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REVERSE SOLANGE – PROTECTING THE ESSENCE OF FUNDAMENTAL RIGHTS AGAINST EU MEMBER STATES

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1. Introduction

Fundamental rights protection, once a sideshow, has become of central importance for the EU,[1] as demonstrated by the new treaty recognition of the EU Fundamental Rights Charter (CFREU), and the upcoming accession of the Union to the European Convention on Human Rights (ECHR). At the same time, the fundamental rights situation in a considerable number of Member States is an increasing cause for concern.[2] While the Union is supposed to promote fundamental rights around the world (Art. 21 TEU)[3] and intensely

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1. Groundbreaking: Alston and Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy", 9 EJIL (1998), 658; see for the effect of that report in impact assessments, European Commission, "Commission Staff Working Paper – Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments", SEC(2011)567 final, 6 May 2011; for a historical overview Rideau, *Le role de l'Union européenne en matière de protection des droits de l'homme* (Martinus Nijhoff, 1999), pp. 29 et seq.

2. See in this regard the letters of the Council of Europe Commissioner for Human Rights to the Bulgarian (letter of 17 Nov. 2010, CommDH(2010)47) and the Romanian Prime Ministers (letter of 7 Oct. 2010, CommDH(2010)53) regarding mainly the situation of national and religious minorities; letters to the Italian Minister of the Interior (letter of 25 Aug. 2009, CommDH(2009)40 and of 2 July 2009, CommDH(2010)23) regarding the treatment of migrants and asylum seekers; on the 2010 case of Roma in France, see Dawson and Muir, "Individual, institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma", 48 CML Rev. (2011), 751 et seq. on the dramatic situation of refugees in Greece, see UN High Commissioner for Refugees, Observations on Greece as a country of asylum, Dec. 2009, available at: <www.unhcr.org/refworld/docid/4b4b3fc82.html> (last visited 1 March 2012); ECtHR, Appl. No. 30696/09, *M.S.S.* v. *Belgium and Greece*, 21 Jan. 2011, nyr.

3. In detail, Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (Springer, 1998); Zaru, "EU Reactions to Violations of Human Rights Norms by Third States", *European Yearbook on Human Rights* (EYHR) (2011), 225.

scrutinizes the fundamental rights situations in candidate countries,[4] there is scant European Union action so far in case of serious fundamental rights violations in Member States.[5] In this respect, the defence of the Union's foundational values (Art. 2 TEU) is largely left to national and international institutions. The deficiencies of this set-up have mostly been illustrated with reference to the example of minority protection;[6] this contribution will focus on another increasingly worrying field: media freedom.

The lack of European Union response can be traced to the idea of a division of labour with the Council of Europe (CoE), to institutional unwillingness, but also to a perceived lack of competence.[7] Indeed, the Commission, which is supposed to be the "Guardian of the Treaties", seems reluctant to fully protect fundamental rights and rather prefers to concentrate on less sensitive "technical" issues of the internal market.[8] The assertion that the scope of EU fundamental rights protection is strictly limited is omnipresent.[9] Such a restrictive approach has traditionally been explained by concerns for the constitutional identity of the Member States.[10] This remains an important principle, not least because of Article 4(2) TEU. However, we argue that in light of recent tendencies it is time to reconsider conventional wisdom to some extent. This is true from the perspective of the affected individual, in particular the Union citizen, who looks to the Union for help. But it can also be argued in systemic terms. A massive deterioration of fundamental rights protection in some Member States might eventually threaten foundations of European

4. De Búrca, "Beyond the Charter. How enlargement has enlarged the human rights policy of the European Union", 27 Ford. Int. LJ (2004), 679, 699 et seq.

5. Albi, "Ironies in human rights protection in the EU. Pre-accession conditionality and post-accession conundrums", 15 ELJ (2009), 46, 48 et seq.; Hillion, "Enlargement of the European Union – The discrepancy between membership obligations and accession conditions as regards the protection of minorities", 27 Ford. Int. LJ (2004), 715 et seq.; Williams, *EU Human Rights Policies: A Study in Irony* (OUP, 2004), p. 97 et seq.

6. Toggenburg (Ed.), *Minority Protection and the enlarged European Union: The way forward* (Open Society Institute, 2004); Hillion, op. cit. *supra* note 5, 718 et seq.

7. Greer and Williams, "Human Rights and the Council of Europe and the EU. Towards 'individual', 'constitutional' or 'institutional' justice?", 15 ELJ (2009), 462, 473.

8. This is criticized *inter alia* in para 3 of the European Parliament Resolution of 10 March 2011 on media law in Hungary, P7-TA-PROV 2011 (0094).

9. See the speech by Neelie Kroes at the extraordinary meeting of the European Parliament's Civil Liberties, Justice and Home Affairs Committee Strasbourg, 17th Jan. 2011, SPEECH/11/22, available at: <europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/22&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited 1 March 2012).

10. Weiler, "Fundamental rights and fundamental boundaries" in Weiler (Ed.), *The Constitution of Europe* (Cambridge University Press, 1999), p. 102, at p. 105 et seq.; von Bogdandy, "The European Union as a Human Rights Organization?", 37 CML Rev. (2000), 1307, 1316 et seq.; Borowsky, in Meyer (Ed.), *Charta der Grundrechte der Europäischen Union* 3rd ed. (Baden-Baden: Nomos, 2011), Art. 51 CFREU para 24 (a); Schönberger, *Unionsbürger* (Tübingen: Mohr Siebeck, 2005), p. 128 et seq.

integration, namely the principle of mutual recognition[11] and the premise that the Union can rely on the functioning democratic polities of the Member States.[12] There is one explicit mechanism to counter such developments which is laid down in Article 7 TEU and is basically political in nature. This provision, together with Article 2 TEU, posits the Union as a guarantor of a European *ordre public*; however its practical impact is subject to doubts.[13]

We propose to complement it with another mechanism which can be developed from the Treaties and which has already been found valuable in *van Gend en Loos*: "the vigilance of individuals concerned to protect their rights" and their willingness to turn to domestic courts.[14] The rights to be protected are those granted by Union citizenship. As the Court held in *Ruiz Zambrano*, "Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union".[15] We are taking that jurisprudence one step further and propose to basically define this "substance" with reference to the essence of fundamental rights enshrined in Article 2 TEU. This standard applies to public authority *throughout* the European legal space. Consequently, a violation by a Member State, even in purely internal situations, can be considered an infringement of the substance of Union citizenship. In order to preserve constitutional pluralism, which is protected by Article 4(2) TEU, we suggest framing this as a "reverse" *Solange* doctrine, applied to the Member States from the European level. This can be put briefly as follows: beyond the scope of Article 51(1) CFREU Member States remain autonomous in fundamental rights protection *as long as* it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU. However, should it come to the extreme constellation that a violation is to be seen as *systemic*, this presumption is rebutted. In such a case, individuals can rely on their status as Union citizens to seek redress before national courts.

This proposal implies an important development of the law. It requires a careful doctrinal construction that reveals it as a feasible next step in the unfolding of both Union citizenship and fundamental rights protection. We

11. See in this regard Joined Cases C-411 & 493/10, *N.S.*, judgment of 21 Dec. 2011, nyr, para 83; the German Federal Constitutional Court expressly held that respect for the values of Art. 2 TEU by other Member States is a precondition for German authorities to cooperate in the framework of the European arrest warrant, see BVerfGE 113, 273, 301.

12. In detail von Bogdandy, "The European Union as situation, executive, and promoter of the international law of cultural diversity – Elements of a beautiful friendship", 19 EJIL (2008), 241 et seq.

13. For a very critical view on this, see Greer and Williams, op. cit. *supra* note 7, 474: "dead letter". On this, see *infra* 2.2.

14. Case C-26/62, *Van Gend en Loos,* [1963] ECR 1, para 24.

15. Case C-34/09, *Ruiz Zambrano*, judgment of 8 March 2011, nyr, para 42.

first sketch the current *problématique* of EU fundamental rights protection against the Member States in practical, theoretical and doctrinal terms, using the example of media freedom, to show the need for action (section 2). The second step explores the development and the present state of Union citizenship which provides the doctrinal basis of our proposal (section 3). Then the elements of our proposal will be elaborated thoroughly, probable objections will be anticipated and rebutted (section 4). Finally we conclude that, once adopted by the ECJ, our proposal will be a crucial prerequisite for fundamental rights protection in the perspective of European constitutional pluralism as it avoids both the *Scylla* of a dysfunctional Union and the *Charybdis* of fundamental rights based centralization (section 5).

2. EU fundamental rights protection against Member States so far

The judicial development of fundamental rights invoked against the European institutions has been praised as a decisive step in the constitutionalization of European law.[16] Later case law which extended this logic to some Member States actions has been received more critically.[17] Indeed, in a Union based on constitutional pluralism (cf. Art. 4(2) TEU)[18] the enforcement of EU fundamental rights against the Member States is a highly sensitive topic. To show the need for venturing in these troubled waters we will take three different perspectives, empirical, theoretical and doctrinal. We start by presenting the critical situation of media freedom in some EU Member States (2.1). The second step outlines why the EU is concerned (2.2). Finally, the current methods of judicial protection of EU fundamental rights with their inconsistencies and insufficiencies are presented (2.3).

16. See the essays by Cunha Rodrigues, Tridimas, Kumm and Bryde in Poiares Maduro and Azoulai (Eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010), p. 87 et seq.

17. For an account of the debate in the Convention on the Charter see Borowsky, op. cit. *supra* note 10, para 24 a.

18. See for this concept: MacCormick, "Beyond the Sovereign State", 56 MLR (1993), 1, 6, 9; Poiares Maduro, "Contrapunctual Law: Europe's constitutional pluralism in action" in Walker (Ed.), *Sovereignty in Transition* (Hart Publishing, 2003), p. 501; Walker, "The idea of constitutional pluralism", 65 MLR (2002), 317; Kumm, "Who is the final arbiter of constitutionality in Europe?: Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice", 36 CML Rev. (1999), 351.

