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Fundamental Rights: Missing Pieces of EU Citizenship Puzzle?

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Abstract:

The European Union has evolved into an entity that simultaneously aims at the protection of fundamental rights while being originally an exclusively economic community. The status of EU citizens offers in this regard a great potential for enhancing fundamental rights protection in the EU. The sentiment that vindicates equality at the heart of EU citizenship stays behind the fact that EU citizenship has been one of the central arguments in favour of the extension of scope of EU fundamental rights.

This article assesses the relationship between EU citizenship and EU fundamental rights. It analyses the current position of these two legal doctrines within EU law. Special attention is paid to the quickly developing jurisprudential line of the ECJ. It is submitted that, in order to protect the substance of EU citizenship rights, the ECJ should overrule its case-law launched in *Dereçi* and should include fundamental rights in the substance of rights doctrine latent already in *Rotmann* and established explicitly in *Zambrano*.

As a consequence, EU citizens could rely on the complementary application of EU fundamental rights in purely internal situations concerning substance of their EU citizenship rights. Subsequently, such a step would as well eliminate the problem of reverse discrimination in the field of fundamental rights and increase the legal certainty of EU citizens while, at the same time, respecting the framework of EU competences. Consequently, the respective role of national judicial authorities, and in particular that of national constitutional courts, is discussed.

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Since 1992, the European Union witnessed ‘a glorious march of European citizenship from a ‘meaningless addition’ to the Treaties to one of the key concepts of EC law’.¹

I Between EU Citizenship and EU Fundamental Rights

Nowadays, an EU citizen can rely on fundamental rights guaranteed under EU law in relation to member states in the situations falling within the scope of EU law.² As a consequence, EU fundamental rights do not apply to situations governed purely by the national law of Member States. Such a conclusion can lead to some strange situations, including reverse discrimination.³ AG Sharpston submits in her opinion on *Zambrano* that:

‘[i]t would be paradoxical (to say the least) if a citizen of the Union could rely on fundamental rights under EU law when exercising an economic right to free movement as a worker, or when national law comes within the scope of the Treaty (...) or when invoking EU secondary legislation (...), but could not do so when merely ‘residing’ in that Member State.’⁴

EU citizenship and EU fundamental rights have been two ‘closely connected phenomena’ throughout the integration process, even though at the time of the adoption of the Treaty of Maastricht establishing EU citizenship, member states refused to endow the new

¹ D. Kochenov, ‘*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights’, *Columbia Journal of European Law* 2 (2009): 173.

² See Article 51(1) of the Charter of Fundamental Rights (OJ C 83, 30 March 2010, p. 404) as further interpreted by the ECJ in Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 19; See also Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan and Others*, ECLI:EU:C:1991:378, para. 31; Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, ECLI:EU:C:2003:333, para. 75.

³ For a landmark judgment of the ECJ on the notion of reverse discrimination see Case C-180/83, *Hans Moser v Land Baden Württemberg*, ECLI:EU:C:1984:233; for a complex overview see A. Tryfonidou, ‘Reverse discrimination in EC law’, *Kluwer Law International* (2009); A. Tryfonidou, ‘Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens’ Europe’, 23 *Legal Issues of Economic Integration* 43, (2008); S. Fredman, ‘Discrimination Law’, *Oxford University Press* (2011).

⁴ Opinion of Advocate General Sharpston in Case C-34/09, *Gerardo Zambrano v. Office national de l’emploi (ONem)*, ECLI:EU:C:2011:124, para. 84.

status with any fundamental rights dimension.⁵ The link between EU citizenship and EU fundamental rights was clearly visible in the Draft Constitutional Treaty of which Title II of Part I was entitled ‘Fundamental Rights and Citizenship of the Union’.⁶ Even though the Draft Constitutional Treaty failed to see the sunshine and this connection was subsequently not reflected by the text of the Treaty of Lisbon, the Charter of Fundamental Rights (hereinafter referred to as ‘the Charter’) makes the connection visible again. Following the fact that individuals have been put into the central place in the integration process ever since *Van Gend en Loos*,⁷ the preamble to the Charter provides that the Union ‘places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating the area of freedom, security and justice’.⁸

