some cases, the Commission has had serious difficulties to force out fundamental rights. In these cases, "it cooked from what it had." The Commission tried to make use of its limited powers to forge legal arguments against laws and measures that appeared to infringe upon fundamental rights, using the "supportive by-effects" of largely economic rights and freedoms. Although this method is by no means foolproof at securing a watertight protection for fundamental rights, in a few cases it proved to be a useful tool in the Commission's arsenal. These were the "Al Capone tricks" of the Commission. As is widely known, Al Capone was not convicted for what he should have been but for what he could be (tax fraud).

3.1. THE EUROPEAN COMMISSION'S SURROGATE TOOLS: 'SUPPORTIVE BY-EFFECTS' OR THE 'AL CAPONE TRICKS' OF THE GUARDIAN OF THE TREATIES

The aforementioned approach was used effectively in *Commission v Hungary*.²⁹ In that case, Hungary lowered the mandatory retirement age applicable to judges, public prosecutors, and public notaries from seventy to sixty-two years. As a result, around 274 judges and public prosecutors had to retire.³⁰ This outcome raised serious concerns about the independence of the judiciary. The concern was that the quick dismissal of these judges and justices, and the subsequent mass recruitment of new judges, may impair the independence of the judiciary and may give an opportunity to the government to influence the composition of the courts. Additionally, a significant portion of Hungarian judges, in particular senior high court judges and supreme court justices, were caught in the net of early retirement. Although the Commission was reluctant to base its claim on the argument that the law endangered the independence of the judiciary since it had no power to intercede in Hungarian politics on that basis, it successfully attacked the law before the CJEU on the basis that it was not

vastly greater than it was supposed to have in 1868. But the development of substantive due process is a story far removed from the question of incorporation of the Bill of Rights.").

29. C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687.

30. European Commission Press Release IP/12/24, *European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary* (January 17, 2012).

compatible with EU equal treatment law (Directive 2000/78/EC), which prohibits discrimination at the workplace, among others, on grounds of age. Here, a well-established principle of EU law—equal treatment—was used as a surrogate to protect the independence of the judiciary.

The Commission appeared to have no power to address the primary issue, at least directly, so it relied on EU rules that prohibit discrimination based on age—and it worked. The CJEU ruled:

[B]y adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 – which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued – Hungary has failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Interestingly, although the Commission's legal arguments were obviously wrapped up in anti-discrimination law, its press release on the infringement procedure makes it perfectly clear that the problem addressed by the Commission was the independence of the judiciary. In fact, the press release section dealing with the retirement age is entitled "2) Independence of the judiciary."³¹

Another notable example of "supportive by-effects" is the Slovak Language Law. Slovakia restricted the use of languages other than Slovak in the public sphere.³² Different organizations scrutinized different facets of the law from a human rights perspective.³³ The Commission examined the compatibility of these provisions with the EU internal market principles, namely the free movement of goods, persons, services and capital, and it came to the conclusion that the restriction of the language rights of the minorities may thwart interstate trade.³⁴

For instance, the Slovak Language Law required the employees of certain sectors to have "command of Slovak language," which countered one of the core principles of the EU internal market, notably the free movement of persons. Although Member States may establish language requirements, the CJEU "has held that any language requirement must be reasonable and necessary for the job in question, and must not be used as an excuse to exclude workers from other Member States."³⁵ Specific circumstances, such as the past concerns and the individual circumstances, have to be taken into consideration on a case-by-case

31. *Id.* at 3.

32. Law on State Language of the Slovak Republic (Act No. 270/1995).

33. *See, e.g.*, European Commission for Democracy through Law (Venice Commission), *Opinion on the Act on the State Language of the Slovak Republic*, Opinion no. 555/2009 (October 15-16, 2010).

34. *See Opinion on the Implementing Principles to the Slovak State Language Law Prepared by the European Commission's Legal Service* (2010), available at <http://www.hhrf.org/hhrf/index.php?oldal=426>. [<https://perma.cc/C5PJ-9G2G>]

35. Commission of the European Communities, *Free movement of workers – achieving the full benefits and potential*, COM (2002) 694 final (Nov. 12, 2002).

basis when assessing whether the language requirement is necessary and justified. Accordingly, strong language requirements of general application raise issues under this jurisprudence. As a further example, the Slovak Language Law's provisions on the mandatory use of Slovak language in broadcasting and publications also raised the risk of interference with the freedom of cross-border economic activities.

3.2. COMPARATIVE OUTLOOK

It is noteworthy that though the Commission's above intellectual efforts were remarkable, the use of the "commerce power" to shield fundamental rights is not unprecedented. The U.S. Congress effectively used the U.S. Constitution's Commerce Clause to protect civil rights. Though this was a positive use of the commerce power, contrary to the Commission's "Al Capone" tricks, which used its negative side in legal prohibitions, the parallelism is nonetheless salient.

The U.S. Congress used its commerce power to pass the Civil Rights Act of 1964, which outlawed segregation and racial discrimination. The Act's scope extended to non-state actors, which could not be addressed under the Fourteenth Amendment, which was confined to state actors. The Supreme Court conceived the commerce power widely and extended it to cases having a fairly marginal or even negligible impact on interstate trade.