2.1. *Media freedom: A fundamental right in danger*

It is almost a truism that media freedom is "one of the fundamental pillars of a democratic society".[19] Activities of the European Parliament however indicate that there is a growing concern with regard to this freedom in the European legal space. Awareness was already raised by a 2004 report of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) which notably addressed issues of media pluralism in Italy and several other Member States.[20] Most recently such concern culminated in the Parliament's resolution with regard to media law in Hungary and LIBE's request to the Fundamental Rights Agency to issue an annual comparative report on media freedom in the EU Member States.[21] This critical assessment of the current situation is shared by NGOs which have recorded a fall of several Member States in rankings of press freedom.[22] Most importantly, however, recent reports by the Council of Europe and the OSCE have highlighted problems, such as a lack of pluralism due to media concentration, overt political influence on both public and private broadcasting, disproportionate sanctions on journalists, misuse of counter-terrorism legislation against the press, deficient protection of journalistic sources, and failure to investigate violence

19. Case C-380/03, *Germany* v. *Parliament and Council*, [2006] ECR I-11573, para 154; similarly already ECtHR, Appl. No. 5493/72, *Handyside* v. *UK*, Series A 24 (1979–80) 1 EHRR 737, para 49.

20. Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Art. 11(2) of the Charter of Fundamental Rights) (2003/2237/(INI)), Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (Rapporteur: J. L.A. Boogerd-Quaak), 5 April 2004, Doc. A5-0230/2004 (Final). This led to the European Parliament Resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Art. 11(2) of the Charter of Fundamental Rights) of 22 April 2004, O.J. 2004, C 104 E, 1026.

21. See the Preamble of the European Parliament Resolution of 10 March 2011 on media law in Hungary, cited *supra* note 8.

22. While in the 2010 Reporters Without Borders World Press Index, thirteen EU Member States are listed in the top 20, others rank remarkably low, including Spain 39th, France 44th, Italy 49th, Romania 52nd and Greece and Bulgaria 70th. Available at: <en.rsf.org/press-freedom-index-2010,1034.html> (last visited 11 Feb. 2012). See for similar conclusions Freedom House, *Freedom of the Press 2011: A Global Survey of Media Independence*, issued on 2 May 2011, available at: <www.freedomhouse.org> (last visited 1 March 2012).

against reporters.[23] Some of these aspects are particularly worrying with regard to recently enacted media legislation in Hungary.[24]

To be clear: it is not maintained here that the dark ages of censorship have returned; fortunately, Europe still enjoys a high level of media freedom. However, these developments raise the question of potential remedies. Many of the grievances listed above have been, or could have been, scrutinized by the European Court of Human Rights.[25] This will often provide a sufficient response; indeed the latter's contribution to the protection of human rights and the development of some basic principles of the European legal space is crucial.[26] Yet, in the following sections we expose why an additional response under EU law is needed and what its doctrinal basis can be.

2.2. *Fundamental rights in the Member States: None of the EU's business?*

To what extent are fundamental rights deficiencies in the Member States a concern of the EU? This is a deeply controversial issue.[27]

23. See the report of the Committee on Culture, Science and Education to the Council of Europe Parliamentary Assembly, Respect for Media Freedom of 6 Jan. 2010, Doc. 12102, listing incidents in Bulgaria, Greece, Hungary, Italy, Spain; OSCE, Analysis of the Hungarian Media Legislation, 28 Feb. 2011, available at:<www.osce.org/fom/75990> (last visited 1 March 2012).

24. Act CLXXXV of 2010 on media services and mass media from 31 Dec. 2010, as amended by the Act XIX from 22 Mar. 2011 and Act CIV of 2010 on the freedom of the press and the fundamental rules on media content, from 9 Nov. 2010, as amended by the Act XIX from 22 Mar. 2011; translations by the Hungarian government available at: <www.kormany.hu/download/c/b0/10000/act_civ_media_content.pdf>; <www.nmhh.hu/dokumentum.php?cid=25694&letolt> and <www.kormany.hu./download/1/8c/10000/sz%C3%B6vegszer%C5%B1%20v%C3%A1ltozat.doc> (last visited 1 March 2012). See for an analysis Council of Europe, Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media, CommDH (2011)10, 25 Feb. 2011; some but not all critical parts of the legislation have now been annulled by the Hungarian Constitutional Court in a judgment of 19 Dec. 2011 that is not yet available in English.

25. See, for example, with regard to sanctions on journalists: ECtHR Appl. No. 16023/07, *Gutiérrez Suárez* v. *Spain*, 1 Jun. 2010 (nyr); Appl. No. 5380/07, *Karsai* v. *Hungary*, 1 Dec. 2009 (nyr); with regard to the protection of journalistic sources ECtHR (GC) Appl. No. 17488/90, *Goodwin* v. *UK* ECHR 1996-II; Appl. No. 20477/05, *Tillack* v. *Belgium* ECHR 2007-XIII.

26. See Frowein, "The transformation of constitutional law through the European Convention of Human Rights", 41 *Israeli Law Review* (2008), 489; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights,* 2nd ed. (OUP, 2009), p. 30 et seq.; Scheeck, "The relationship between the European courts and integration through human rights", 65 ZaöRV (2005), 837.

27. See Weiler, op. cit. *supra* note 10, 119 et seq.; Eeckhout, "The EU Charter of Fundamental Rights and the federal question", 39 CML Rev. (2002), 945; Kühling,

According to a narrow and rather functionalist reading, EU fundamental rights serve to protect the primacy and uniform application of Union law.[28] If one were to follow this logic, review of Member State actions against European fundamental rights would be justified only to the extent that they are determined by Union law. Strictly speaking, such a type of review would again target the Union itself.

This reading is unsatisfactory today. The Union has overcome its existence as a functionalist entity devoted to market integration.[29] In light of Article 3 TEU and the scope of its competences, it should be seen as an open-ended polity where highly sensitive social choices are made. This is prominently reflected by the fact that the internal market and economic progress, for 50 years first among the stated aims of integration, according to Article 3 TEU now rank only third, ceding its former place to "peace, [the Union's] values and the well-being of its peoples". The Union's broad scope of competences increases the demands for legitimacy. An EU fundamental rights discourse in the sense of protecting Union citizens' individual autonomy is an important response to these demands.[30]

What is crucial for our argument, however, is that these rights are also foundational for the EU's democratic legitimacy. Democracy in the Union rests on two strands (Arts. 9 to 12 TEU): one leading to political processes at the Union level, namely to the European Parliament, and one, mediated by the national governments, originating in the political processes of the Member States (Art. 10(2) TEU).[31] Both strands eventually lead to the individual, i.e. the citizen of the Union and simultaneously of one or several Member States.[32] Fundamental rights foster democratic legitimacy in the Union by protecting

"Fundamental Rights" in von Bogdandy and Bast (Eds.), *Principles of European Constitutional Law*, 2nd ed. (Hart Publishing, 2010), p. 479, at p. 496 et seq.; Borowsky, op. cit. *supra* note 10.

28. This is, *inter alia*, the premise of the famous critique by Coppel and O'Neill, "The European Court of Justice: Taking rights seriously?", 29 CML Rev. (1992), 669; see more recently Kingreen, "Art. 51 GRC", in Calliess and Ruffert (Eds.), *EUV/AEUV*, 4th ed. (C.H. Beck, 2011), paras. 11 et seq.; Papier, "Verhältnis des Bundesverfassungsgerichts zu den Fachgerichtsbarkeiten", 124 DVBL (2009), 473, 480.

29. Prominently expressed in scholarship by the notions of "Zweckverband" or "regulatory State". See Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr Siebeck, 1972), p. 197; Majone, "The European Community as a Regulatory State" in *Collected Courses of the Academy of European Law*, Vol. 1 (Kluwer Law International, 1994), p. 321.

30. Chalmers, "Looking back at *ERT* and its contribution to an EU fundamental rights agenda" in Maduro and Azoulai, op. cit. *supra* note 16, p. 140, at p. 148.

31. Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot, 2001), pp. 556 et seq.

32. Habermas, *Zur Verfassung Europas* (Suhrkamp, 2011), 67; Dellavalle, "Between Citizens and Peoples", *Annual of German & European Law* II/III (2004/2005), 171; Pernice, "Europäisches und nationales Verfassungsrecht", 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2001), 148, 160.

individual participation in the political processes on the Union or Member State level.[33] This is particularly so with regard to media freedom: democracy in the Union would be seriously affected if Union citizens were hampered in expressing their opinions in or informing themselves via independent media.

At the same time, one cannot ignore that in federal entities central enforcement of one single set of fundamental rights against (member) State action bears the risk of further centralization.[34] The respective experiences undergone by federal States like the USA or Germany are not a suitable way for Europe to proceed: "United in Diversity" is the Union's motto and pluralism and respect for the national identity of the Member States are laid down in its constitutional law (Arts. 2 and 4(2) TEU).

The solution found by the Treaties is ambiguous: the Member States are not generally bound to the whole fundamental rights *acquis* as expressed in Article 6(1) TEU and the Charter, but only "when they are implementing Union law" (Art. 51(1) CFREU). Yet, even when acting autonomously they have to observe the common values of Article 2 TEU, *inter alia* "respect for human rights".[35] Article 7 TEU foresees a political enforcement mechanism in case of "serious and persistent violation". By these provisions the EU has become a guarantor of constitutional principles in the Member States.[36] This is not to be seen as a step towards a European superstate[37] but as a condition for a complex polity to operate.[38]

However, the enforcement mechanism has severe drawbacks. The problem is not so much that it has never been applied in practice;[39] Article 7 TEU is rightly designed for rare use.[40] What really matters is that its overall features arguably create "expectations" amongst the Member States that it actually *will* never be applied.[41] Firstly, the very nature of the sanctions procedure involves

33. Habermas, *Die postnationale Konstellation* (Suhrkamp, 1998), pp. 175 et seq.

34. Frowein, Schulhofer and Shapiro, "The protection of fundamental human rights as a vehicle of integration" in Cappelleti, Seccombe and Weiler (Eds.), *Integration Through Law*, Vol. 1 (de Gruyter, 1986), 231; Huber, "Auslegung und Anwendung der Charta der Grundrechte", 64 NJW (2011), 2385, 2386; A.G. Sharpston in *Ruiz Zambrano*, cited *supra* note 15, paras. 172 et seq.

35. See *infra* 4.1.

36. von Bogdandy, "The European Union as a supranational federation", 6 CJEL (2000), 27.

37. See for such fears Murswiek, "Die heimliche Entwicklung des Unionsvertrages zur europäischen Oberverfassung", 28 *Neue Zeitschrift für Verwaltungsrecht* (2009), 481.

38. A.G. Maduro in C-380/05, *Centro Europa 7*, [2008] ECR I-349, para 19.

39. The actions taken against Austria in the *Haider affair* in 2000 were unilateral measures by the Member States. See in this regard Sadurski, "Adding bite to a bark: The story of Article 7, EU enlargement, and Jörg Haider", 16 CJEL (2009–2010), 385, at 400.