Despite of their common goals, EU citizenship and EU fundamental rights appear in EU law as two formally differentiated legal regimes for various reasons, two of which deserve particular attention. In the first place, *the principle of attributed powers* must be taken into account. The project of EU citizenship has brought tensions between its purpose of aiming at equality between EU citizens on the one hand and the limited protection of rights of individuals outside the concept of EU fundamental rights on the other hand. EU citizenship has had an implicit vocation to fill the gaps in personal and material scope of protection of individual rights in the EU.⁹ That is why the battle for equal rights amongst EU citizens has taken place within the system of allocation of competences - in a system that was not designed to be a ‘human rights’ organisation.¹⁰

The second argument for the formal separation of these two concepts lies in *the universal nature of fundamental rights* which leads to disconnection of fundamental rights, in particular of article 6 TEU, from the provisions concerning EU citizenship. In this regards, EU citizenship appears as a specific category of rights in contrast to the catalogue of universal fundamental rights that has been enacted. On the other hand, the content of EU citizenship,

⁵ S. I. Sánchez, ‘Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?’, *European Law Journal*, Vol. 20 (2014): 456.

⁶ OJ C 310, 16.12.2004, p. 13.

⁷ Case C-26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1.

⁸ Preamble to the Charter of Fundamental Rights, OJ C 83, 30.3.2010, p. 393.

⁹ S. I. Sánchez (2014), op. cit.: 466.

¹⁰ Opinion 2/94, ECLI:EU:C:1996:140; compare to Opinion 2/13, ECLI:EU:C:2014:2454.

which makes such danger not intrinsically related to a stronger relationship between EU citizenship and EU fundamental rights,¹¹ precluded this exclusionary potential.¹²

Be it as it may, common goals of the concepts of EU citizenship and EU fundamental rights, as well as their far-reaching constitutional consequences, tend to weaken the division of both legal doctrines. The jurisprudence of the ECJ launched in *Rottmann*¹³ and confirmed in *Zambrano*¹⁴ and *McCarthy*¹⁵ opens the door to the future alliance between EU citizenship and EU fundamental rights. Even though the ECJ finally decided these cases without referring to EU fundamental rights, they might have profound consequences for fundamental rights architecture within the EU. The case-law of the ECJ is progressively making clear that the protection of EU fundamental rights is likely to overcome the nationality chasm.¹⁶ The refinement of this jurisprudential line in *Dereçi*¹⁷, *O. and S.*¹⁸, *Ymeraga*¹⁹ and *Alokpa*²⁰ seems to stop such an outcome and form a step backwards in the protection of fundamental rights of EU citizens thus weakening effectiveness of EU citizenship.²¹

The rights of EU citizens conferred by Article 20 TFEU²² form a part of their EU fundamental rights since these rights have been incorporated into Chapter V of the Charter entitled 'Citizens' rights'. It will further be argued that the equivalence of this relationship would be a logical consequence. Recognizing EU fundamental rights as a part of substance of EU citizenship rights would certainly give more meaning to the concept of EU citizenship.²³

¹¹ A. Von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei and M. Smrkold, 'Reverse Solange—Protecting the Essence of Fundamental Rights against EU Member States', 49 *Common Market Law Review* (2012): 489, 516.

¹² To this end see D. Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe', 4 *Journal of Political Philosophy* 337 (1996).

¹³ Case C-135/08, *Janko Rottman v. Freistaat Bayern*, ECLI:EU:C:2010:104.

¹⁴ Case C-34/09, *op. cit.*

¹⁵ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, ECLI:EU:C:2011:277.

¹⁶ S. I. Sánchez (2014), *op. cit.*: 466.

¹⁷ Case C-256/11, *Murat Dereçi and Others v. Bundesministerium für Inneres*, ECLI:EU:C:2011:734.

¹⁸ Joined Cases C-356/11 and C-357/11, *O. and S.*, ECLI:EU:C:2012:776.

¹⁹ Case C-87/12, *Ymeraga*, ECLI:EU:C:2013:291.

²⁰ Case C-86/12, *Alokpa and Moudoulou*, ECLI:EU:C:2013:645.

²¹ M. J. Van den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?', *Legal Issues of Economic Integration* 39, no. 2 (2012): 274.

²² Pursuant to Article 20 TFEU, EU citizens shall enjoy a) the right to move and reside freely within the territory of the Member States, b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State, c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State, d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

²³ M. J. Van den Brink (2012), *op. cit.*: 280.

