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# EU Citizenship as a Means of Empowerment for Fundamental Rights During the Financial Crisis

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ARTICLES
SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS

# EU CITIZENSHIP AS A MEANS OF EMPOWERMENT FOR FUNDAMENTAL RIGHTS DURING THE FINANCIAL CRISIS

KATERINA KALAITZAKI*

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ABSTRACT: The financial crisis has revealed gaps in the protection of EU citizens against unjust deprivations of their rights, including the right to effective judicial protection, due to the difficulty in challenging the consequences of the conditionality imposed. This *Article* suggests that the deficient protection derives from the limited scope of application of fundamental rights under the Charter of Fundamental Rights of the European Union (Charter) and its unstable judicial interpretation, along with the fact that EU citizenship rights have not developed sufficiently. I will, however, argue that there is a duty to protect citizens within a constitutionalised Union, against any deprivations of their rights contrary to the values of the Union itself. This *Article* aims to fill these gaps, by developing the connection between EU fundamental and EU citizenship rights, using the judicially developed "substance of the rights" doctrine. Various attempts have been made to achieve this end, yet some loose ends remain which are largely addressed in this *Article* through the establishment of a new jurisdictional test, which combines a dynamic reading of Art. 20 TFEU and the "substance of the rights" doctrine, and Art. 2 TEU and fundamental rights as general principles of EU law.

KEYWORDS: EU citizenship – financial crisis – substance of the rights doctrine – constructivism – *Ruiz Zambrano* – fundamental rights.

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## I. Introduction

The EU is no longer an organisation which merely pursues economic objectives but is also evolving towards a more political and constitutionalised Union. The *Article* supports the idea that the political integration in the domain of EU fundamental rights is primarily evolving through a "triangular" inter-connected system of protection, including the constructivist transformation of EU citizenship, the institutionalised developments of EU law[1] and the protection of fundamental rights as general principles of EU law. Yet major components of a comprehensive and all-embracing fundamental rights policy are still absent, which is even more perceptible during periods of crisis, such as the recent financial crisis, where the gaps in citizens' rights protection became evident due to the difficulties encountered in challenging the consequences of the conditionality imposed.[2] This deficient protection largely derived from the restricted scope of application of fundamental rights under the Charter of Fundamental Rights of the European Union (Charter), its unstable judicial interpretation and in turn from the unwillingness of the Court to rule on complex financial cases. The financial crisis and its mechanisms constitute a useful case study from which to assess the modern "triangular" protection of rights and encourage interest in assessing new legal paths to reinforce it.

Although EU citizenship has not played a substantial role in the financial crisis, this *Article* suggests that it is not constrained to its current, "confined" form, since it is designed to encounter constant evolution and progress.[3] Its constructive character culminated in the judicially developed "substance of the rights" doctrine, which has substantially altered the architecture of EU fundamental rights protection towards including purely internal violations within the Union's scope if they amount to emptying Union citizenship rights of their substantive meaning. When placed within a new jurisdictional test, the doctrine can arguably fill the gaps of the current protection system in an effort to link EU fundamental and citizenship rights and propose an alternative, more effective use of rights.

## II. Setting the scene: legal characteristics of the "triangular" fundamental rights protection system

The first corner of the "triangle" is the legal concept of Union citizenship,[4] which constituted a decisive step towards a constitutionalised Union;[5] although a relevant personal

[1] D. Kostakopoulou, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in *The Modern Law Review*, 2005, p. 250 *et seq*.

[2] A.J. Menéndez, *The Existential Crisis of the European Union*, in *German Law Journal*, 2013, p. 455.

[3] Commission of the European Communities, *Intergovernmental Conference: Contributions by the Commission*, Luxembourg: Office for Official Publications of the European Communities, 1991, p. 87; C. Closa, *The Concept of Citizenship in the Treaty on European Union*, in *Common Market Law Review*, 1992, p. 1167.

[4] D. Kostakopoulou, *Ideas, Norms and European Citizenship*, cit., p. 250.

status had clearly matured long before its formal incorporation in the Maastricht Treaty.[6] The list of rights provided under Art. 20 TFEU, although non-exhaustive, fell short of establishing the full range of modern citizenship rights,[7] since no legal connection was declared with fundamental rights. The Commission, however, defined EU citizenship as a dynamic concept which should always reflect "the aims of the Union, [...] stemming from the gradual and coherent development of the Union's political, economic and social dimension".[8] It has indeed proved to be of "constructivist" nature, especially through the Court of Justice's case law, by deepening European integration, based on a federal logic, while broadening the potential impact on EU fundamental rights. Namely, after *Martínez Sala*,[9] EU citizenship demonstrated a shift away from "economic and market citizens", to a social and political dimension,[10] while establishing protection against discrimination based on nationality and a free-standing right to move and reside freely.[11] The constructivist nature of EU citizenship culminated with the inclusion of new, unwritten rights into the concept, through the "substance of the rights" doctrine.

Regardless of the influence exerted by EU citizenship in forming current policies, a significant role was also played by the "effects of institutional interaction",[12] such as the

[5] A. WIENER, *The Constructive Potential of Citizenship: Building European Union*, in *Policy & Politics*, 1999, p. 271 *et seq.*

[6] D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, in *European Law Review*, 2012, p. 372; R. WELGE, *Union Citizenship as Demoicratic Institution: Increasing the EU's Subjective Legitimacy Through Supranational Citizenship*, in *Journal of European Public Policy*, 2015, p. 56; T. KOSTAKOPOULOU, *Citizenship, Identity and Immigration in the European Union: Between Past and Future*, Manchester: Manchester University Press, 2010; S. O'LEARY, *The Relationship Between Community Citizenship and the Protection of Fundamental Rights in Community Law*, in *Common Market Law Review*, 1995, p. 519.

[7] European Parliament, Resolution of 14 June 1991 on Union citizenship, Doc. A3-0139/91; C. CLOSA, *Citizenship of the Union and Nationality of Member States*, in *Common Market Law Review*, 1995, p. 490.

[8] Commission of the European Communities, *Intergovernmental Conference: Contributions by the Commission*, cit., p. 87.

[9] Court of Justice, judgment of 12 May 1998, case C-85/96, *Martínez Sala v. Freistaat Bayern.*

[10] S. O'LEARY, *Putting Flesh on the Bones of European Union Citizenship*, in *European Law Review*, 1999, p. 68 *et seq.*; D. KOCHENOV, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, in *Columbia Journal of European Law*, 2009, p. 173 *et seq.*

[11] Court of Justice: judgment of 20 September 2001, case C-184/99, *Grzelczyk*; judgment of 17 September 2002, case C-413/99, *Baumbast and R*, para. 83; judgment of 7 September 2004, case C-456/02, *Trojani* [GC]; judgment of 26 October 2006, case C-192/05, *Tas-Hagen and Tas*; Opinion of AG Kokkott delivered on 30 March 2006, case C-192/05, *Tas-Hagen and Tas*, para. 33. See C. BARNARD, *The Substantive Law of the EU: The Four Freedoms*, Oxford: Oxford University Press, 2013.