40. Ibid., at 423.

41. See de Schutter, "Les droits fondamentaux dans le traité d'Amsterdam" in Lejeune (Ed.), *Le traité d'Amsterdam* (Bruylant, 1998) pp. 153, 179 et seq.; Stein, "Die rechtlichen

considerations of political appropriateness. This is not bad in and of itself, yet it arguably might lead to a habit of mutual indulgence amongst the Member States. The prevailing unwillingness to initiate the Article 259 TFEU procedure[42] can serve as an illustration. Secondly, the ponderous nature of the procedure and the stigmatization inherent in Article 7 TEU put the political stakes very high. The Commission, after initial willingness,[43] now seems largely reluctant to use the mechanism and is advocating a very restrictive interpretation of Article 7 TEU.[44] Perhaps the experience of the *Haider* affair has left the Member States and the Union institutions extremely reluctant to use similar mechanisms.[45]

2.3. *Where does the "scope of EU law" end?*

In light of the foregoing it is not surprising that the ECJ has searched for a way to ensure fundamental rights protection by stretching the "scope of Union law" in which EU fundamental rights apply to the Member States. This jurisprudence has however not offered a satisfactory solution. On the one hand it can certainly not address all the problematic constellations, on the other hand it has sometimes transgressed the limits of what is doctrinally justifiable.

According to the Court's *jurisprudence constante*, EU fundamental rights apply to the Member States only when they act within the "scope of EU law".[46] This basically comprises three constellations. The first consists of Member

Reaktionsmöglichkeiten der Europäischen Union bei schwerwiegender und anhaltender Verletzung der demokratischen und rechtsstaatlichen Grundsätze in einem Mitgliedstaat" in Götz, Selmer and Wolfrum (Eds.), *Liber amicorum Günther Jaenicke – zum 85. Geburtstag* (Springer, 1998), pp. 871 and 898; Crawford, "Democracy and the body of international law" in Fox and Roth (Eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000), p. 91, at p. 112, note 85, arguing that Art. 7 TEU is rather of "symbolic character".

42. See Lenaerts, *Procedural Law of the European Union,* 2nd ed. (Sweet and Maxwell, 2006), p. 148.

43. See Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, 15 Oct. 2003, COM(2003)606 final, 3.

44. "The clause only would apply if there was a complete breakdown of national jurisdictional orders and fundamental rights systems." Freedom of Expression and Information in Italy: Declaration in the European Parliament Plenary by EU Media Commissioner Viviane Reding, 8 Oct. 2009, <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20091008+ITEM-005+DOC+XML+V0//EN&language=EN> (last visited 1 March 2012).

45. As the "report of the three wise men" mentions, the measures taken were perceived by the Austrian public as politically motivated sanctions by foreign governments against the Austrian population and therefore fostered nationalist sentiments. See Ahtisaari, Frowein and Oreja, Report on the Austrian Government's Commitment to the Common European Values, adopted in Paris on 8 Sep. 2000, para 116.

46. Case C-299/95, *Kremzow,* [1997] ECR I-2629, para 15; Joined Cases C-60 & 61/84, *Cinéthèque,* [1985] 2605, para 26.

State authorities executing outright obligations stemming from Union law.[47] This is endorsed widely in the literature as in such a situation national authorities are acting as an "agency" of the Union.[48] More controversial is the second constellation: EU fundamental rights also apply to Member State measures that implement Union law, including directives which only lay down minimum harmonization or grant a margin of discretion.[49] Although this line of case law is disputed amongst scholars[50] it is justified by the rationale that an EU measure cannot grant the Member States discretion to violate EU fundamental rights.[51] In the case of media freedom it is the AVMS Directive which brings national implementing measures within the scope of Article 11(2) CFREU.[52] This instrument is however subject to an important limitation as it only applies to audiovisual media, that is mostly television and on-demand audiovisual media services. In contrast, Member States' interferences with the press, online-press, or radio broadcasting are outside its reach and therefore cannot be tackled within the second constellation.[53]

In light of similar limitations, the Court recently extended the second constellation even further. In *ORF* it gave a very broad interpretation to the scope of a directive in order to be able to engage in a fundamental rights discourse.[54] In *Kücükdeveci* it widened the notion of "implementation" which now apparently even extends to Member State legislation that is not intended to implement a directive in a strict sense but otherwise touches upon fields

47. Case C-5/88, *Wachauf,* [1989] ECR 2609, para 19; Case C-201/85, *Klensch,* [1986] ECR 3477, paras. 9–11; Case C-2/92, *Bostock,* [1994] ECR I-955, para 16.

48. See for an account Kühling, op. cit. *supra* note 27, p. 498.

49. Joined Cases C-379 & C-380/08, *ERG,* [2010] ECR I-2007, para 79; Case C-275/06, *Promusicae*, [2008] ECR I-271, para 68; Case C-276/01, *Steffensen,* [2003] ECR I-3735, paras. 69 et seq.; Case C-442/00, *Rodríguez Caballero,* [2002] ECR I-11915, para 31.

50. See for an account Calliess, "Europäische Gesetzgebung und nationale Grundrechte", 64 JZ (2009), 113.

51. Kühling, op. cit. *supra* note 27, p. 498; Case C-540/03, *Parliament* v. *Council,* [2006] ECR I-5769, paras. 103 et seq.

52. Directive 2010/13/EU of the European Parliament and of the Council on audiovisual media services, O.J. 2010, L 95/1. As its Art. 4(1) evokes, "Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive *provided that such rules are in compliance with Union law.*"

53. There is some Union legislation which covers a few marginal aspects of other media law. Cf. *inter alia* Art. 9 of Directive 95/46/EC, O.J. 1995, L 281/31, which provides for a specific regime concerning "the processing of personal data carried out solely for journalistic purposes". See for EU competences in media law Drechsler, "Verantwortung der Europäischen Union für eine freie Berichterstattung in den Medien", 57 *Osteuropa-Recht* (2011), 53.

54. Case C-465/00, *ORF,* [2003] ECR I-4989, paras 31–47; see for a critique Classen, annotation, 41 CML Rev. (2004), 1377, 1381 et seq.

regulated by that act.[55] It is difficult to see how this meets the rationale mentioned above. The Court has never explained the doctrinal basis for this extension, and it was hence criticized in the literature.[56] Most recently, the judges seem more anxious to underline the limits to their jurisdiction, but to date this has had rather rhetorical consequences.[57]

Most controversial is the third constellation that defines the "scope of EU law". According to the so-called *ERT* doctrine, national limitations of a right granted by EU law, in practice mostly the market freedoms, trigger the application of EU fundamental rights.[58] While this doctrine has been subjected to critique before,[59] it is now particularly disputed whether it is compatible with the wording of Article 51(1) CFREU.[60] Besides, *ERT* also has its limits: notably non-economic activities and purely internal situations are largely outside its reach.[61] In these respects, the Court has again tended to stretch the operative range of fundamental rights in some cases. In *Carpenter*, determined to protect the plaintiff's right to family life, the judges held the freedom to provide services to be applicable in a situation many commentators classified as "purely internal".[62] In *Karner*, although the Court held that there

55. Case C-555/07, *Kücükdeveci,* [2010] ECR I-00365, paras. 23–26; this even goes beyond the ruling in Case C-144/04, *Mangold,* [2005] ECR I-9981, para 51.

56. See e.g. Manthey and Unseld, "Grundrechte vs. „effet utile" – Vom Umgang des EuGH mit seiner Doppelrolle als Fach- und Verfassungsgericht", 14 *Zeitschrift für europarechtliche Studien* (2011), 323, 334 et seq.

57. Case C-400/10 PPU, *McB*, judgment of 5 Oct. 2010, nyr, para 52 et seq.

58. Case C-260/89, *ERT*, [1991] ECR I-2925, para 43; Case C-368/95, *Familiapress,* [1997] ECR I-3689; Case C-245/01, *RTL Television,* [2003] ECR I-12489.

59. See Jacobs, "Human Rights in the European Union: The Role of the Court of Justice", EL Rev. (2001), 331, 337; Huber, "Unitarisierung durch Gemeinschaftsgrundrechte – Zur Überprüfungsbedürftigkeit der ERT-Rechtsprechung", 43 EuR (2008), 190.

60. See in the negative Borowsky, op. cit. *supra* note 10, paras. 29 et seq.; Picod, in Burgorgue-Larsen et al. (Eds.), *Traité établissant une Constitution pour l'Europe, Partie II La Charte des droits fondamentaux* (Bruylant, 2005), Art. II-111 para 15; in the affirmative see Craig, "The ECJ and *Ultra Vires* Action: A conceptual analysis", 48 CML Rev. (2011), 395, 430; Cartabia, "Art. 51", in Mock and Demuro (Eds.), *Human Rights in Europe* (Carolina Academic Press, 2010), at p. 320; Mangas Martín, "Art. 51", in Mangas Martín (Ed.), *Carta de los Derechos Fundamentales de la Unión Europea* (Fundación BBVA, 2008), at p. 817.

61. The latter leads to the well-known reverse discrimination which might be prohibited under national law and has been controversially discussed for years. Yet, the Court is still reluctant in this regard, cf. Case C-212/06, *Gouvernement wallon,* [2008] ECR I-1683, para 38.

62. Case C-60/00, *Carpenter* [2002] ECR I-6279; for a critique see Mager, annotation, 58 JZ (2003), 204; Acierno, "The Carpenter Judgment: Fundamental rights and the limits of the Community legal order", 28 EL Rev. (2003), 398, 402 et seq.

was no interference with free movement of goods,[63] fundamental rights on the basis of *ERT* applied anyhow.[64]

In her conclusions in *Ruiz Zambrano,* Advocate General Sharpston undertook a thorough critique of this case law and highlighted inconsistencies caused by the desire to expand EU fundamental rights protection.[65] As an alternative she proposed to link EU fundamental rights to the Union's exclusive or shared competences. Thereby, the Member States would be bound by EU fundamental rights in all fields in which the Union possesses legislative competences regardless of whether they are exercised.[66] However, in our view it is doubtful whether this approach would actually cure the deficiencies perceived by Advocate General Sharpston. Firstly, it may be asked whether it can be squared with the wording of Article 51(1) CFREU.[67] Secondly, it would probably not lead to more clarity and consistency in the scope of fundamental rights as the case law on Union competences is highly complex and in itself the object of critique.[68] Finally, Sharpston herself admitted that her proposition would entail far-reaching consequences and should not be adopted by the Court in the case at hand.[69] Thus, in our view, a different approach is needed to both do away with the existing inconsistencies and offer the protection needed while respecting the identities of the Member States. Instead of being bound to situational contingencies, such an approach should really only focus on critical issues. It will be developed in this vein in the following sections.

