

EDITORIAL

The EU Bill of Rights' Diagonal Application to Member States

Comparative Perspectives of Europe's Human Rights Deficit

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It is out of the question that nowadays the European competence to defend rule of law and human rights against Member States is one of the core issues of the 'European project'. In the last decade, the EU institutions have made several, benevolent but feeble, attempts to enforce rule of law and human rights requirements.¹ All of these showcased how little power the EU has when encountering recalcitrant Member States who are contemptuous of the EU's fundamental values. Of course, the reason why the EU has a human rights problem is neither local attitudes nor the fact that it lacks the power to effectively protect fundamental

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1 See e.g. 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; Speech of Neelie Kroes, vice president of the European Commission responsible for the Digital Agenda, on Hungary's new media law (SPEECH/11/6) delivered in the European Parliament (Brussels, 11 January 2011), available at: http://europa.eu/rapid/press-release_SPEECH-11-6_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; Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)) (25 June 2013), Committee on Civil Liberties, Justice and Home Affairs. Rapporteur: Rui Tavares, available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//EN; Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law. COM/2014/0158 final; European Commission's Press release of 7 December 2017: Commission refers Hungary to the European Court of Justice of the EU over the Higher Education Law, available at: http://europa.eu/rapid/press-release_IP-17-5004_en.htm; European Commission's Press release of 20 December 2017: Rule of Law: European Commission acts to defend judicial independence in Poland, available at: http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

freedoms and rule of law against its Member States. The reason is that there is a significant tension between the federal values and certain local attitudes.

The major source of the EU's human rights problem is that the current European system in relation to Member States, at least as it operates, combines the naivety of a preachment and the simplicity of a bludgeon. Article 2 of the Treaty on European Union (TEU) declares that 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". Nonetheless, this remains an empty declaration as long as no effective legal mechanism is attached to actually compel Member States to respect fundamental rights and freedoms in general.

The EU Charter of Fundamental Rights has, in principle, no diagonal application: it is, in principle, addressed to EU institutions; it applies to Member States only when they act as the EU's agents (*i.e.* implement EU law).² The European Commission has been very creative in availing itself of its competences and used unconnected (*i.e.* 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).³ The recent proposal to make EU funding conditional on rule of law⁴ may be a further example. Nonetheless, these sporadic successes could not provide a comprehensive solution.⁵

The political mechanism embedded in Article 7 TEU is meant to reinforce the elevated declaration of Article 2 TEU. Although it is cherished as a nuclear bomb, it is rather a security valve, which is found wanted on at least three points. First, it is unavailable in terms of practical feasibility, because of the requirement of unanimity. Second, it is ineffective in terms of legal remedy, because it offers no redress but merely a sanction on the delinquent Member State. While a remedy could reinforce the trust in the 'federal' government, a sanction on the Member States may actually have a counterproductive effect and fuel nationalist sentiments, especially in case of a country that carries out a mutiny against Brussels

2 Art. 51. *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: <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', *Common Market Law Review*, Vol. 52, 2015, p. 1201.

3 C.I. Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's "Federal Bill of Rights" to Member States (October 15, 2017)', *Indiana International & Comparative Law Review*, Vol. 27, No. 1, 2017, pp. 9-11.

4 S. Gopalan, 'Linking EU Funds to "Rule of Law" Is Innovative – But Vague (7 May 2018)', available at: <https://euobserver.com/opinion/141757>. *See* G. Halmai, 'The Possibility and Desirability of Economic Sanction: Rule of Law Conditionality Requirements against Illiberal EU Member States', *EUI Working Papers Law 2018/06*, available at: http://cadmus.eui.eu/bitstream/handle/1814/51644/LAW_2018_06.pdf?sequence=1.

5 The EU's failure to protect fundamental rights in an effective manner has attracted a good deal of criticism. *See, e.g.*, G. Halmai, 'The Early Retirement Age of the Hungarian Judges', in Nicola Fernanda and Bill Davis (Eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, Cambridge University Press, 2017, pp. 471-488.

and European federalism. Third, it is summary and oversimplified: because of its political character and the general condemnation, it does not concentrate on the act but on the person, which may cause more harm than benefit. While the established metaphor for Article 7 TEU is nuclear (or atomic) bomb, in reality it is just a bludgeon.