[12] D. KOSTAKOPOULOU, *Ideas, Norms and European Citizenship*, cit., p. 264; J.B. LIISBERG, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: A Fountain of Law of Just an Inkblot*, in *Jean Monnet Working Papers*, no. 4, 2001, p. 7; K. LENAERTS, *Exploring the Limits of the EU Charter of Fundamental Rights*, in *European Constitutional Law Review*, 2012, p. 375; G. ARESTIS, *Fundamental Rights in the EU: Three Years After Lisbon, the Luxembourg Perspective*, in *College of Europe Cooperative Research Papers*, no. 2, 2013, p. 2; C.B. SCHNEIDER, *The Charter of Fundamen-*

Charter, whose list of rights is far more extensive, as it reunites a wide range of rights and freedoms – including socioeconomic rights – which have been violated the most during the financial crisis.[13] On the contrary, considering the nature of the two concepts, the list under EU citizenship might currently be limited, but its constructivist nature arguably allows for expansion of the "*inter alia* list" under Art. 20 TFEU. Therefore, while the list of rights under the Charter adequately incorporates the rights violated during the financial crisis, the precise extent of Union citizenship rights cannot be clearly defined from a strictly textual perspective. However, it is generally believed that the essence of EU citizenship is much broader than the list provided by Art. 20, para. 2, TFEU, in the broader sense of what supranational citizenships entail.[14]

The third piece of the EU triangular system is the protection of fundamental rights as general principles of EU law, many of which are unwritten and judge-made, but the majority of which have been codified in the Treaties over time.[15] They *inter alia* assist with judicial interpretations and legal reviews,[16] but more importantly, they are largely used to fill legal gaps where relevant EU laws are lacking or do not provide a concrete answer.[17] It can thus be argued that general principles are both institutional and constructive in nature since they are enshrined in the Treaty, but the Court regularly recognises new rights as falling within the "general principles umbrella", under Art. 2 TEU.

Nevertheless, the effectiveness and potential use of the instruments in a crisis largely depends on their material and/or personal scope of application and the existence of any legal restrictions. The scope of EU citizenship was largely based on the logic of economic growth,[18] which has arguably diminished its essence and the attempts made in the Maas-

*tal Rights of the European Union: The Evolution of the First Bill of Rights of the European Union and Its Position Within the Constellation of National and Regional Fundamental Rights Protection Systems*, in *Bridging Europe Working Paper*, 2014, p. 2 *et seq.*

[13] S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights. A Commentary*, London: Bloomsbury Publishing, 2014.

[14] D. Kochenov, *On Tiles and Pillars: EU Citizenship as a Federal Denominator*, in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, p. 26 *et seq.*

[15] A. Cuyvers, *General Principles of EU Law*, in E. Ugirashebuja, J.E. Ruhangisa, T. Ottervanger, A. Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Leiden: Brill Nijhoff, 2017, p. 220.

[16] Court of Justice: judgment of 19 November 1991, joined cases C-6/90 and C-9/90, *Francovich*, para. 30; judgment of 5 March 1996, joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, paras 27-36; judgment of 8 April 2004, joined cases C-293/12 and 594/12, *Digital Rights Ireland and Seitlinger and Others* [GC], para. 10.

[17] Court of Justice: judgment of 23 April 1986, case 294/83, *Les Verts v. Parliament*, para. 12; judgment of 19 January 2010, case C-555/07, *Kücükdeveci* [GC], para. 21.

[18] S. Douglas-Scott, *In Search of Union Citizenship*, in *Yearbook of European Law*, 1998, p. 30 *et seq.*; P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, in *Common Market Law Review*, 2002, p. 971; N. Nic Shuibhne, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, p. 1621 *et seq.*; D. Kochenov, *A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe*, in *Columbia Journal of European Law*, 2011, p. 61.

tricht Treaty to connect it with the citizen.[19] However, the CJEU has identified an increasing number of "citizenship cases in which the element of true movement is either barely discernible or non-existent",[20] while the scope *ratione materiae* of EU law has been further stretched to cover virtually hypothetical cross-border situations.[21] EU citizenship has further managed to overcome the strict requirement for a cross-border element completely, by creating an independent, EU citizenship-based right,[22] and redefining the material and personal scope of EU citizenship[23] to allow more cases to fall within the CJEU's jurisdiction. Most importantly, in *Ruiz Zambrano* the Court ruled that Art. 20 TFEU prevents Member States from taking measures which have the effect of "depriving EU citizens of the genuine enjoyment of the substance of rights conferred on them by the citizenship of the Union".[24] It, therefore, created the possibility of EU law "intervening", once the enjoyment of the essence of EU citizenship rights is brought into question.[25]

The restriction on the field of application of the Charter under Art. 51, para. 1,[26] also severely limits the scope of fundamental rights policies, including the relevant jurisdiction for challenges to austerity measures. The Court has not accepted the restriction easily, although it continues to be difficult to predict whether a domestic measure will be found to be bound by the Charter.[27] The Court has interestingly interpreted "implementation" under Art. 51, para. 1, broadly as meaning to "fall within the scope of EU law".[28] In *Åkerberg Fransson*[29] a remote connection with EU law was enough to trigger

[19] E. SPAVENTA, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects*, in *Common Market Law Review*, 2008, p. 40; J. SHAW, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, in *Edinburgh School of Law Working Paper Series*, no. 14, 2010, p. 11.

[20] Opinion of AG Sharpston delivered on 30 September 2010, case C-34/09, *Ruiz Zambrano*; H. VAN EIJKEN, S.A. DE VRIES, *A New Route into the Promised Land? Being a European Citizen After Ruiz Zambrano*, in *European Law Review*, 2011, p. 710; A. TRYFONIDOU, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, in *Legal Issues of Economic Integration*, 2008, p. 50 *et seq.* See further Court of Justice, judgment of 14 October 2008, case C-353/06, *Grunkin and Paul* [GC].

[21] Court of Justice: judgment of 2 October 2003, case C-148/02, *Garcia Avello*, para. 45; judgment of 19 October 2004, case C-200/02, *Zhu and Chen*, para. 45; judgment of 12 July 2005, case C-403/03, *Schempp* [GC], para. 47; E. SPAVENTA, *Seeing the Wood Despite the Trees*, cit., p. 21.

[22] C. O'BRIEN, *"Hand-to-Mouth" Citizenship: Decision Time for the UK Supreme Court on the Substance of Zambrano Rights, EU Citizenship and Equal Treatment*, in *Journal of Social Welfare and Family Law*, 2016, p. 229 *et seq.*

[23] Court of Justice, judgement of 2 March 2010, case C-135/08, *Rottmann* [GC].

[24] Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano* [GC], para. 42.

[25] A. TRYFONIDOU, *Reverse Discrimination in Purely Internal Situations*, cit., p. 50 *et seq.*

[26] F. FONTANELLI, *The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights*, in *Columbia Journal of European Law*, 2014, p. 193 *et seq.*

[27] *Ibid.*, p. 193.