3. Union citizenship as the doctrinal basis for our proposal

Our proposal is to open up "respect for human rights" set out by Article 2 TEU for individual legal actions via Union citizenship. While we do not consider that Treaty objectives and values as such have direct effect, they guide the

63. Case C-71/02, *Karner,* [2004] ECR I-3025, paras. 37 et seq.; a limitation of free movement of goods was ruled out in line with the so-called *Keck* doctrine. See Joined Cases C-267 & 268/91, *Keck*, [1993] ECR I-6097.

64. *Karner,* cited *supra* note 63, paras. 48 et seq.; for a critique see Kühling, op. cit. *supra* note 27, pp. 499 et seq.

65. Opinion of A.G. Sharpston in *Ruiz Zambrano,* cited *supra* note 15, paras. 156 et seq.

66. Ibid., paras. 163 et seq.

67. See the critique by Bergmann, "Neuerungen beim EU Grundrechtsschutz", 32 *Verwaltungsblätter für Baden-Württemberg* (2011), 169, 172.

68. See with regard to external action: de Witte, "Too much constitutional law in the European Union's foreign relations?" in Cremona and De Witte (Eds.), *EU Foreign Relations Law* (Hart Publishing, 2008), p. 3, at p. 11.

69. Opinion of A.G. Sharpston in *Ruiz Zambrano*, cited *supra* note 15, paras. 171 et seq.

interpretation of other norms.[70] We claim that systemic violations of the essence of fundamental rights, as enshrined in Article 2 TEU, by *any* public authority in the European legal space amount to infringements of Article 20 TFEU which can be considered by national courts in cooperation with the Court of Justice. To substantiate our approach, we first fit it in the development of Union citizenship so far. It is not built from scratch but just adds to what has been construed patiently over sixty years (3.1). Of particular importance is the recent development of a "substance" of Union citizenship in the *Ruiz Zambrano* ruling which even covers so-called internal situations (3.2). This, the last step argues, offers a doctrinal basis to protect the Union citizen against all fundamental rights violations that deprive citizenship of its practical meaning (3.3).

3.1. *The idea of a European citizen*

The idea of European citizenship has been with European integration forever.[71] Walter Hallstein, first president of the European Commission, envisaged in 1951 a European *Staatsangehörigkeit* to describe the concept of freedom of movement of the workers of the coal and steel industry.[72] Thirteen years later, the predecessor of Union citizenship – market citizenship – found its way into legal debate.[73] True, this concept was used solely to describe the direct effect of fundamental freedoms on the individual; it was emphasized that it did not confer any Community status upon the individual.[74] This was a poor understanding of citizenship indeed,[75] but helped the ensuing debate on a European status to gain momentum and depth.[76] The very term "Union citizenship" goes back to one of the founding fathers of the European Union, Altiero Spinelli, a fervent federalist, who employed it for the first time 1984 in the European Parliament's Draft Treaty Establishing the European Union.[77] It

70. See in this regard Joined Cases C-402 & 415/05 P, *Kadi*, [2008] ECR I-6351, para 304.

71. For a powerful analysis in historical and comparative perspective, see Schönberger, "European citizenship as federal citizenship", 19 *Revue Européenne de Droit Public* (2007), 61 et seq.

72. Hallstein, *Der Schuman-Plan* (Vittorio Klostermann, 1951), p. 18.

73. The term was coined by Ipsen and Nicolaysen, "Haager Konferenz für Europarecht und Bericht über die aktuelle Entwicklung des Gemeinschaftsrechts", 18 NJW (1965), 339, 340.

74. Ipsen, op. cit. *supra* note 29, pp. 187, 250 et seq.

75. Kadelbach, "Union Citizenship" in von Bogdandy and Bast, op. cit. s*upra* note 27, p. 443, p. 445.

76. Cf. only Grabitz, *Europäisches Bürgerrecht zwischen Marktbürgerschaft und Staatsbürgerschaft* (Europa Union, 1970); Lhoest, "Le Citoyen à la une de l'Europe", 18 RMC (1975), 431.

77. Resolution on the Draft Treaty Establishing the European Union, O.J. 1984, C 77/33, Art. 3.

took only another eight years, and Union citizenship became positive law with the Maastricht Treaty. This move was first met with some scepticism.[78] But then the idea took off. Efforts in academia[79] and the consequent jurisprudence of the ECJ sealed the departure into a new era; the concept of the individual in his or her entirety, not just as an agent of the common market or a passive beneficiary, started to inform the European legal order. The entry into force of the Lisbon Treaty pushes this evolution ahead: through the vehicle of citizenship the Union "places the individual at the heart of its activities" (CFREU, 2nd consideration). Citizenship is the cornerstone of (democratic) legitimacy in a European polity (cf. Arts. 9–11 TEU).[80]

In light of the foregoing, it seems fully consistent to provide the Union citizen with a judicial remedy against serious threats to his constitutional status, be it at the European or at the Member State level. One could even think of this as encompassing all the Union's foundational values as enshrined in the first sentence of Article 2 TEU. The German Federal Constitutional Court indeed follows an analogous logic by giving German voters the right to "challenge the constitutionally relevant deficits in the democratic legitimation of the European Union".[81] Individual legal actions to enforce abstract principles like democracy (beyond political rights) or the rule of law (beyond civil rights) are however more difficult to argue, as the critique with regard to the Constitutional Court's approach has shown.[82] In any case, at the European

78. Famously Weiler, "Citizenship and Human Rights" in Winter et al (Eds.), *Reforming the Treaty on European Union* (Kluwer Law International, 1996), 57, 65: "little more than a cynical exercise in public relations on the part of the High Contracting Parties".

79. Closa, "The concept of Union Citizenship in the Treaty on European Union", 29 CML Rev. (1992), 1137 et seq.; Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe* (University of Chicago Press, 1994); O'Leary, *The Evolving Concept of Community Citizenship* (Kluwer Law International, 1996); Wiener, "Making sense of the new geography of citizenship: Fragmented citizenship in the European Union" 26 *Theory & Society* (1997), 529 et seq.; Shaw, "Citizenship of the Union: Towards a Post-National Membership?" in *Collected Courses of the Academy of European Law*, Vol. VI-1 (Kluwer Law International, 1995), pp. 237 et seq.

80. See Levade, "Citoyenneté de l'Union européenne et identité constitutionelle", 18 *Revue des Affaires Européennes* (2011), 98 et seq.

81. See BVerfGE 123, 267, 331 (*Lisbon*), English translation at: <www.bverfg.de/en/decisions/es20090630_2bve000208en.html> (last visited 1 March 2012).

82. For an account see Klein, "Art. 38", in Maunz and Dürig (Eds.), *Grundgesetz*, 62th ed. (C.H. Beck, 2011), para 146 et seq.

level such a step seems premature given the fact that there is no respective case law of the Court of Justice. Hence, we limit our approach to one value of Article 2 TEU, namely "respect for human rights".[83] Firstly, there is a longstanding tradition in Europe that courts play an important role in that context. Secondly, as the next sections will show, in this regard there are already pertinent indications in the Luxembourg jurisprudence.

3.2. *The "substance" of Union citizenship*

The Court has continuously built and expanded Union citizenship into a fundamental concept for the entire European legal space. The Court proclaimed in its famous *Grzelczyk* judgment that "Union Citizenship is destined to be the fundamental status of nationals of the Member States".[84] Advocate General Sharpston rightly points out that this development is "potentially of similar significance to [the Court's] seminal statement in *Van Gend en Loos*".[85] Indeed, Union citizenship has become the "new frontier" of EU law, which the Court expands even against great resistance.[86] One likely explanation for this line of case law might be that the Court, in light of the multiple crises Europe is facing, attempts to strengthen the legal concept on which the Union ultimately rests.

In this regard it is important to recall that the Court of Justice has construed the right to move and to reside freely (now Art. 21 TFEU) as a directly effective individual right which prohibits any unjustified burden or "serious inconvenience" and which can also be invoked against the Union citizen's Member State of origin.[87] While most of the cases involved physical movement from one Member State to another, this element was increasingly blurred over time.[88] Eventually, this led to the most recent step in *Ruiz*

83. We understand the other values "human dignity", "freedom" and "equality" to form part of "human rights".

84. Case C-184/99, *Grzelczyk*, [2001] ECR I-6193, para 31. This formula has been used in the case law ever since, cf. Case C-413/99, *Baumbast and R*, [2002] ECR I-7091, para 82; *Ruiz Zambrano*, cited *supra* note 15, para 41.

85. Opinion of A.G. Sharpston in *Ruiz Zambrano*, cited *supra* note 15, para 68.

86. In *Ruiz Zambrano* the Commission and nine Member States intervened, submitting that the Court should dismiss the case.

87. Case C-406/04, *De Cuyper*, [2006] ECR I-6947, para 39; Case C-208/09, *Sayn-Wittgenstein*, judgment of 22 Dec. 2010, nyr, para 67. See in detail Spaventa, "Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects", 45 CML Rev. (2008), 13, 22 et seq.; Wollenschläger, "A new fundamental freedom beyond the market", 17 ELJ (2011), 1, 25 et seq.

88. See Case C-148/02, *Garcia Avello*, [2003] ECR I-11613, para 26; Case C-200/02, *Zhu and Chen*, [2004] ECR I-9925, para 26; Case C-135/08, *Rottmann*, judgment of 2 March 2010, nyr, para 42. See in detail Kochenov, "A real European Citizenship: The Court of Justice opening a new chapter in the development of the Union in Europe", 18 CJEL (2011) 56.

Zambrano by which the Court introduced an additional category: the "substance" of Union citizenship is protected by virtue of Article 20 TFEU also in the absence of any cross-border element whatsoever.