In *Heart of Atlanta Motel, Inc. v. U.S.*, the Supreme Court held that the activities of a hotel that catered to interstate travelers affected interstate commerce.³⁶ In *Katzenbach v. McClung*, the Supreme Court held that interstate commerce is affected by a restaurant's operations, if "the particular restaurant either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce."³⁷ In this case, forty-six percent of the value of the food purchased locally was meat the restaurant bought "from a local supplier who had procured it from outside the State."³⁸ In *Daniel v. Paul*, the Supreme Court found that the operations of the Lake Nixon Club, an amusement place owned and operated by the respondent and his wife, affected interstate commerce.³⁹

Lake Nixon's customary 'sources of entertainment . . . move in commerce.' The Club leases 15 paddle boats on a royalty basis from an Oklahoma company. Another boat was purchased from the same company. The Club's juke box was manufactured outside Arkansas, and plays records manufactured outside the State. The legislative history indicates that mechanical sources of entertainment such as these were considered by Congress to be 'sources of entertainment' within the meaning of § 201(c)(3).

36. *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964).

37. *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

38. *Id.* at 296.

39. *Daniel v. Paul*, 395 U.S. 298 (1969).

One may argue that in the above cases interstate commerce was grasped widely so as to maximize the applicability of the Civil Rights Act of 1964. Some facets of these endeavors, to an extent, parallel the problem inquired as to EU law—the “federal” government has limited powers and envisages a higher level of legal protection for fundamental rights than states do.

4. CONCLUSIONS OR IS THIS THE BEST OF ALL POSSIBLE WORLDS?

It would be difficult to argue that the current constitutional architecture of the protection of fundamental rights in the EU is the best of all possible worlds. And indeed, the scholarship is not devoid of proposals to extend, one way or another, the scope of the Charter of Fundamental Rights to Member States (also in domestic matters).⁴⁰ However, the origin and the rationale of the Charter clearly suggest that it was meant to hold in check “federal” activities. And it should not be disregarded that EU Member States are not free from human rights checks: they are members of the European Convention on Human Rights and are bound by the judgments of the European Court of Human Rights.

Furthermore, one must consider that while the full federalization of human rights is a tempting option, this is justified only regarding those fundamental values and rights, the violation of which qualifies as a “ground of divorce.” It is noteworthy that in U.S. law the extension of the federal Bill of Rights to states was fueled by such an unpleasant experience, though what grew out of this is much more overwhelming. For the time being, the Supreme Court fully unified human rights law and states have no or very little margin of appreciation.

The treatment of same-sex marriages demonstrates this well. In *Obergefell v. Hodges*, the US Supreme Court held that all states are required to register and recognize same-sex marriages.⁴¹ On the contrary, the ECtHR adopted a more deferential but still protective approach. It held that the status of same-sex couples has to be recognized but states are not obliged to call this status a marriage. Put it otherwise, states have to afford a more or less comparable status to same-sex couples⁴² but they are not obliged to use the label of marriage⁴³ (they may do this under the notion of civil union or registered partnership). In other words, the ECtHR protected the status of same-sex couples to the utmost extent but also tried not to interfere with the national sensitivities. In the case *Schalk and Kopf v.*

40. See, e.g., Nóra Chronowski, *Enhancing the Scope of the Charter of Fundamental Rights?*, 2014 JURA 13 (2014) (Arguing for making the Charter of Fundamental Rights directly applicable, without limitations, to Member States.); Armin Von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei & Maja Smrkolj, *Reverse Solange—Protecting the essence of fundamental rights against EU Member States*, 49(2) COMMON MARKET L. REV. 489 (2012).

41. *Obergefell v. Hodges*, 576 U.S. ____ (2015).

42. *Case Vallianatos and Others v. Greece*, nos. 29381/09 and 32684/09 (November 7, 2013)

43. *Case Schalk and Kopf v. Austria*, no. 30141/04 (June 24, 2010); *Hämäläinen v. Finland*, no. 37359/09, (July 16, 2014); *Case Chapin and Charpentier v. France*, no. 40183/07, (June 9, 2016).

Austria, the Court “observe[d] that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another [and] it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society.”⁴⁴ This sharply differs from the U.S. Supreme Court’s approach which appears to search for the one and only best standard.

As the Charter of Fundamental Rights contains a full-fledged catalogue of fundamental rights, it also encompasses rights (in particular the economic and social rights listed in Title IV)⁴⁵ that may be legitimately amenable to regional variations. And albeit that the protection of fundamental rights is one of the cornerstones of the EU, respect for the national constitutional identities also belongs to one of its core principles.⁴⁶ It goes without saying, the core of human rights protection cannot be subject to territorial variations and the violation of the nucleus of these rights cannot be justified with reference to constitutional identity. The cases where the Commission was under the necessity of using the “supportive by-effects” of EU economic law do appear to concern the core of the fundamental rights the EU is built upon. In other words, the Commission should have had the power to intervene directly so as to enforce human rights requirements upon Member States. However, outside this sphere, to use the terminology of the European Court of Human Rights, European federalism demands respect for the Member States’ margin of appreciation.⁴⁷

44. *Kopf v. Austria*, no. 30141/04, (June 24 2010), para 62.

45. Protocol No. 30, on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, 2008 O.J. (C 115) 313.

46. See Bernhard Schima, *EU fundamental rights and Member State action after Lisbon: putting the ECJ’s case law in its context*, 38 *FORDHAM INT’L L. J.* 1097, 1113-1114 (2015).

47. Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives From U.S. Constitutional Law*, in JAMES E. FLEMING & JACOB T. LEVY, *FEDERALISM AND SUBSIDIARITY* 123, 172-175 (NYU Press, 2014).