[28] Court of Justice: judgment of 18 June 1991, case C-260/89, *ERT v. DEP*, para. 42; judgment of 13 June 1996, case C-144/95, *Maurin.*

the Charter, stressing how much grey area remains in the interpretation of this provision. The scope of EU fundamental rights is therefore interpreted variously, with the Charter being more likely to apply to national rules in cases with a stronger EU interest while applying only in extreme cases regarding the co-ordination of rules.[30] Therefore, although the Court has interpreted Art. 51, para. 1, broadly, the level of discretion available allows it to promote a differentiated understanding of the Charter's scope of application in selected cases. The vagueness and uncertainty deriving therefrom[31] were also criticised by the European Parliament, stating that the citizens' expectations "go beyond the Charter's strictly legal provisions" and called on the Commission to do more to meet citizens' expectations.[32] Within the framework of strengthening the protection of EU fundamental rights, the Parliament had even proposed the deletion of Art. 51 of the Charter,[33] recognising the structural difficulties it creates. A reinforced system, towards a truly constitutionalised Union, could be achieved by adopting a broader and more stable use of the Charter, to make rights more visible to citizens, especially in situations which are firmly within the scope of EU law or have a clear connection with it, such as those of the European Stability Mechanism (ESM).

General principles of EU law are also invoked when "implementing Union law", in view of the fact that almost all Charter rights have been previously recognised as general principles.[34] Unlike the Charter, however, due to their hybrid nature, the scope of application of general principles is not as restricted.[35] According to AG Bot in his Opinion in *Scattolon*, the restrictive scope of application defined for the Charter was not intended to restrict the scope of application of the fundamental rights recognised as general principles of EU

[29] Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC]; European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures* – Study by E. Spaventa, Brussels: European Union, 2016, PE 556.930, www.europarl.europa.eu.

[30] European Parliament, *The Interpretation of Article 51 of the EU Charter of Fundamental Rights*, cit., p. 10.

[31] F. Fontanelli, *The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights*, cit., p. 200.

[32] European Parliament Resolution P8_TA(2016)0021 of 21 January 2016 on the activities of the Committee of Petitions 2014, para. 24.

[33] European Parliament Resolution P7_TA(2014)0173 of 27 February 2014 on the situation of fundamental rights in the European Union (2012), para. 15.

[34] M.J. van den Brink, *EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously*, in *Legal Issues of Economic Integration*, 2012, p. 287.

[35] K. Lenaerts, J.A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, in *Common Market Law Review*, 2010, p. 1640; T. Tridimas, *Horizontal Effect of General Principles: Bold Rulings and Fine Distinctions*, in U. Bernitz, X. Groussot, F. Schulyok (eds), *General Principles of EU Law and European Private Law*, Alphen aan den Rijn: Wolters Kluwer, 2013; Court of Justice, judgment of 13 July 1989, case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*.

law,[36] which can still be invoked where the Charter cannot. Therefore, in terms of the scope of application of the respective instruments, it is argued that a constructivist understanding of EU citizenship can more effectively overcome its restrictions compared to the Charter, demonstrating its greater potential for safeguarding citizens' rights.[37]

## III. The modern protection of fundamental rights

To cope with the financial crisis and safeguard financial stability in the euro area,[38] new mechanisms were adopted,[39] including the permanent ESM, which was established as an international, intergovernmental Treaty (ESMT)[40] concluded and ratified by the Member States outside the EU legal order. Accordingly, Art. 136, para. 3, TFEU states that the mechanism is activated if indispensable to safeguard the stability of the euro area as a whole, subject to strict conditionality,[41] which is agreed under the relevant memoranda of understanding (MoUs). As a way to alleviate budgetary concerns, conditionality is based on austerity and includes reductions in public spending, cuts in wages and increases in tax revenues.[42] Although necessary for the mechanism to work,[43] the conditionality imposed was repeatedly challenged for fundamental rights infringements.[44] Due to the diversified legal establishment and the use of the financial assistance mechanisms, the judicial challenges have proven arduous,[45] while the current protection system has been largely ineffective in protecting EU citizens' rights.

[36] Opinion of AG Bot delivered on 5 April 2011, case C-108/10, *Scattolon*, para. 120.

[37] D. Kochenov, *A Real European Citizenship*, cit., p. 61.

[38] K. Tuori, K. Tuori, *The Eurozone Crisis: A Constitutional Analysis*, Cambridge: Cambridge University Press, 2014; European Commission, *Quarterly Report on the Euro Area*, in *Economic and Financial Affairs*, 2015, p. 28; Regulation (EU) 407/2010 of the Council of 11 May 2010 on establishing a European financial stabilisation mechanism; Decision of the Representatives of the Governments of the Euro Area Member States Meeting Within the Council of the European Union of 10 May 2010, Council Document 9614/10 (whereby the governments agreed to provide financial assistance through a Special Purpose Vehicle).

[39] P.M. Rodriguez, *A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis*, in *European Constitutional Law Review*, 2016, p. 270.

[40] Recitals 1 and 5of the Treaty Establishing the European Stability Mechanism (ESM).

[41] View of AG Kokott delivered on 26 October 2012, case C-370/12, *Pringle*, paras 142-143; P. Craig, *Pringle and the Nature of Legal Reasoning*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 208 *et seq*.

[42] S. Theodoropoulou, A. Watt, *Withdrawal Symptoms: An Assessment of the Austerity Packages in Europe*, in *European Trade Union Institute Working Papers*, no. 2, 2011, p. 11 *et seq*.

[43] H. Gilliams, *Stress Testing the Regulator: Review of State Aid to Financial Institutions After the Collapse of Lehman*, in *European Law Review*, 2011, p. 5 *et seq*.; H.R.B. Avalos, *Moral Hazard in the Euro-Zone*, in *Munich Personal RePEc Archive Papers*, no. 61103, 2012, p. 2 *et seq*.; Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*, paras 69 and 111.

[44] Council of Europe Commissioner for Human Rights, *Safeguarding Human Rights in Times of Economic Crisis* – Issue Paper by N. Lusiani, I. Saiz, 2014, book.coe.int.

[45] C. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, in *Oxford Journal of Legal Studies*, 2015, p. 331.

The Court has repeatedly referred to the Charter in its rulings, only to conclude in most cases that it cannot be invoked due to a lack of connection with EU law. Therefore, leaving aside the level of protection which could actually have been offered by the Charter, the Court's persistent preference for interpreting Art. 51, para. 1, in the narrowest way possible when in fact a connection with EU law could be identified, has led EU citizens to a state of deadlock in such actions. This is primarily the case in claims against the Member States, which are under a duty to implement the agreed conditionality into national laws, in order to restore stability and return to sustainable growth.[46] The Court, in *Pringle*[47] and later in *Sindicatos dos Bancarios*,[48] ruled that the provisions of the Charter do not apply to the implementation of the MoUs for the provision of stability support under the ESM since the Member States are not implementing Union law within the meaning of Art. 51, para. 1, of the Charter.[49] The *Pringle* ruling had raised intense debate, since the ESMT indicates that the EU framework should be observed by the ESM members, especially "the economic governance rules" set out in the TFEU,[50] while previous rulings and principles allowed more room for a connecting link with EU law.[51]

Further reluctance was manifested in *Sindicato Nacional*,[52] where the Court narrowly ruled that it had no jurisdiction to determine the request for a preliminary ruling since no link with EU law was found.[53] In contrast, although the Portuguese Government seemed to "have gone further than its commitments in the MoU",[54] the national legislation also makes express reference to the Council Decision on granting financial assistance, thus at least a remote link between the national measure with EU law was evident. The Court of Justice was straightforwardly asked about the validity and interpretation of specific provisions implemented in national law in *Florescu*, where it had for the first time indicated that since the MoU is an act of the EU institutions, it must be regarded as implementing

[46] European Stability Mechanism, The Republic of Cyprus, Central Bank of Cyprus, *Financial Assistance Facility Agreement between European Stability Mechanism and The Republic of Cyprus as the Beneficiary Member State and Central Bank of Cyprus as Central Bank*, www.esm.europa.eu.