Mr Ruiz Zambrano and his wife had taken refuge in Belgium due to the civil war in their home country Colombia. His applications to attain a regular residence status were rejected by Belgian authorities. In the meantime his wife had given birth to two children who had, according to Belgian law, acquired Belgian nationality and consequently the status of Union citizens. However, as they had never moved beyond Belgium's borders, according to conventional rules one would have qualified the situation as "purely internal" and thus outside the ambit of Union law.[89] This constellation led the Court to adopt a new concept in its jurisprudence on Union citizenship. It held categorically that "Article 20 TFEU preclude[d] national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union."[90] As the Ruiz Zambrano children were dependent on their father, the judges argued, they eventually would have to leave the Union's territory, should he be denied residence. Yet, this would mean that they were "unable to exercise the substance of the rights" conferred by Union citizenship.[91] Later case law has affirmed this principle yet given it a narrow application: as it is now understood, the "substance" comes into play if the effectiveness of Union citizenship is undermined. Accordingly, it precludes expulsion of a third country national family member if this results in the Union citizen being *factually obliged* to leave the Union's territory.[92] However, practice shows that it is very difficult to cross that threshold.[93]

To develop a "substance" of Union citizenship which even applies to purely internal situations is a seminal step of judicial law making. Given its importance it is unfortunate though easy to understand that the Court has not come up with a comprehensive doctrinal justification.[94] Yet, what emerges

89. This was indeed argued by the Commission and all of the nine Member States that submitted observations in *Ruiz Zambrano*, cited *supra* note 15, para 37.

90. Ibid., para 42.

91. Ibid., para 44.

92. Case C-256/11, *Dereci*, judgment of 15 Nov. 2011, nyr, para 66 et seq.

93. Case C-434/09, *McCarthy*, judgment of 5 May 2011, nyr, para 49 et seq., held that expulsion of a spouse did not fall under the "substance"; *Dereci*, cited *supra* note 92, left the final decision to the referring court but hinted at a rather strict reading.

94. See for critique Hailbronner and Thym, case note on *Zambrano*, 48 CML Rev. (2011), 1253, 1259 et seq.; Lansbergen and Miller, "European citizenship rights in internal situations: An ambiguous revolution?", 7 EuConst (2011), 287, 306 et seq.; Nic Shuibhne, "Seven questions for seven paragraphs", 36 EL Rev. (2011), 161; for a more positive appraisal Kochenov, op. cit. *supra* note 88; Nettesheim, "Der 'Kernbereich' der Unionsbürgerschaft", 66 JZ (2011), 1030, 1031 et seq.

from the Court's reasoning is that it views Union citizenship not only as transnational citizenship, basically facilitating its holder to move freely while not being discriminated against.[95] The "fundamental status" also has a domestic dimension in that the Union comes to protect its citizens against excesses even of their Member States of origin which would deprive that status of practical meaning.[96] This almost inevitably leads to the question what role fundamental rights play in such a construct.

3.3. *Fundamental Status and Fundamental Rights*

Linking Union citizenship with EU fundamental rights is a seasoned project.[97] Within the Court, it was first voiced by Advocate General Jacobs in his famous Opinion in *Konstantinidis*. He argued that a Union citizen exercising his right to movement was, by virtue of his status, entitled to say "civis europaeus sum" and to invoke European fundamental rights.[98] Initially, the Court did not follow this approach and decided the case on the basis of the freedom of establishment.[99] However, somewhat ironically both protagonists seem to have changed their views over time. In a recent scholarly piece Jacobs argued for a careful separation between Union citizenship and fundamental rights.[100] On the other hand, the Court in many of its citizenship cases seemed to be driven by a fundamental rights discourse in all but name.[101] Often this can be traced back to the respective conclusions by the Court's Advocates General, which exposed the fundamental rights background of what sometimes seemed

95. But see for a strong case in that direction Schönberger, op. cit. *supra* note 71, 79.

96. Dittert, "Les droits des citoyens de l'Union: Vers un statut détaché de tout élément transfrontalier?", 18 *Revue des Affaires Européennes* (2011), 223, 226; Van Elsuwege, "European Union Citizenship and the Purely Internal Rule Revisited", 7 EuConst (2011), 308, 313 et seq.

97. See O'Leary, "The relationship between Community citizenship and the protection of fundamental rights in Community law", 32 CML Rev. (1995), 519; Benlolo Carabot, *Les fondements juridiques de la Citoyenneté Européenne* (Bruylant, 2008), pp.606 et seq., pp. 614 et seq.; Kadelbach, op. cit. *supra* note 75, pp. 464 et seq.; Opinion of A.G. Colomer in Case C-228/07, *Petersen*, [2008] ECR I-6989, paras. 25 et seq.

98. Opinion of A.G. Jacobs in Case C-168/91, *Konstantinidis*, [1993] ECR I-1191, para 46. This was met with divided reactions. See for an affirmation Reich and Harbacevica, "Citizenship and family on trial: A fairly optimistic overview of recent Court practice with regard to free movement of persons", 40 CML Rev. (2003), 615, 634 et seq.; for a critique see Haltern, *Europarecht und das Politische* (Mohr Siebeck, 2005), pp. 372 et seq.

99. *Konstantinidis*, cited *supra* note 98.

100. Jacobs, "*Wachauf* and the protection of fundamental rights in EC law" in Maduro and Azoulai, op. cit. *supra* note 16, 138.

101. But see *Baumbast,* cited *supra* note 84, para 91, where the Court held that limitations of rights granted by Union citizenship must be applied in conformity with the general principles of Community law.

to be rather technical cases[102] or to references by national courts pointing in that direction.[103] As a consequence, ECtHR jurisprudence, *inter alia* on the right to family life or the right to a name, openly or covertly found its way into the Court's case law on Union citizenship.[104]

What are the arguments for linking these two legal concepts? Firstly, it is in line with the historical emergence of fundamental rights as citizens' rights in European States.[105] Secondly, with regard to EU law, there is an even more pronounced historical and teleological connection: both discourses developed around the same period in reaction to the pressing legitimacy question. Citizenship and fundamental rights are therefore two mutually strengthening concepts which essentially pursue the very same objective, i.e. to bring the Union closer to the individual.[106] In systematic terms this is also reflected in today's positive law in that the Charter of Fundamental Rights not only contains the so-called citizens' rights but also refers to citizenship as a whole (2nd consideration). Finally, if Union citizenship is to be taken seriously, it cannot be completely separated from fundamental rights questions. In theory, it would seem odd to exclude the – literally – most fundamental rights in EU law (cf. Art. 2 TEU) from the "fundamental status" of the citizen. In practice, the cases cited above show that effective exercise of Union citizenship is often heavily dependent on fundamental rights. With regard to media freedom a particularly strong case can be made, as it is crucial for Union citizens' rights to democratic participation.[107]

However, one has to resist the temptation of reformulating simply any fundamental rights issue as a "serious inconvenience" with regard to movement and residence or as an infringement upon the "substance" of Union citizenship. This would ultimately induce general fundamental rights review of Member State action in a way which is irreconcilable with Article 51 CFREU.[108] As recent case law shows, the Court is well aware of the *problématique* but refrains from taking an unambiguous position. In *Ruiz*

102. See for example Opinion of A.G. Jacobs in *Garcia Avello*, cited *supra* note 88, para 27, who assessed the dispute about the composition of a surname in light of the right to a personal identity. Cf. further Opinion of A.G. Geelhoed in *Baumbast*, cited *supra* note 84, para 58; Opinion of A.G. Tizzano in *Zhu and Chen*, cited *supra* note 88, para 94; Opinion of A.G. Sharpston in *Sayn-Wittgenstein*, *supra* note 87, para 3.

103. See for a recent example the reference in the pending Case C-40/11, *Iida*.

104. A fine example is *Sayn-Wittgenstein*, cited *supra* note 87, which explicitly relies on ECtHR case law pertaining to Art. 8 ECHR.

105. In detail Schönberger, op. cit. *supra* note 10, pp. 196 et seq., also pointing to inherent difficulties.

106. See further O'Leary, op. cit. *supra* note 97, 549 et seq.

107. Kadelbach, op. cit. *supra* note 75, p. 466.

108. See Graf Vitzthum, "Die Entdeckung der Heimat der Unionsbürger", 46 EuR (2011), 550, 557 et seq.

Zambrano and *McCarthy* the Court, in contrast to the respective Advocates General, did not address fundamental rights at all.[109] In *Dereci,* it declared that the "substance" of Union citizenship was not activated "by the mere fact that it might appear desirable" for a Union citizen to live with his family in the territory of the Union. It continued however by stating that this finding was "without prejudice" to the question whether the claimants could rely on the right to family life. The referring court, so the judges held, had to verify whether the case fell within the scope of EU law and in the affirmative apply Article 7 CFREU, in the negative consider Article 8 ECHR.[110] It is unusual for the Court to raise a question concerning EU fundamental rights and then to refrain from deciding whether they in fact apply. One explanation could be that this move was only meant to show the Court's awareness of fundamental rights. Adopting a more expansive reading the respective paragraphs could be seen as the foundation of an *ERT* doctrine for the "substance" of Union citizenship, but the added value of such a construct is open to debate. Finally, one could take the reasoning as a sign that the Grand Chamber was deeply divided on what breadth to give to the "substance" and as to the exact role of fundamental rights in that context.

We claim, however, that there is a doctrinally convincing way to resolve the tension between the effectiveness of Union citizenship and respect for the limited scope of EU fundamental rights: in principle, the "substance" of Union citizenship does not lead to fundamental rights protection by the Union. Outside the boundaries of Article 51(1) CFREU such issues are left to national law and the ECHR.[111] However, a domestic fundamental rights violation falls under Union law and the "substance" if it amounts to emptying Union citizenship of its practical meaning.[112] This is our doctrinal starting point. In the following section we argue that it should be generalized and framed in a "reverse" *Solange* doctrine.

109. See A.G. Sharpston in *Ruiz Zambrano*, cited *supra* note 15, para 54 et seq.; Opinion of A.G. Kokott in *McCarthy*, cited *supra* note 93, para 59 et seq.

110. *Dereci*, cited *supra* note 92, paras. 68 to 72.

111. With regard to Art. 7 CFREU: Opinion of A.G. Mengozzi in *Dereci*, cited *supra* note 92, para 37 et seq.; this is important in order to avoid conflicts given that the ECtHR's jurisprudence on Art 8 ECHR seems noticeably less generous than the corresponding case law of the ECJ on citizenship. See in this regard Lansbergen and Miller, op. cit. *supra* note 94, 303 et seq.

112. See also Van Eijken and De Vries, "A new route into the promised land? Being a European Citizen after *Ruiz Zambrano*", 36 EL Rev. (2011), 704, 718; Van Elsuwege, op. cit. *supra* note 96, 323.