Fortunately, comparative federalism provides an array of experiences, solutions and techniques, which help the European integration to grasp and address the diagonal human rights problem and to take stock of its solutions. The spectrum of federal patterns is wide, ranging from Canada, where the Charter of Rights and Freedoms applies equally to the federal government and the provinces and the bifurcation of the Bill of Rights was discarded,⁶ to Australia, where there is no federal Bill of Rights at all. In between stands the United States, whose constitutional history appears to provide the closest parallelism to the EU. The current EU architecture clearly parallels the first century of US constitutional history: although today, due to the incorporation doctrine, most fundamental rights valid against the federal government can be invoked also against the states,⁷ the first century of US constitutional law reveals a federal approach similar to Article 51 of the EU Charter of Fundamental Rights. Although the American Constitution sporadically established a couple of limits against states that may be regarded as human rights in nature,⁸ the arsenal of human rights protection as enshrined in the US Constitution's first ten amendments (the federal Bill of Rights) did not apply to states until the adoption of the Fourteenth Amendment (after the Civil War); for a century, states were limited only by the rules of state constitutions.⁹

The parallelisms and similarities between the first one and a half centuries of US constitutional history and the current European architecture are manifold. In both systems, the federal Bill of Rights (the EU Charter of Fundamental Rights and the US Constitution's first ten amendments) has been the product of the same thinking (no public power may exist without human rights clogs) and was, initially, introduced to limit the federal government without any endeavour to introduce a federal human rights watchdog for the states. In Europe, the predecessors of the Charter had been the general principles of law, a concept developed by the Court of Justice of the European Union (CJEU), among others, to introduce human rights limits against the actions of the EU. The CJEU established very early that the EU has to respect human rights even if they are not explicitly provided for in EU law, simply because it is evidently natural that public power goes hand in hand with human rights limits.¹⁰ These court-developed human rights requirements culminated in the Charter, which was likewise not intended

6 Section 32(1) of the Canadian Charter of Rights and Freedoms.

7 J.R. Kanovitz, *Constitutional Law* 23, 12th ed., 2010.

8 See Article I Section 10 of the US Constitution: "[n]o state shall (...) pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

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

10 See P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', *Common Market Law Review*, Vol. 39, 2002, pp. 945, 958-969.

to be a general human rights ‘watchdog’ but a check on the EU’s ‘federal’ government.¹¹ This approach informs the scope of the Charter as defined in Article 51.

The extension of the federal Bill of Rights to the states (an accomplished fact in the United States and a historical necessity in Europe) was and is inspired by a ‘ground of divorce’ type of thinking. The American Civil War proved that there are certain common core values which have to be respected throughout the Union and there are certain practices that violate, to use conflicts law phraseology, the Union’s ‘most basic notions of morality and justice’.¹² This recognition fuelled the adoption of the Fourteenth Amendment, which provided for the applicability of a few federal fundamental rights to states. Interestingly, the idea of a bifurcated fundamental rights protection was so deeply entrenched in the American constitutional thinking that US courts rejected the extension for half a century.¹³ 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.

American constitutional history also provides a caveat for Europe. While this has not always been the case, at the end of the day the Fourteenth Amendment almost unified human rights law in the United States. Subsidiarity and state constitutional identities could have been given room in two ways: incorporating only part of the enumerated rights and interpreting the incorporated rights in a more flexible manner to afford states a certain margin of appreciation to display local values and idea. After a period of balking, both of these were rejected. Although

- 11 See F. Fontanelli, ‘The implementation of European Union law by Member States under Article 51(1) of the Charter of Fundamental Rights’, *Columbia Journal of European Law*, Vol. 20, No. 2, 2014, pp. 193, 197-198.
- 12 *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de L’Industrie du Papier (RAKTA)*, 508 F. 2d 969, 974 (2d Cir. 1974).
- 13 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.” *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). 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’. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). The breakthrough was brought along in 1925, with *Gitlow v. New York*, where the Supreme Court explicitly announced the doctrine of incorporation (in this case with express reference to the First Amendment). *Gitlow v. New York*, 268 U.S. 652 (1925). 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 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.”). This was followed by numerous cases extending the application of the federal Bill of Rights to states.

the Supreme Court was, for long, wavering between total and selective incorporation, at the end, it incorporated the vast majority of the rights listed in the first ten amendments.¹⁴ It is true that some of the liberties of the federal Bill of Rights are not incorporated, but they are very few. For the time being, most fundamental rights valid against the federal government can also be invoked against states under the incorporation doctrine.¹⁵ States are, of course, free to have a more generous rights catalogue; however, they may not depart from the national liberties applied via the Fourteenth Amendment.¹⁶ Furthermore, the doctrines of margin of appreciation, subsidiarity and constitutional identity are alien to the Supreme Court's Bill of Rights case law.¹⁷

This volume presents and examines the current European approach to the application of the federal Bill of Rights to states from a comparative perspective and explores the constitutional and jurisprudential patterns addressing the question of inquiry in a multilevel constitutional architecture. It endeavours to contribute to the current European debate with a new comparative perspective and to foster EU constitutional development with structural patterns worthy of consideration.

The volume is divided into three sections. The first deals with the current status of the diagonal application of EU human rights law to Member States. The second section deals with the more general problems of national constitutional identities and margin of appreciation in multilayered constitutionalism, in particular in the case law of the European Court of Human Rights (ECtHR). The third section consists of six comparative articles and, using the inventory of comparative federalism, aims to take stock of the experiences of Australian and US constitutional law in the diagonal application of the federal Bill of Rights to states.