[47] *Pringle*, cit., para. 178.

[48] Court of Justice, order of 7 March 2013, case C-128/12, *Sindicato dos Bancários do Norte and Others.*

[49] F.J. Mena Parras, *The European Stability Mechanism Through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle*, in *European Law Review*, 2013, p. 850 *et seq.*; *Pringle*, cit., para. 180.

[50] G. Beck, *The Court of Justice, Legal Reasoning, and the Pringle Case – Law as the Continuation of Politics by Other Means*, in *European Law Review*, 2014, p. 240; A. Hinarejos, *The Court of Justice of the EU and the Legality of the European Stability Mechanism*, in *Cambridge Law Journal*, 2013, p. 237.

[51] Court of Justice: judgment of 12 February 2009, case C-45/07, *Commission v. Greece*; judgment of 20 April 2010, case C-246/07, *Commission v. Sweden*, para. 91; C. Barnard, *The Charter, the Court – and the Crisis*, in *University of Cambridge Faculty of Law Research Papers*, no. 18, 2013, p. 9.

[52] Court of Justice, order of 26 June 2014, case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins.*

[53] See also, Court of Justice, order of 10 May 2012, case C-134/12, *Corpul Naţional al Poliţiştilor.*

[54] C. Barnard, *The Charter in Time of Crisis: A Case Study of Dismissal*, in N. Countouris, M. Freedland (eds), *Resocialising Europe in a Time of Crisis*, Cambridge: Cambridge University Press, 2013, p. 262.

that law according to Art. 51, para. 1, despite the amount of discretion they have in deciding the implementing measures.[55] As a whole, the Charter failed to protect EU citizens' rights completely during the financial crisis, primarily because the unstable status of the restriction under Art. 51, para. 1, allowed the CJEU to treat claims against Member States as purely internal,[56] even when a remote connection with EU law existed. This approach largely deprived citizens of the ability to proceed in such litigation to the factual assessment of the disputed measures and possible remedies.

The Charter has been more successfully invoked against the acts of the EU institutions tasked with negotiating the MoUs and overseeing the austerity plan.[57] In her view in *Pringle*, AG Kokott emphasised that the Commission remains a Union institution and is bound by the full extent of EU law, even when acting within the framework of the ESM.[58] Accordingly, the Court in *Ledra Advertising Ltd* stated that the Commission retains within the framework of the ESMT, its role as guardian of the Treaties and should refrain from signing an MoU whose consistency with EU law and the Charter is doubtful.[59]

In contrast, fundamental rights as general principles of EU law have rarely been used and only recently with any positive effect. Specifically, *Associação Sindical dos Juízes Portugueses*[60] questioned the compatibility of austerity measures imposed on the judiciary with the principle of judicial independence. The Court clearly sought to overcome the legal barrier of the Charter by invoking the principle of effective judicial protection under Art. 19, para. 1, TEU, since according to the Court, its material scope goes beyond that of Art. 47 of the Charter. Although this is a beneficial development for fundamental rights, it is another demonstration of the Charter's weaknesses, forcing the Court to resort to concepts from the pre-constitutionalisation years, where the protection of rights solely depended on general principles. In contrast to the minimal application of the Charter and the general principles, EU citizenship has not played any substantive role in the austerity measures case law. This is primarily due to the limited list of rights attached to it, rendering it irrelevant in such cases, which are grounded in al-

[55] Court of Justice, judgment of 13 July 2013, case C-258/14, *Florescu and Others* [GC], para. 34.

[56] C. KILPATRICK, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, in *European Constitutional Review*, 2015, p. 400.

[57] Art. 13, para. 3, of the ESM Treaty.

[58] View of AG Kokott, *Pringle*, cit., para. 176; European Parliament, Opinion of the Committee on Constitutional Affairs for the Committee on Economic and Monetary Affairs on the enquiry report on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, 11 February 2014, www.europarl.europa.eu, para. 11.

[59] Court of Justice, judgment of 20 September 2016, joined cases C-8/15 P to C-10/15 P, *Ledra Advertising v. Commission and ECB* [GC], para. 59.

[60] Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses* [GC].

leged fundamental rights' infringements, thus demoting citizenship from being "the fundamental status of Union citizens".[61]

The limited applicability of these legal instruments left many wondering how fundamental rights can be among the foundational values of a constitutionalised Union if their use can be limited more easily than it can be invoked. It has also resulted in a gap in effective judicial protection, because of the limited routes available to access justice, the reluctance of the Courts to support those seeking to minimise the impact of the austerity measures and finally because the Court's rulings were largely based on reasons unconnected with law, but rather with politics.[62] The reluctance of the Court is arguably based on the nature of the claims under dispute, which include complex economic situations and can have substantial impact on national democracy.[63] The Court has therefore demonstrated a preference for "evading" performing legal assessment, rather than embarking on judicial activism, so as to avoid the hostile reaction which would ensue. A disparity in the pursuit of Union objectives is also demonstrated, namely that the Court seems more willing now to act to address the current rule of law crisis and protect the democratic judicial processes at the national and European level[64] than it did during the financial crisis. That interest in assessing new routes to equally safeguard citizens' rights and Union's objectives has been prompted, such as the use of EU citizenship in novel areas using the recent "substance of the rights" doctrine.

## IV. The Court's "substance of the rights" doctrine

To tackle the limitations of EU law described above effectively, a broader scope of application of fundamental rights is needed, using a "living instrument" with transformative qualities, such as the concept of EU citizenship, and the "substance of the rights" doctrine. *Rottmann*,[65] in particular, has been correctly described as the foundation which paved the way towards the emancipation of EU citizenship from the limits inherent in

[61] *Grzelczyk*, cit., para. 31.

[62] J. Tomkin, *Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy*, in *German Law Journal*, 2013, p. 180 *et seq.*; R. Repasi, *Judicial Protection Against Austerity Measures in the Euro Area: Ledra and Mallis*, in *Common Market Law Review*, 2017, p. 1123 *et seq.*; D. Ghailani, *Violations of Fundamental Rights: Collateral Damage of the Eurozone Crisis*, in B. Vanhercke, D. Natali, D. Bouget (eds), *Social Policy in the European Union: State of Play 2016*, Brussels: ETUI, 2017, p. 158 *et seq.*

[63] H. Kriesi, *The Political Consequences of the Financial and Economic Crisis in Europe: Electoral Punishment and Popular Protest*, in *Swiss Political Science Review*, 2012, p. 519 *et seq.*; M. Funke, M. Schularick, C. Trebesch, *Going to Extremes: Politics After Financial Crises 1870-2014*, in *European Economic Review*, 2016, p. 230.