4. Our proposal: Reverse *Solange*

In the previous section we have shown that Article 20 TEU provides a remedy for Union citizens to challenge those fundamental rights deficits which deprive their "fundamental status" of practical meaning. In the following we propose to frame this in terms inspired by the German Federal Constitutional Court's *Solange* doctrine. As is well known, the Karlsruhe Court does not exercise its competence to control EU secondary law as long as the Union ensures fundamental rights protection which is "essentially similar to the protection of fundamental rights required unconditionally by the Basic Law." This is further defined by the requirement to "generally safeguard the essential content of fundamental rights" and operates as a presumption to be disproved by the claimant.[113] We argue that this should be taken up by the Court and turned towards the Member States:[114] outside the Charter's scope of application, a Union citizen cannot rely on EU fundamental rights as long as it can be presumed that their respective *essence* is safeguarded in the Member State concerned. However, should this presumption be rebutted, the "substance" of Union citizenship – within the meaning of *Ruiz Zambrano* – comes into play.

The essence of fundamental rights, we will show, is set out in Article 2 TEU as one basic condition for the exercise of public authority in the European legal space and can be drawn inductively from the jurisprudence of the ECtHR, the ECJ and national constitutional courts. Most importantly, it is far more restricted than the full range of fundamental rights protection enshrined in Article 6 TEU and the CFREU (4.1). The foundations for the second prong of our reverse *Solange* test are the principles of subsidiarity and respect for

113. See BVerfGE 73, 339, 376 (1986) (*Solange II*); 89, 155, 174 et seq. (1993) (*Maastricht*); 102, 147, 164 (2000) (*Bananas*); 125, 260, 306 (*Data Retention)*. A different formula is used only in 123, 267, 335 (2009) (*Lisbon*). As is equally well known, the Court had initially claimed such competence, as long as fundamental rights protection in the EU had not reached such a level. See 37, 271, 280 (1974) (*Solange I*).

114. See opinion of A.G. Maduro in *Centro Europa 7*, cited *supra* note 38, paras. 17 et seq., who suggested that in free movement cases the ECJ should review compliance with Art. 2 TEU employing a kind of *Solange*-method. Years before *Ruiz Zambrano* he could not rely on the "substance" of Union citizenship as we do. See also, with a similar idea, Halberstam, "Constitutional Heterarchy: The centrality of Conflict in the European Union and the United States", in Dunoff and Trachtmann (Eds), *Ruling the World* (Cambridge University Press, 2009), p. 326, 353. In contrast, other authors recently have suggested applying a reverse *Solange* doctrine to the Charter itself, thereby generally limiting fundamental rights control by the ECJ with regard to Member States. See Cruz Villalón, "'All the Guidance', ERT and Wachauf" in Maduro and Azoulai, op. cit. *supra* note 16, 162, 168; Kirchhof, "Grundrechtsschutz durch europäische und nationale Gerichte", 64 NJW (2011), 3681, 3686; Sabel and Gerstenberg, "Constitutionalising an overlapping consensus: The ECJ and the emergence of a coordinate constitutional order", 16 ELJ (2010), 511, 516.

national identities (Arts. 4(2) and 5(1) TEU). In this light, it can and should be assumed that national law and national courts comply with their obligations arising out of Article 2 TEU. However, this presumption can be rebutted and consequently the "substance" of Union citizenship comes into play if it can be shown that there is a systemic violation of that standard (4.2). The last section will anticipate and rebut potential objections to our proposal. Notably, it will be shown that such a step, if taken by the ECJ, would not be *ultra vires* (4.3).

4.1. *Article 2 TEU and the essence of fundamental rights*

In the words of Article 2 TEU, the Union "is founded on" *inter alia* "respect for human rights". This constitutes a legal standard that applies to *any* exercise of public authority in the European legal space, be it by the Union or the Member States.[115] Firstly, it is crucial to see that there is no limitation in Article 2 TEU such as is contained in Article 51(1) CFREU. Secondly, according to a systematic assessment, respect for the values enshrined in Article 2 TEU is not only a precondition for a State to accede to the Union (cf. Art. 49 TEU), but also a yardstick for Member States, the performance of which can be appraised according to Article 7 TEU.[116] Finally, this understanding is confirmed by strong historical evidence: Article 2 TEU constitutionalizes the Copenhagen criteria, laid down in the decision by the European Council of 21 and 22 June 1993 to open up a perspective of accession for the transformation countries which still had to overcome authoritarian traditions.[117] As it was impossible to subject new Members to a different regime from that applying to old Members, the standards of Article 2 TEU apply to all.[118]

But what does "respect for human rights" entail? Obviously, as concrete legal consequences are attached to non-respect, it cannot simply command

115. See Hilf and Schorkopf, "Art. 2 EUV", in Grabitz and Hilf (Eds.), *Das Recht der EU* (C.H. Beck, 2011), para 18; Ruffert, "Art. 7 EUV", in Calliess and Ruffert. op. cit. *supra* note 28, para 4; Schmahl, "Die Reaktion auf den Einzug der Freiheitlichen Partei Österreichs in das österreichische Regierungskabinett – Eine europa- und völkerrechtliche Analyse", 5 EuR (2000), 819, 822; Schorkopf, *Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art. 7 EUV* (Duncker & Humblot, 2000), pp. 69 et seq., pp. 99 et seq.; Verhoeven, "How democratic need European Union members be?", 23 EL Rev. (1998), 217, 222–224, 234; Declaration of the Presidency of the Convention, 6 Feb. 2003, CONV 528/03, 11; European Commission, COM(2003)606, at 5.

116. In addition it is also referred to in Art. 32 (1) and 42(5) TEU. For the interrelationship between Art. 7 and 49 TEU see Rötting, *Das verfassungsrechtliche Beitrittsverfahren zur Europäischen Union* (Springer, 2009), p. 232 et seq., 263.

117. Conclusions of the Presidency of 21–22 June 1993 (SN 180/1/93), 13; see further Sadurski, op. cit. *supra* note 39, 391 et seq.

118. Cf. the principle of equality in Art. 4(2) TEU.

adherence to an abstract *idea* of human rights protection.[119] On the other hand, this cannot mean that the Member States are comprehensively bound by the full *acquis* of EU fundamental rights as expressed in the Charter and Article 6 TEU. As Article 51(1) CFREU states, the provisions of the Charter mainly point to the Union itself and are applicable to the Member States *only* when they are implementing Union law. With regard to media freedom (Art. 11(2) CFREU) this standard arguably is even more stringent than the one demanded by Article 10 ECHR in that it recognizes media freedom as an independent right.[120] Accordingly, the Court offers a particularly high level of protection e.g. with regard to commercial aspects of that freedom.[121]

In contrast, Article 2 TEU, we argue, aims at safeguarding essentials.[122] In order to define its content, a first hint can be drawn from its wording. While the specific mode of fundamental rights protection is conditioned by the different legal, political and cultural characteristics of each Member State,[123] the values protected by Article 2 TEU are said to be "common to the Member States". In our view, the best way to find such a common denominator is to cling to the concept of the *essence of fundamental rights*. This notion covers both longstanding tradition and widespread recognition. Not only is it laid down in Article 52(1) CFREU and numerous constitutions of EU Member States,[124] it is also used by several constitutional courts as a yardstick for European integration.[125] As such it has become part of an *ordre public* in the European legal space. It also underlies the jurisprudence of the ECtHR.[126] To be sure, we do not claim that there is a fixed or universally valid essence of

119. Hilf and Schorkopf, op. cit. *supra* note 115, Art. 2 EU para 36.

120. Borowsky, op. cit. *supra* note 10, Art. 11 CFREU para 15.

121. Ibid., paras. 16 and 20.

122. Hilf and Schorkopf, op. cit. *supra* note 115, Art. 2 EU para 36.

123. See *supra* 2.2.

124. Art. 4(4) Czech Fundamental Rights Charter; Art. 19(2) German Basic Law; Art. 8(2) Hungarian Constitution; Art. 30(3) Polish Constitution; Art. 18(3) Portuguese Constitution; Art. 49(2) Rumanian Constitution; Art. 13(4) Slovakian Constitution; Art. 53(1) Spanish Constitution.

125. *Solange I*, cited *supra* note 113; 58, 1, 40 (1981) (*Eurocontrol*); *Solange II*, cited *supra* note 113; Polish Constitutional Court, Case K 18/04, Judgment of 11 May 2005, 41 EuR (2006), 236, 239 et seq.; Danish Supreme Court, Case I 361/1997, Judgment of 6 April 1998, 26 EuGRZ (1999), 49, 50; Spanish Constitutional Court, Case 1/2004, Judgment of 13 Dec. 2004, 40 EuR (2005), 339, 343; Italian Constitutional Court, Case 183/1973, Judgment of 18 Dec. 1973, 1/2 EuGRZ (1975), 311, 315; Case 170/84, Judgment of 8 June 1984 (*Granital*), in Oppenheimer, *The Relationship between European Community Law and National Law*, Vol. I (Cambridge University Press, 1994), 643, 651; Italian Constitutional Court, Case 232/1989, Judgment of 13/21 April 1989 (*Fragd*), in Oppenheimer, *ibid*., 653, 657; Czech Constitutional Court, Case Pl ÚS 19/08, Judgment of 22 Nov. 2008, paras 110 and 196.

126. See in detail von Bernstorff, "Kerngehaltsschutz durch den UN-Menschenrechtsausschuss und den EGMR: Vom Wert kategorialer Argumentationsformen", 50 *Der Staat* (2011), 165, 169 et seq.

rights which can be conceptually deduced. However, a "European essence" can be approached inductively by analysing the jurisprudence of Europe's highest courts with regard to certain infringements upon certain rights that cannot be justified.[127]

If one looks at the gist of the ECtHR's jurisprudence it should be safe to state that the rights which are non-derogable by virtue of Article 15(2) ECHR, by and in itself, are already "essential".[128] With regard to other rights, a thorough analysis is needed.[129] For our purpose, three patterns can be pointed out that can help to identify in a concrete situation whether Article 2 TEU is infringed. Firstly, sometimes the Court refers to the notion of essence as an absolute limit to balancing, i.e. to underline that a certain interference actually "destroys" a certain right or strips it of any content.[130] Secondly, if the essence of a right is at stake, a Member State's margin of appreciation is reduced.[131] Finally, even where the term is not explicitly used, an implicit differentiation between the "essence" and the "periphery" of a right can be drawn from the ECtHR's jurisprudence. In the field most interesting for this contribution, the Human Rights Court constantly holds that "there is little scope . . . for restrictions on political speech or on debate on questions of public interest".[132] This means that in such cases the States' margin of appreciation is severely limited unless there is public "incitement to violence".[133] On this basis, the Human Rights Court, without entering into a balancing test, repeatedly held that e.g. a "blanket ban" on certain media or "draconian" measures that dissuaded from reporting on certain topics could not be justified.[134] Outside that "political" sphere it is much easier to justify interferences in media freedom.[135]

127. Ibid., 167 et seq.

128. See with regard to Art. 3 ECHR, ECtHR (GC) Appl. No. 22978/05, *Gäfgen* v. *Germany*, 1 June 2010 (nyr), para 87.

129. In detail see Von Bernstorff, op. cit. *supra* note 126, 171.

130. See ECtHR Appl. No. 11209/84, *Brogan* v. *UK* ECHR Series A 44, para 55; (GC) Appl. No. 35014/97, *Hutten-Czapska* v. *Poland* ECHR 2006-VIII, paras 202 et seq. This approach can also be found in the jurisprudence of the UN Human Rights Committee; see Nowak, *UN Covenant on Civil and Political Rights*, 2nd ed. (Engel, 2005), Art. 5 para 6.