The EU's current human rights predicament is addressed by three articles (Section 1). The article of Professor Gábor Halmai, titled 'The Application of European Constitutional Values in EU Member States: The Case of the Fundamental Law of Hungary', demonstrates the EU's human rights problem through the case of Hungary. It presents the backsliding of liberal democracy in Hungary, after 2010, and the EU institutions' incapability to compel compliance with the EU's core values.

Professor Marie-Pierre Granger's contribution ('Federalization through Rights in the EU: A Legal Opportunities Approach') explains the dynamics of inte-

14 O.H. Stephens and J.M. Scheb II, *American Constitutional Law. Volume II: Civil Rights and Liberties*, Cengage Learning, 2008, pp. 23-25.

15 Kanovitz, 2010.

16 Federal Bill of Rights case-law establishes that the first ten amendments constitute only a baseline and states are free to place further restrictions on their actions to provide a higher level of protection. The federal judicial interpretation of the federal constitution sets a 'minimum' level of rights protection but states are entirely free to provide greater protection under their own constitutions. For example, no affirmative right to education is secured under the federal constitution but many state constitutions secure that right, states are free to allow 16-year-olds to vote etc.

17 S.G. Calabresi & L.D. Bickford, 'Federalism and Subsidiarity: Perspectives From U.S. Constitutional Law', in J.E. Fleming & J.T. Levy (Eds.), *Federalism and Subsidiarity*, NYU Press, 2014, pp. 123, 172-175.

gration-through-rights in the EU, proposing an explanatory framework inspired by a legal opportunities approach. The article argues that the weaker the domestic legal opportunities for human rights protection are, the greater the federalizing pressure is.

The article of Professor Filippo Fontanelli and Professor Amedeo Arena, titled 'The Harmonization Potential of the Charter of Fundamental Rights of the European Union', discusses two underrated and connected aspects that determine the applicability of the EU Charter on Fundamental Rights to Member State actions: first, the Charter is a standard of review for domestic measures only when they are covered but not precluded by EU law; second, because the scope of application of EU law and that of the Charter are identical, the latter suffers from the same uncertainties as the former.

The place and role of national constitutional identities and the doctrine of margin of appreciation in multilayered constitutionalism are addressed by two articles (Section 2).

Professor Koehn Lemmens, in his article entitled 'The Margin of Appreciation in the ECtHR's Case Law: A European Version of the Levels of Scrutiny Doctrine?' analyses the European concept of margin of appreciation in comparison with the American doctrine of levels of scrutiny. He argues that due to the institutional framework the differences between the two doctrines are notable and the social consequences may even be radically opposed.

Professor Renáta Uitz and Professor András Sajó ('The Sovereign Strikes Back: A Judicial Perspective on Multi-Layered Constitutionalism in Europe') examine the supranational web of public law emerging in a globalized world with global markets. The question addressed by the authors is whether it is possible to guarantee freedom, rule of law and efficiency in a multilayered era where it is difficult to pinpoint the centre of authority.

The perspectives of comparative federalism are presented by six articles from two continents.

Professor Kenneth R. Stevens, in his article titled 'Perspectives on Comparative Federalism: The American Experience in the Pre-incorporation Era', presents the pre-Civil-War era. Why no Bill of Rights was included into the US Constitution at the constitutional convention and how subsequently the recognition that the Constitution's ratification could fail without the inclusion of a Bill of Rights led to the adoption of the first ten amendments in 1791.

Professor Lee J. Strang's article ('Incorporation Doctrine's Federalism Costs: A Cautionary Note for the European Union') presents how the US Supreme Court incorporated the federal Bill of Rights against the states and argues that this has come with significant costs to federalism, providing a cautionary note for the EU. The author identifies options for the development of EU law.

The article of Professor Howard Schweber ('The Architecture of American Rights Protections: Texts, Concepts and Institutions') presents the architecture of American rights protections in three senses: textual, conceptual and institutional. Through the development of these three architectures of rights, the author demonstrates the dimensions of the strengths, limitations and distinctive character of the American rights protections in theory and in practice.

Professor Barry Sullivan ('Three Tiers, Exceedingly Persuasive Justifications and Undue Burdens: Searching for the Golden Mean in US Constitutional Law') examines the standards of review in cases where government action is challenged on equal protection grounds.

The article of Professor Brett G. Scharffs, titled 'Trinity Lutheran and Its Implications for Federalism in the United States', analyses the 'tire scrap' playground case, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, decided by the US Supreme Court in the summer of 2017, and its implications for federalism in the United States.

Professor Nicholas Aroney and Professor James Stellios, in their article titled 'Rights in the Australian Federation', present the unique Australian constitutional system, which has been a very stable federal democracy, maintaining high levels of personal freedom, political rights, civil liberties and the rule of law, without containing an entrenched Bill of Rights.