[64] Court of Justice, judgment of 24 July 2018, case C-216/18 PPU, *Minister for Justice and Equality* [GC].

[65] *Rottmann* [GC], cit.

its free movement origins.[66] The Court indicated the importance of having due regard to EU law when exercising national powers within the sphere of nationality,[67] and specifically ruling that where an EU citizen is addressed by a decision withdrawing naturalisation, which causes him to lose the status and the rights conferred by Art. 20 TFEU, this falls, by reason of its nature and its consequences, within the ambit of EU law.[68] The citizenship-specific rights which a person would lose are thus emphasised, rather than the general human rights imperative, which indicates a substantial increase in the effect of EU citizenship on national citizenship.[69]

The *Ruiz Zambrano* case offered further insights into this development and extended the idea that Member States and the EU should leave the substantive core of rights under EU citizenship intact.[70] In answering the question of whether Art. 20 TFEU has an autonomous character and serves as a sufficient connection with EU law, the Court of Justice developed a jurisdictional test, whereby national measures are precluded if depriving EU citizens of the genuine enjoyment of the substance of EU citizenship rights.[71] Consequently, third-country nationals obtain a derived right to reside in their children's Member State of nationality under Art. 20 TFEU when the factual conditions of *Ruiz Zambrano* are met.[72] This ruling constitutes one of the most inspiring of the last decade, primarily due to it marking a departure from the traditional cross-border concept, as the Court interpreted Art. 20 TFEU as a sufficient link in itself,[73] consequently extending the scope of application of EU law. Secondly, because the prohibition against a violation of the substance of rights has been applied as a self-standing EU test,[74] while it had *hitherto* been applied within the context of the proportionality test. Despite the potentially enormous implications of the doctrine, it has been characterised as frustratingly opaque,[75] since little clarity was provided with regards to the circumstances under which it can be invoked.

Subsequent case law provided further clarity, which can boil down to two major conclusions on the conditions for triggering the recently developed doctrine. Firstly, it is

[66] K. Lenaerts, *EU Citizenship and the European Court of Justice's "Stone-by-Stone" Approach*, in *International Comparative Jurisprudence*, 2015, p. 2.

[67] *Rottmann* [GC], cit., para. 41.

[68] *Ibid.*, para. 42.

[69] J. Shaw, *Setting the Scene: The Rottmann Case Introduced*, in J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in National Law?*, in *EUI Working Papers Robert Schuman Centre for Advanced Studies (RSCAS)*, no. 62, 2011, p. 4.

[70] *Ruiz Zambrano* [GC], cit.

[71] *Ibid.*, para. 44.

[72] *Ibid.*, para. 45.

[73] H. van Eijken, S.A. de Vries, *A New Route into the Promised Land?*, cit., p. 711.

[74] 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*, cit., p. 90 *et seq.*

[75] A. Lansbergen, N. Miller, *European Citizenship Rights in Internal Situations: An Ambiguous Revolution*, in *European Constitutional Law Review*, 2011, p. 290 *et seq.*

evident that not every limitation of a right will trigger the doctrine but only its deprivation. In particular, the Court clarified in *McCarthy*[76] that Art. 21 TFEU is "applicable to situations that have the effect of depriving [a Union citizen] of the genuine enjoyment of the substance of the rights" under EU citizenship or of "impeding the exercise of his right of free movement and residence" within the Member States.[77] The use of the doctrine does not thus depend on an EU citizens' age but rather upon the seriousness of the restraint to the substance of the rights normally conferred. Therefore, a distinction is made whereby the "impeding effect" refers to the traditional line of case law requiring a cross-border link, without requiring the national measures to cause the loss of the status of Union citizens in practice.[78] If no cross-border situation occurs, only a deprivation of the substance of the rights will trigger EU law,[79] requiring the national measure to create more than a "serious inconvenience".

Moreover, in *Dereci*,[80] the Court indicated that the "deprivation" of the substance of the rights refers to situations in which the Union citizen not only has to leave the territory of the Member State but the Union territory as a whole.[81] The strict approach was confirmed in *Iida*,[82] where the Court recalled that "purely hypothetical prospects of exercising the right of freedom of movement" and of that right being obstructed[83] do not establish a sufficient link with EU law. This stricter approach[84] emphasised the need to determine whether there is a relationship of dependency with the child's primary carer,[85] while a major part underlying the Court's reasoning was clearly based on the respect for the division and balance of competences as enshrined in Art. 5 TEU. The Court of Justice affirmed in *Rendón Marín* that the prohibition under Art. 20 TFEU, only applies in "very specific" situations, while this derived right cannot be refused when the effectiveness of EU citizenship is to be disregarded.[86] Therefore, in the Court's view, any possible limitations on the substance of citizenship rights undermine its effectiveness.[87] A *de facto* loss of a Union citizenship right is thus required, which rightly reduces the con-

[76] Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy.*

[77] *Ibid.*, para. 56.

[78] K. Lenaerts, *"Civis europaeus sum": From the Cross-border Link to the Status of Citizen of the Union*, in *Online Journal on Free Movement of Workers within the European Union*, 2011, p. 8 *et seq.*

[79] *McCarthy*, cit., para. 56.

[80] Court of Justice, judgment of 15 November 2011, case C-256/11, *Dereci and Others* [GC].

[81] *Ibid.*, para. 66.

[82] Court of Justice, judgment of 8 November 2012, case C-40/11, *Iida.*

[83] *Ibid.*, para. 77.

[84] See further Court of Justice: judgment of 8 May 2013, case C-87/12, *Ymeraga and Ymeraga-Tafarshiku*; judgment of 10 May 2017, case C-133/15, *Chávez-Vílchez and Others* [GC].

[85] T. Royston, C. O'Brien, *Breathing and Not-incarcerated, Estranged Fathers Do Not Automatically Cancel Out Mothers' Zambrano Rights*, in *Journal of Social Security Law*, 2017, p. 63.

[86] Court of Justice, judgment of 13 September 2016, case C-165/14, *Rendón Marín* [GC], para. 74.

[87] P.J. Neuvonen, *EU Citizenship and Its "Very Specific" Essence: Rendón Marín and CS*, in *Common Market Law Review*, 2017, p. 1205 *et seq.*

sequences of the test without being too intrusive.[88] Although it is believed that fundamental rights should not be ruled out based on a narrow reading of the Treaties,[89] the doctrine should be applied only when EU citizenship rights are deprived and cannot be remedied at the national level, to keep the test within the limits of an acceptable federal and legal balance within the EU.