131. See ECtHR, Appl. No. 11329/85, *F* v. *Switzerland* ECHR Series A 128, para 32.

132. ECtHR (GC) Joined Appl. No. 23927/94 and 24277/94, *Sürek and Özdemir* v. *Turkey*, 8 July 1999, para 46; Appl. No. 17419/90, *Wingrove* v. *the United Kingdom,* ECHR 1996-V, para 58.

133. *Sürek and Özdemir*, cited *supra* note 132, para 46; Appl. No. 14526/07, *Ürper* v. *Turkey*, 20 Oct. 2009 (nyr), para 35; Appl. No. 11976/03, *Demirel* v. *Turkey*, 9 Dec. 2008, (nyr), para 27.

134. *Demirel v Turkey*, cited *supra*.; *Ürper v Turkey*, cited *supra*, paras 38 et seq.

135. See ECtHR Appl. No. 39394/98, *Scharsach* v. *Austria,* ECHR 2003-XI, para 30; in detail Frowein and Peukert, *Europäische Menschenrechtskonvention*, 3rd ed. (Kehl am Rhein: Engel, 2009), Art. 10 para 27.

This jurisprudence of the ECtHR informs that of the Court of Justice.[136] The possibility to apply such a differentiating approach to Article 2 TEU is also confirmed by a contextual assessment. Firstly, freedom of political expression falls under Article 2 TEU not only because it enters in the category of "respect for human rights" but also as it is closely connected to "democracy".[137] Secondly, the practice of the European Commission, which actually applies Article 2 TEU in accession procedures, points in the same direction in that it focuses on deficits threatening the democratic function of the media.[138]

To sum up the first prong of our proposal: it is possible to designate an EU-specific essence of fundamental rights enshrined in Article 2 TEU. With regard to media freedom it precludes measures inhibiting public debate on questions of the *res publica*.[139]

4.2. *The presumption of compliance with Article 2 TEU*

The second prong of our proposal consists of the presumption that in the fields autonomous from EU law the Member States respect the essence of fundamental rights enshrined in Article 2 TEU. Therefore a Union citizen cannot rely on Article 20 TFEU to invoke a violation of Article 2 TEU unless this presumption is rebutted.

Such a presumption is crucial to the Federal Constitutional Court's *Solange* doctrine. The ECtHR and several national constitutional courts have adopted similar stances.[140] If one is to assess both the rationale and consequences of the doctrine, one cannot but conclude that it has played a pivotal role in European integration. On the one hand, it has maintained the threat that EU legislation could and would be reviewed on fundamental rights grounds. Arguably, this threat may have pushed the Court constantly to refine its

136. See *Karner*, cited *supra* note 63, para 51; *Germany* v. *Parliament and Council*, cited *supra* note 19, paras. 155 et seq., which distinguish between a "political" essence and an "economic" periphery of media freedom.

137. See s*upra* note 19.

138. See European Commission, Turkey 2010 Progress Report, 9 Nov. 2010, COM(2010)660, 61 et seq.; European Commission, FYROM 2010 Progress Report, 9 Nov. 2010, COM(2010)660, 36; both expressing "serious" or "ongoing concern" about intimidation and pressure on the media.

139. See also Kühling, op. cit. *supra* note 27, p. 509; similarly Weiler, op. cit. *supra* note 10, 102, 105, who points out that the European conception is probably more restrictive than the American.

140. See ECtHR (GC) Appl. No. 45036/98, *Bosphorus* v. *Ireland* ECHR 2005-VI, paras. 149 et seq.; for an overview of national jurisprudence see Huber, "Offene Staatlichkeit: Vergleich" in von Bogdandy, Cruz Villalón and Huber (Eds.), *Handbuch Ius Publicum Europaeum* Vol. II (C.F. Müller, 2008), § 26 paras. 34 et seq.; Sadurski, "'Solange, chapter 3': Constitutional Courts in Central Europe – Democracy – European Union", 14 ELJ (2008), 1.

respective jurisprudence, and recently even to resist great political pressure on the part of EU institutions and Member States governments in the *Kadi* case.[141] On the other hand, the presumption has made it clear that no review of EU acts would take place on a day-to-day basis. This has helped avoid direct conflict of jurisdiction and safeguard the uniform application of EU law.[142] It has also enabled the EU to develop an autonomous standard of fundamental rights protection which, for good reasons, might differ in individual cases from e.g. the one adopted by the German *Grundgesetz*.[143] Thereby, the *Solange* doctrine is a cornerstone of European constitutional pluralism and diversity.[144]

This makes the presumption of compliance an ideal component of our proposal. Respect for national identities (Art. 4(2) TEU) commands that outside the scope of the CFREU the EU refrains from superseding the delicate balance between fundamental rights and general interests enshrined in national constitutions. In light of the subsidiarity principle (Art. 5(1) TEU), EU law must limit itself in this respect to just spanning a basic safety net, and must leave the main part to national law and (constitutional) courts. Finally, such restraint is also in line with a concept of Union citizenship that "shall be additional to and not replace national citizenship" (Art. 20(1) TFEU).[145]

How then, could the presumption of compliance be rebutted? In light of what has just been said, not by simple and isolated fundamental rights infringements. Instead, one has to look for violations of the essence of fundamental rights which in number or seriousness account for *systemic* failure and are not remedied by an adequate response within the respective national system.[146] Such violations not only put into question the basics of the European legal space but also deprive Union citizenship of its practical meaning.[147] The presumption is therefore not to be mistaken as instrumentalizing the individual for general purposes, but seen as focusing on those cases which demand EU intervention. In this respect, inspiration can be drawn from the interpretation given to the criterion of a "serious and persistent breach" in Article 7(2) TEU. Conceivable examples therefore include the refusal to abide by a final judgment of the ECtHR in a domain that touches

141. See Halberstam and Stein, "The UN, the EU and the King of Sweden: Economic sanctions and individual rights in a plural world order", 46 CML Rev. (2009), 13, 63.

142. Maduro, op. cit. *supra* note 18, p. 501, p. 510.

143. This is expressly underlined by the Federal Constitutional Court. See *Solange II*, cited *supra* note 113, para 116.

144. See Maduro, op. cit. *supra* note 18, 509 et seq.; Kumm, op. cit. *supra* note 18, at 361.

145. Similarly A.G. Sharpston in *Ruiz Zambrano*, cited *supra* note 15, para 148.

146. For a similar definition in the field of transfer of asylum seekers *N.S.*, cited *supra* note 11, para 86.

147. Cf. A.G. Maduro in *Centro Europa 7*, cited *supra* note 38, para 22 who however – unlike us – seems to rely uniquely on the right to free movement.

upon the essence of fundamental rights,[148] the defiance, bypassing or intimidation of domestic courts in such cases,[149] or intentional, reckless or evidently illicit conduct of highest State authorities.[150]

Put into practice our proposal could then work as follows. If a national of a Member State feels that her rights have been violated she would turn to the national judge. In court she could rely on the domestic (and possibly ECHR) standard of fundamental rights protection. Outside the scope of the CFREU she could not invoke EU fundamental rights, nor could she rely on Union citizenship to claim a violation of Article 2 TEU unless the presumption of compliance was rebutted. However, in case of systemic violation of the essence of fundamental rights the "substance" of Union citizenship, within the meaning of *Ruiz Zambrano*, would be activated as a basis for her redress. First of all, it would be up to the national court to establish the facts and to apply the respective provisions of Union law. Yet, according to Article 267 TFEU the latter would be enabled and, in a case of last instance, by and large obliged to refer to the Court for a preliminary ruling on the interpretation of Articles 2 TEU and 20 TFEU. This mechanism not only has the well-known advantage of combining the interpretative rulings of the Court with the authority and enforceability of domestic court decisions.[151] Arguably, it can also provide national judges with some backing from the side of Union law through the voice of the Court speaking on behalf of a Union founded on respect for human rights.[152] Hence, it could be said that our proposal ultimately aims at strengthening domestic courts in critical situations.

4.3. *Three objections, three rejoinders*

Having unfolded our proposal we will anticipate and rebut three objections in the remaining section.

148. See COM(2003)606, 9; Ruffert, op. cit. *supra* note 115, para 6.

149. In both cases, the violation of the rule of law principle in Art. 2 would aggravate the fundamental rights infringement. See for this interplay also COM(2003)606, 9.

150. See with regard to this and to further categories Schmitt von Sydow, in Von der Groeben and Schwarze (Eds.), *Kommentar zum EUV und EGV*, 6th ed. (Nomos, 2003), Art. 7 EU, paras. 20 et seq.

151. See Weiler, "The Least Dangerous Branch", in *The Constitution of Europe* (Cambridge University Press, 1999), p. 188, pp. 192 et seq.; Alter, *Establishing the Supremacy of European Law* (OUP, 2001).

152. Here the example of the Hungarian Constitutional Court, which has recently been stripped of some competences and packed with judges appointed by the government's majority, comes to mind. See European Commission for Democracy through Law (Venice Commission), Opinion on the New Constitution of Hungary, Opinion No. 618/2011 of 20 June 2011, CDL-AD(2011)016, paras. 91 et seq.