The second conclusion of the analysis concerns the argument that the "*inter alia* clause" under Art. 20, para. 2, TFEU suggests that citizens can enjoy further rights, beyond those expressly stated therein, not only through the procedure enshrined under Art. 25 TFEU but also through the judicial incorporation of unwritten rights.[90] Following the recent judicial developments, the list has indeed been expanded to include new rights, contrary to the allegation of *McCarthy* that the approach put forward in *Ruiz Zambrano* was only applicable to the "rights listed in Art. 20, para. 2, TFEU".[91] This consideration is arguably rather unexpected and inaccurate since the recent series of case law has protected EU citizens' rights not expressly listed in Art. 20, para. 2, TFEU, such as the right against forced removal from the EU's territory or even the ability to benefit from equality in a wholly internal situation outside the scope of EU law.[92] It is therefore argued that the extent of Union citizenship rights is much broader than what is defined in a textual sense.[93]

## V. The way forward: taking the "substance of the rights" doctrine a step further

The establishment of a link between the jurisprudential doctrines of EU citizenship and EU fundamental rights would arguably overcome the deficiencies identified in protecting EU citizens' rights. It also constitutes the "next logical step" to EU citizenship's evolution, since, throughout the integration process, the reinforcement of the protection of fundamental rights and the empowerment of EU citizenship have been two closely connected phenomena.[94] Over the years, various attempts to strengthen this link have

[88] See further: C. Ritter, *Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234*, in *European Law Review*, 2006, p. 690; A. Wiesbrock, *Disentangling the "Union Citizenship Puzzle"? The McCarthy Case*, in *European Law Review*, 2012, p. 861; S. Iglesias Sánchez, *Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison*, in *European Law Review*, 2014, p. 464.

[89] D. Kochenov, *On Tiles and Pillars*, cit., p. 10.

[90] *Ibid.*, p. 25 *et seq.*

[91] K. Lenaerts, *"Civis europaeus sum"*, cit., p. 9.

[92] Court of Justice, judgment of 12 September 2006, case C-300/04, *Eman and Sevinger* [GC], para. 61; L.M. Besselink, *Annotation of Spain v UK, Eman en Sevinger, and ECtHR Case Seviger and Eman v The Netherlands*, in *Common Market Law Review*, 2008, p. 787.

[93] D. Kochenov, *On Tiles and Pillars*, cit., p. 26 *et seq.*

[94] S. Iglesias Sánchez, *Fundamental Rights and Citizenship of the Union at a Crossroads*, cit., p. 470; 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*, cit., p. 95 *et seq.*; A. von Bogdandy, *Reverse Solange – Pro-*

been endeavoured, yet none has been successful, including the idea of extending the application of EU fundamental rights to mobile citizens,[95] the equation of the "scope of EU law" to Union competences regardless of whether they have been exercised or not[96] and the so-called "reverse" *Solange* proposal.[97]

The starting point for the proposed way forward is that beyond the scope of Art. 51, para. 1, of the Charter, fundamental rights issues are left to national laws and Courts. The recent doctrine, however, allowed some room for EU intervention, if an internal violation amounts to detaching Union citizenship from its substantive sense.[98] The proposal brings the classic doctrine a step further, by proposing a three-step jurisdictional test which will allow EU fundamental rights, beyond the ones mentioned under the list, to be used in exceptional wholly internal situations, through a combined dynamic reading of Art. 2 TEU, the general principles of EU law and Art. 20 TFEU.

### V.1. Delimiting the proposal in accordance with Art. 2 TEU

Broadening the scope of application of fundamental rights cannot be achieved merely by extending the list of EU citizenship rights already falling within the sphere of the "substance of the rights" doctrine. It is therefore necessary to focus on cases which require EU intervention by delimiting the scope of application of the proposal to the essential core of rights, which represents the untouchable core or minimum circle of fundamental rights common to the Member States, which cannot be diminished or breached without the right in question losing its value either for the right holder or for society as a whole.[99] This idea is elaborated on the basis of Art. 2 TEU,[100] and Member States remain autonomous in fundamental rights and the rule of law, as long as it can be presumed that they safeguard the essence of these values.

The *Article* strongly supports that the "*inter alia* clause" under the non-exhaustive list of Art. 20, para. 2, TFEU should be interpreted as including the Union's foundational values, which also work as general legal standards of protection for EU citizens. In order for these to be used, they must be narrowed down to the essence of their content, which shares a similar rationale with the term "substance" in the doctrine. Although Art. 2 TEU works as a legal standard of assessment, it cannot be interpreted as meaning

*tecting the Essence of Fundamental Rights against EU Member States*, in *Common Market Law Review*, 2012, p. 489.

[95] Opinion of AG Jacobs delivered on 9 December 1992, case C-168/91, *Konstantinidis*, para. 46.

[96] Opinion of AG Sharpston, *Ruiz Zambrano*, cit., paras 163-176.

[97] A. von Bogdandy, *Reverse Solange*, cit., p. 490.

[98] *Ibid*.

[99] J. Rivers, *Proportionality and Variable Intensity of Review*, in *The Cambridge Law Journal*, 2006, p. 176 *et seq.*; M. Brkan, *The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core*, in *European Constitutional Law Review*, 2018, p. 340 *et seq*.

[100] European Council Conclusions of 21-22 June 1993, *Conclusions of the Presidency*.

that the Member States are fully bound by the entire fundamental rights *acquis*, since this is expressly prevented by the Charter and the Treaty itself.[101] On the contrary, it aims at safeguarding the essentials which are "common to the Member States",[102] covering long-standing national traditions[103] used by several constitutional courts and infringements of certain rights which cannot be justified in accordance with the CJEU's case law.[104] In *Tele2 Sverige*,[105] the CJEU ruled that the right to freedom of expression (Art. 11, of the Charter), constitutes one of the EU's foundational values under Art. 2 TEU and it is an essential foundation of a pluralist democratic society.[106]

The right to effective judicial protection also falls under Art. 2 TEU, not only because it constitutes a component of the "rule of law", but also because it is undoubtedly connected to the "respect for human rights". Relatively early in the case law, the Court insisted that the Union is based on the rule of law and has built up in its case law a catalogue of elements inherent to the rule of law within the meaning of Art. 2 TEU,[107] including the principle of separation of powers,[108] the principle of effective judicial protection[109] and effective application of EU law.[110] Consequently, a violation of the rule of law principle under Art. 2 TEU would likely aggravate a fundamental rights infringement, undermine the basic foundations of the EU legal order and the substantive meaning of Union citizenship.[111] Infringements of this right, amounting in their extent and seriousness to the total inexistence of the fundamental right's essence, cannot be adequately

[101] Art. 51, para. 1, of the Charter and Art. 6 TEU.

[102] A. VON BOGDANDY, *Reverse Solange*, cit., p. 500.

[103] The need to protect the essence of fundamental rights and not to impose any unjust limitations is expressly enshrined in most of the national Constitutions or EU Charters: Art. 19, para. 2, of the German Basic Law; Art. 4, para. 2, of the Czech Fundamental Rights Charter; Art. 8, para. 2, of the Hungarian Constitution; Art. 30, para. 3, Polish Constitution; Art. 18, para. 3, of the Portuguese Constitution; Art. 49, para. 2, of the Rumanian Constitution; Art. 13, para. 4, of the Slovakian Constitution; Art. 53, para. 1, of the Spanish Constitution.