The first objection boils down to the reproach that such a construction, if adopted by the Court, would amount to an *ultra vires* act. So far, we have made the case that there are policy reasons why the Court should develop the law in that direction and we have shown that such a step would be doctrinally consistent with the current Treaties. However, questions remain as there is evidently no explicit textual mandate. The discourse is in particular shaped by German jurisprudence and doctrine.[153] It is therefore helpful to recall the criteria recently set out by the Federal Constitutional Court (FCC) for judicial lawmaking[154] or "development of the law" given the principle of conferral (Art. 5(1) TEU). According to the FCC, development of the law is part of the ECJ's mandate.[155] It is warranted within the limits of judicial methodology, especially "where programmes are fleshed out, gaps are closed, contradictions of evaluation are resolved or account is taken of special circumstances of the individual case".[156] At the same time, the FCC considers judicial lawmaking to be *ultra vires* if it is contrary to or devoid of statutory provisions, above all where "fundamental policy decisions" or "structural shifts . . . in the system of the sharing of constitutional power and influence" are enacted judicially.[157]

One obvious point in this regard might be that our approach aims at extending the scope of EU fundamental rights to the detriment of Member States powers, thereby disregarding Article 51(2) CFREU. However this argument is not persuasive. As has been shown above we do not rely on the full EU fundamental rights acquis as enshrined in Article 6 TEU and in the Charter, but exclusively on the essence of fundamental rights as referred to in Article 2 TEU. It is beyond question that the latter binds *any* exercise of public authority by the Member States and can be enforced by the EU under Article 7 TEU.[158] Therefore our approach neither creates new and unexpected obligations for the Member States nor adds new competences for the Union as such; only the *Organkompetenz* of the Court, but not the *Verbandskompetenz* of the EU is affected.

However, if this is the case, another point comes into play. One could claim that the political sanctions mechanism in Article 7 TEU was intended to be the only way to enforce Article 2 TEU and exclusive of individually activated judicial procedures. This could even be underlined by Article 269 TFEU

153. See also Craig, op. cit. *supra* note 60, who heavily relies on concepts stemming from the *querelle allemande*.

154. See also for a definition of judicial lawmaking von Bogdandy and Venzke, "Beyond dispute: International judicial institutions as lawmakers", 12 *German Law Journal* (2011), 979 et seq., 986 et seq.

155. BVerfGE 126, 286, 305 (*Honeywell*).

156. Ibid., 306.

157. Ibid.

158. See *supra* 4.1.

which precludes the Court from reviewing the merits of Article 7 decisions. However, this objection is not convincing either. While the former Treaties have kept the EU's foundational principles out of the reach of the Court[159] the Lisbon Treaty subjects Article 2 TEU to the Court's jurisdiction and thus to its mandate to ensure that "the law is observed" (Art. 19(1) TEU). To expound that provision would therefore not constitute an unwarranted arrogation of institutional powers, but the "fleshing out" of "programmes" already laid down by the framers of the Treaties.

This doctrinal argument can be enriched by institutional comparative analysis. While it would be highly desirable that the Commission becomes a more active fundamental rights guardian, the political institutions are likely to see each individual case only as a fragment in their overall relationship with the Member States. In contrast, the Court has the somewhat counter-intuitive advantage that its decisions are of more limited reach. Firstly, it only decides one case at a time, which provides for more room for manoeuvre. Secondly, it is a national judge who triggers the procedure of Article 267 TFEU and ultimately decides the case. This furthers legitimacy as it avoids a blunt confrontation of the European and the national levels. Having independent courts decide when it comes to the protection of individual rights is not only a core element of constitutionalism in the European States, but also an established feature of EU law. As early as *Van Gend en Loos,* the Court enabled individual legal actions based on Treaty provisions in order to complement the centralized infringement procedure.[160] Later the Court developed its doctrine on Member State liability for breaches of EU law although it must have been aware that Member States were about to introduce a different procedure (now Art. 260(2) TFEU) in the Treaty of Maastricht.[161] Both features have become accepted part of the EU law *acquis* ever since.[162]

A second objection might be that our approach fails to include third-country nationals as it is based on Union citizenship. Admittedly, this might seem odd at first glance considering that Article 2 TEU speaks of "human rights". It might then be argued that we in fact leave an often particularly vulnerable group aside. However, that objection would only carry if our approach negatively affected the legal situation of third-country nationals, but the opposite is the case. The mechanism we propose does not remove the Union's obligation to ensure "respect for human rights" in the

159. According to Art. 46(d) TEU (Nice version) the ECJ was only competent for what was then Art 6(2) TEU (Nice) but not for the values laid down in Art 6(1) TEU (Nice).

160. *Van Gend en Loos*, cited *supra* note 14; see further Stein, "Lawyers, judges, and the making of a transnational constitution", 75 AJIL (1981), 1, 4.

161. Joined Cases C-6 & 9/90, *Francovich*, [1991] ECR I-5357.

162. On the degree to which subsequent approval can legitimize judicial lawmaking, see Craig, op. cit. *supra* note 60, 406 et seq.

sense of Article 2 TEU with regard to non-EU citizens. To the extent their situation falls within the scope of EU law, the latter can rely on most of the Charter's rights.[163] Furthermore, the procedure of Article 7 TEU remains applicable in their favour. Our proposal merely privileges Union citizens to the extent that only they can introduce individual legal actions to challenge systemic deficiencies. The level of fundamental rights protection thereby enforced remains applicable to all.

For a polity to privilege its own citizens to a certain extent with regard to some kind of "status activus" might be criticized in terms of social philosophy.[164] From this point of view, it could be seen as morally attractive to conceive of an approach which also includes third-country nationals. This would however imply a much bigger step than our proposal, one that is arguably not for the Court to take given that, as has been shown above, the EU polity is centred on the concept of citizenship. Solace might be found in two lines of thought: firstly, Union citizenship itself can be seen as a first step to open up nationality to a cosmopolitan dimension.[165] And secondly, as the *Ruiz Zambrano* case has shown, better protection of EU citizens' rights often indirectly benefits third country nationals.

The third objection takes an external viewpoint. As our approach adds a new dimension to EU fundamental rights protection, some might fear that it is undermining the role of the ECHR and its institutions, the Council of Europe and the ECtHR. However, the opposite is the case. As it is now understood, the EU will become a party of the ECHR on a mostly equal footing with State parties.[166] Protecting fundamental rights by domestic courts[167] cannot have an undermining effect on the ECtHR as an international mechanism of human rights protection. On the contrary, the main reference point for EU fundamental rights was and will be the jurisprudence of the ECtHR.[168] Hence, it can only be in the interest of the latter if its voice is gaining even more weight

163. See for an important case *N.S.*, cited *supra* note 11, para 68.

164. See Besson and Utzinger, "Towards European Citizenship", 39 *Journal of Social Philosophy* (2008), 185, 193 et seq.

165. Ibid.

166. See CoE Informal Group on Accession of the European Union to the Convention, Final version of the draft legal instruments on the Accession of the European Union to the European Convention on Human Rights, CDDH-EU (2011) 16fin (19 July 2011), available at: <www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents/CDDH-UE_2011_16_final_en.pdf> (last visited 1 March 2012); see also Lock, "EU Accession to the ECHR, Implications for Judicial Review in Strasbourg", 35 EL Rev. (2010), 777–798.

167. On the ECJ being a domestic court when looked at from an international law perspective, see *Kadi,* cited *supra* note 70, para 317.

168. See Joint Communication from Presidents Costa and Skouris following the meeting of delegations from the ECtHR and the ECJ of 17 Jan. 2011, available at: <www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf> (last visited 1 March 2012).

in the EU by the ECJ expounding Article 2 TEU.[169] The EU, as a Union based on the rule of law, cannot merely shift its burden to protect fundamental rights to a mechanism which is external and subsidiary in nature, which lacks direct enforceability in many domestic legal orders[170] and currently faces serious work-load challenges.[171] With regard to media freedom, the Council of Europe Parliamentary Assembly has already called several times upon the European Union "as a supranational organization with effective governmental powers" to show more awareness of its responsibilities.[172]

5. Summing up: The next step in European constitutional pluralism

Real problems, theoretical considerations and jurisprudential inconsistencies call to reconsider EU fundamental rights protection against the Member States. In this vein we propose to complement the established doctrines with an innovative approach. With regard to the recently acquired status of Union citizenship it is time to lay open and expand its connection to fundamental rights. The "substance of the rights" conferred on a Union citizen within the meaning of *Ruiz Zambrano* should basically be defined by the essence of fundamental rights enshrined in Article 2 TEU and be framed in a reverse *Solange* doctrine. Outside the Charter's scope it should be presumed that the Member States comply with their fundamental rights obligations arising out of Article 2 TEU. However, should that presumption be rebutted by systemic violations, Union citizens can rely on Article 20 TFEU to seek redress before national courts and the ECJ.

Our proposal is fully in line with recent jurisprudential and doctrinal approaches to Union citizenship which are concerned with rights rather than with mere integration.[173] We believe that it would help to safeguard one of the basic conditions for legitimacy in the European legal space in general and for

169. See also, with an optimistic account, Douglas-Scott, "A Tale Of Two Courts: Luxembourg, Strasbourg and the growing European human rights acquis", 43 CML Rev. (2006), 629, 664.

170. See Ress, "Effect of decisions and judgments of the European Court of Human Rights in the domestic legal order", 40 *Texas International Law Journal* (2005), 359–382.

171. For current deliberations see Keller, Fischer and Kühne, "Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two innovative proposals", 21 EJIL (2010), 1025–1048; Wolfrum and Deutsch (Eds.), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Springer, 2009).

172. Report by the Committee on Culture, Science and Education to the Council of Europe Parliamentary Assembly of 6 Jan. 2010, *supra* note 23, paras. 107 et seq.; CoE Parliamentary Assembly, Respect for Media Freedom, Recommendation 1897 (2010) of 27 Jan. 2010, para 16.

173. See for an account Spaventa, op. cit. *supra* note 87, 39.

the functioning of the Union in particular. At the same time, it might also persuade the Court to avoid overstretching the scope of fundamental rights in the light of well-founded critique, e.g. pertaining to the rulings in *Carpenter* or *Kücükdeveci*. Finally, in contrast to the approaches taken by the Advocates General Jacobs and Sharpston, it would avoid fundamental rights-based centralization and would not encroach upon national identities protected in Article 4(2) TEU. In short, we believe that our proposal shows a way to sail safely between the *Scylla* of a dysfunctional Union and the *Charybdis* of suffocating national constitutional identities. It takes European constitutional pluralism to the next step. EU and national systems of fundamental rights protection would coexist symbiotically like good friends: respectful of each other's specificities, but mutually vigilant and helpful in order to preserve shared foundational principles.