[104] A. VON BOGDANDY, *Reverse Solange*, cit., p. 491.

[105] Court of Justice, judgment of 21 December 2016, joined cases C-203/15 and C-698/15, *Tele2 Sverige AB* [GC].

[106] Y. NAKANISHI, *The EU's Rule of Law and the Judicial Protection of Rights*, in *Hitotsubashi Journal of Law and Politics*, 2018, p. 5.

[107] The word "rule of law" was enshrined in Art. 6 TEU by the Treaty of Amsterdam 1997.

[108] Court of Justice, judgment of 10 November 2016, case C-477/16 PPU, *Kovalkovas.*

[109] Court of Justice: judgment of 28 March 2017, case, *Rosneft* [GC]; judgment of 6 October 2015, case C-362/14, *Schrems* [GC].

[110] M. BRKAN, *The Concept of Essence of Fundamental Rights in the EU Legal Order*, cit., p. 340 *et seq.*; Y. NAKANISHI, *The EU's Rule of Law and the Judicial Protection of Rights*, cit., p. 11; Court of Justice: judgment of 20 November 2017, case C-441/17, *Commission v. Poland* [GC]; *Associação Sindical dos Juízes Portugueses* [GC], cit., para. 31.

[111] Opinion of AG Poiares Maduro delivered on 12 September 2007, case C-380/05, *Centro Europa 7*, para. 22. Guidance can be drawn from the interpretation given to the criterion of a "serious and persistent breach" under Art. 7, para. 2, TEU.

remedied within a Member State but rather at the Union level.[112] However, the use of Art. 2 TEU in the proposal, does not aim to establish its infringement but is rather used as a safety valve towards including only the "essentials" within Art. 20, para. 2.

### V.2. Another use of rights

After defining the essence of Art. 2 TEU – delimiting the content eligible to be judicially incorporated into the "*inter alia* list" – the next step is to assess the scope of application of the respective Charter right or general principle, to determine its compatibility with the doctrine. The infringement under dispute must finally constitute a deprivation in accordance with the *Zambrano* doctrine, and not a mere inconvenience or impediment, so as to satisfy the proposed test and challenge rights-violating measures outside a strict interpretation of the scope of EU law.

As a result of this divergence in interpretations of Art. 51, para. 1, the test's wording is not entirely unambiguous.[113] The question is thus to what extent the Court of Justice could interpret the scope of the Charter so as to fall within the "substance of the rights" doctrine. On the one hand, if the "implementation" concept is adopted according to *Åkerberg Fransson*,[114] the Charter can be considered applicable in situations "falling within the scope of EU law" and be invoked in relation to the "substance of the rights" doctrine.[115] On the contrary, if the Court cleaves to its narrow interpretation, this does not necessarily prevent the application of EU fundamental rights in purely internal situations,[116] depending on the extent to which the narrow scope of the Charter can restrain the scope of those general principles as well.[117] The prevailing view in this *Article* is that the scope of application of the Charter is narrower than that of general principles of EU law and the narrow scope of the former cannot affect that of the latter.

After the pragmatic Opinion of AG Bot in *Scattolon*,[118] the Court in *Associação Sindical dos Juízes Portugueses* clarified that Art. 19, para. 1, TEU can be applied in full, even if the Charter does not apply, in a far-reaching demonstration of the Court's judicial activism in favour of European integration.[119] It is therefore safe to say that at least in the case of effective judicial protection, general principles of EU law have a broader scope of application than the Charter rights, with the latter not affecting the former's

[112] A. von Bogdandy, *Reverse Solange*, cit., p. 501.

[113] According to the Explanations relating to the Charter of Fundamental Rights (2007) the Charter "is only binding of the Member States when they act in the scope of Union law".

[114] *Åkerberg Fransson* [GC], cit.

[115] M.J. van den Brink, *EU Citizenship and EU Fundamental Rights*, cit., p. 282.

[116] *Ibid.*, p. 287.

[117] Editorial Comments, *The Scope of Application of the General Principles of Union Law: An Ever Expanding Union*, in *Common Market Law Review*, 2010, p. 1590.

[118] Opinion of AG Bot, *Scattolon*, cit., para. 120.

[119] *Commission v. Poland* [GC]; *Associação Sindical dos Juízes Portugueses* [GC], cit., para. 29.

application. Accordingly, the argument put forward by AG Mengozzi that the Charter prevents the inclusion of EU fundamental rights in the "substance of the rights" doctrine is not entirely correct[120] or at least is not the only possible explanation. That being the case, and due to the complexity of the Charter's scope, fundamental rights as general principles are more likely to be found eligible to be included in the "substance of the rights" doctrine as part of the new jurisdictional test.

### V.3. The paradigm of effective judicial protection

A link between fundamental rights as general principles of EU law and the "substance of the rights" doctrine is accordingly attainable, provided that the relevant principle of EU law is "essential" under Art. 2 TEU and its scope of application is broader than that of Art. 20 TFEU. Although this possibility is arguably achievable for several principles, that of effective judicial protection is the most suitable for examination, since it has been a vulnerable and constantly violated right during the recent financial crisis, and recent judicial developments have substantially added to its significance.[121]

The concept of "effective judicial protection" is dual-faced, occasionally referred to by the Courts as a self-standing "principle"[122] of EU law or as a "fundamental right" under the Charter.[123] It *inter alia* entrusts the responsibility to ensure judicial review in the EU legal order both to the Court of Justice and to the national courts and tribunals.[124] As discussed above, the Court made clear in *Associação Sindical dos Juízes Portugueses* that the scope of application of Art. 19 TEU is broader than that of Art. 47 of the Charter.[125] Through a particularly interesting legal reasoning, the Court built on "operationalising" Art. 2 TEU, by stating that Art. 19 TEU, "gives concrete expression to the value of the rule of law".[126] Without offering any explanation on the applicability of the Charter, the Court overcame the barrier in Art. 51, para. 1, and exclusively relied on Art. 19, para. 1, TEU, merely by requiring the existence of a virtual link between the relevant national

[120] Opinion of AG Mengozzi delivered on 29 September 2011, case C-256/11, *Dereci and Others*, paras 37-39.

[121] P. Alston, J.H.H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights*, in P. Alston (ed.), *The EU and Human Rights*, Oxford: Oxford University Press, 1999, p. 200.

[122] Court of Justice: judgment of 25 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, para. 39; judgment of 1 April 2004, case C-263/02 P, *Commission v. Jégo-Quéré*, para. 29; judgment of 16 July 2009, case C-12/08, *Mono Car Styling*, para. 46.

[123] Court of Justice, judgment of 29 January 2009, case C-275/06, *Promusicae* [GC], para. 62; D. Leczykiewicz, *"Effective Judicial Protection" of Human Rights After Lisbon: Should National Courts Be Empowered to Review EU Secondary Law?*, in *European Law Review*, 2010, p. 330.

[124] N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, Oxford: Oxford University Press, 2013.

[125] *Associação Sindical dos Juízes Portugueses* [GC], cit., para. 32.

[126] *Ibid.*, paras 29-38.

measures and EU law and thus enabled natural and legal persons to challenge a broader set of national measures using this route.[127] This ruling has created a national legal obligation to safeguard judicial independence based on a combined reading of Arts 2, 4, para. 3, and Art. 19, para. 1, TEU, regardless of whether the situation falls within the scope of EU law. The judgment has far-reaching consequences for effective judicial protection since the Court went beyond the minimum effective necessity of the national remedies needed to ensure the application of EU law and gave the green light to proceed with the proposed jurisdictional test.[128]

The new approach towards Art. 19 TEU is believed to have a great resemblance with the "substance of the rights" doctrine, since both were developed by the Court of Justice as the main actor, through the exercise of judicial activism. Moreover, they aimed to overcome the barrier created by the restricting provision of the Charter's scope, while at the same time, both resulted in the enhancement of citizens' rights protection. There are however significant dissimilarities between them, namely that the "substance of the rights" doctrine constitutes a tool for claiming EU legal jurisdiction, which is only triggered when a deprivation of the genuine enjoyment of the substance of the rights under Art. 20 TFEU occurs.[129] It can thus be characterised as a moderately invasive approach, which must be used as a last resort to preserve the effectiveness of EU law. In contrast, the development of Art. 19, para. 1, TEU[130] constitutes a new general obligation, regardless of whether the matter falls within the scope of EU law. It is, therefore, more invasive, since it essentially created a federal standard of review for the principle of judicial independence that can now be directly invoked before national courts, demonstrating that the Court of Justice does not hesitate to issue courageous decisions to secure EU law.[131]

This article proposes a practical tool for claiming jurisdiction under EU law, rather than a general obligation, to enable the review of national breaches of the rule of law occurring outside the areas covered by the EU's *acquis*. Beyond the scope of the Charter, applicants challenging austerity measures have not been able to successfully invoke EU fundamental rights, although numerous assistance packages were clearly granted through EU-established mechanisms, unless the "substance of the rights" doctrine was triggered and the matter was brought within the scope of EU law. According to the current proposal, if an infringed right whose substance had been deprived by a national

[127] *Ibid.*, paras 27-29; L. PECH, S. PLATON, *Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in Associação Sindical dos Juízes Portugueses*, in *EU Law Analysis*, 13 March 2018, eulawanalysis.blogspot.com.

[128] L. PECH, S. PLATON, *Rule of Law Backsliding in the EU*, cit.

[129] *Ruiz Zambrano* [GC], cit., para. 44.

[130] *Associação Sindical dos Juízes Portugueses* [GC], cit.

[131] M. TABOROWSKI, *CJEU Opens the Door for the Commission to Reconsider Charges Against Poland*, in *Verfassungsblog*, 13 March 2018,verfassungsblog.de.

measure was not expressed within the list of Art. 20, para. 2, the *inter alia* clause applies, suggesting that citizens can also enjoy the protection of other rights.[132] The delimitation of the "eligible" rights is best achieved using Art. 2 TEU, without aiming to establish its infringement, but it is rather used as a boundaries-indicator. Subsequently, the scope of application of the respective Charter right or general principle is assessed to determine its compatibility with the doctrine.

## VI. Concluding remarks

Recent judicial developments, including the "substance of the rights" doctrine, have built on the constitutional perspective of EU citizenship,[133] by *inter alia* proving that the list of rights the Treaties express is not exhaustive, but can rather incorporate "unwritten" rights.[134] More importantly, they have granted further opportunities for reinforcing EU fundamental rights protection, such as the proposed expansion of the "substance of the rights" doctrine towards including the principle of effective judicial protection, when a deprivation of the "substance of the rights" under the principle of effective judicial protection occurs. Nevertheless, strong objections against such a proposal can be raised. The proposed expansion of the doctrine can easily be perceived as a threat to the system of allocation of competences. However, no such contradiction occurs, because Art. 2 TEU is employed as a safety valve, confining the expansion of the proposal with the requirement for a deprivation of the substance of the rights, which safeguards national identities, provided that the foundations and the effectiveness of EU law are not eroded.

Moreover, conflicts with other Treaty provisions can emerge, including with Art. 25, para. 2, TFEU which allegedly prevents the desired judicial incorporation of fundamental rights into citizenship status. However, this does not constitute an absolute obstacle to judicial incorporation, since the procedural limitations are read as applying to the legislature only,[135] thus ensuring the constitutional legitimacy of a judicial incorporation. The use of Art. 2 TEU could also raise arguments that the "values on which the Union is built" are illusory in a number of respects.[136] Although an *acquis* on values would give it more weight, the increasing use of the provision in the Court's case law proves the op-

[132] See P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, cit., p. 980 *et seq.*; J.L. da Cruz Vilaça, A. Silveira, *The European Federalisation Process and the Dynamics of Fundamental Rights*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 133 *et seq.*

[133] K. Hailbronner, D. Thym, *Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, in *Common Market Law Review*, 2011, p. 1253.

[134] D. Kochenov, *The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon*, in *International and Comparative Law Quarterly*, 2013, p. 100.

[135] D. Düsterhaus, *EU Citizenship and Fundamental Rights: Contradictory, Converging or Complementary?*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 643 *et seq.*

[136] D. Kochenov, *On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed*, in *Polish Yearbook of International Law*, 2013, p. 150 *et seq.*

posite.[137] Moreover, no conflict with Art. 7 TEU can arise since the proposal is not intending to turn Art. 2 TEU into black-letter law or establish its violation, but rather to "operationalise" it, by shaping the essence of the values expressed therein, which also constitute basic rights to be enjoyed by EU citizens.[138]

All in all, the proposal is fully in line with the doctrinal and jurisprudential approaches towards Union citizenship and will arguably allow citizens facing effective judicial protection violations, including those faced during the financial crisis, to bring their cases within the scope of EU law, provided that the requirements described above are satisfied. Further rights can also be protected through this proposal if the test is satisfied, with equality and non-discrimination rights constituting the most likely candidates, considering that during the crisis, the disputed measures were commonly challenged before the Court as being discriminatory and that the general principle of non-discrimination has long been established within the EU legal order. Although the proposal's reach is limited, it would definitely overcome the barrier imposed by Art. 51, para. 1, of the Charter and safeguard the "substance" of the "essential" rights which must be included in the list of EU citizenship rights. It is also believed that such an incorporation in practice would prompt the Court to be more willing to claim jurisdiction, while the current imbalance between the EU's purposes would be largely restored, by acknowledging that the enjoyment of rights continued to lie at the heart of the EU, even during the financial crisis.

[137] *Associação Sindical dos Juízes Portugueses* [GC], cit.; General Court, judgment of 3 February 2017, case T-646/13, *Minority SafePack – one million signatures for diversity in Europe v. Commission*; Court of Justice: order of 17 July 2014, case C-505/13, *Yumer*; order of 12 June 2014, case C-28/14, *Pańczyk*; General Court, judgment of 10 May 2016, case T-529/13, *Izsák and Dabis v. Commission.*

[138] D. Kochenov, *On Policing Article 2 TEU Compliance*, cit., p. 160.