Such a step would imply an extension of EU fundamental rights' scope of application by means of EU citizenship. Therefore, an EU citizen could rely on the complementary application of EU fundamental rights in the purely internal situations. Subsequently, this solution would as well have the consequence in eliminating the problem of reverse discrimination and increasing the legal certainty for EU citizens.

II *Rottmann, Zambrano, McCarthy*: Hope for Fundamental Rights of EU Citizens?

EU citizenship forms a vital part of contemporary EU law. The incorporation of EU citizenship into the Treaties in 1992 was followed by a 'glorious march of European citizenship from a 'meaningless addition' to the Treaties to one of the key concepts of EC law'.²⁴ Even though the ECJ was initially unwilling to provide EU citizenship with some more serious effect, it nevertheless recognized in *Martínez Sala*²⁵ that the status of EU citizenship has extended the personal scope of EU law.²⁶ This recognition required a clarification of material scope of EU law necessary to set up a clear border between EU law and national law of member states.²⁷

The ECJ made the first attempt to precise the delineation of the material scope of EU law regarding EU citizenship in *Rotmann*.²⁸ In this case, the national court asked whether it was contrary to EU law to withdraw the nationality of a German national, which had been acquired by naturalization, as a result of which that national, would also lose his EU citizenship since he could not recover his Austrian nationality.²⁹ The ECJ rejected the 'purely national situation' argument of governments and the Commission³⁰ stating that:

'it is clear that the situation of a citizen of the Union who, (...), is faced with a decision withdrawing his naturalisation, (...), and placing him, (...), in a position capable of causing him to lose the status conferred by Article [20

²⁴ D. Kochenov (2009), op. cit.: 173.

²⁵ Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, ECLI:EU:C:1998:217.

²⁶ Case C-85/96, op. cit., para. 61.

²⁷ Van den Brink (2012), op. cit.: 275.

²⁸ Case C-135/08, op. cit.

²⁹ Case C-135/08, op. cit., para. 36.

³⁰ Case C-135/08, op. cit., para. 37-38.

TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.’³¹

The ECJ confirmed the trend established in *Rotmann* a year later in *Zambrano*³². The case concerned a Columbian national, Mr Zambrano, who claimed that, since his two children, who have Belgian nationality and are thus EU citizens, are dependent on him, he had a derived right of residence.³³ The ECJ once again set out all arguments claiming inapplicability of EU law for the purely internal situation³⁴ and stated that:

‘[a]rticle 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.’³⁵

Since the refusal to grant a residence permit to Mr Zambrano would force his children, who are EU citizens, to leave Belgian territory, this would *pro futuro* deprive his children of the genuine enjoyment of the substance of their rights as EU citizens.³⁶ It should be noted that the use of the word ‘genuine’ indicates that ‘the intensity of the Member State’s interference’ plays its important role.³⁷

In *McCarthy*³⁸, the ECJ followed the substance of rights doctrine stated implicitly already in *Rotmann* and explicitly mentioned in *Zambrano*.³⁹ Mrs McCarthy, a national of the United Kingdom as well as of Ireland, has resided in the United Kingdom for her entire life and never exercised her EU free-movement rights.⁴⁰ Authorities of the United Kingdom refused her application for a residence permit for her husband, a national of Jamaica, since

³¹ Case C-135/08, op. cit., para. 42.

³² Case C-34/09, op. cit.; on the content and importance of the judgment see also D. Gallo, ‘Développements récents en matière de citoyenneté européenne et regroupement familiale’, *Revue du Droit de l’Union Européenne* 1/2012 (2012): 101-120.

³³ Case C-34/09, op. cit., para. 34.

³⁴ Case C-34/09, op. cit., para. 37.

³⁵ Case C-34/09, op. cit., para. 42.

³⁶ Case C-34/09, op. cit., para. 43-44. On the implication on the concept of ‘deprivation’ in *Zambrano* see A. Lansbergen and N. Miller, ‘Court of Justice of the European Union European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Zambrano v Office national de l’emploi (ONEM)’, *7 European Constitutional Law Review* 287 (2011).

³⁷ D. Kochenov, ‘A Real European Citizenship; a New Jurisdiction Test; a Novel Chapter in the Development of the Union in Europe’, *Columbia Journal of European Law* 1 (2012).

³⁸ Case C-434/09, op. cit.

³⁹ D. Gallo (2012), op. cit.: 113.

⁴⁰ Case C-434/09, op. cit., para. 14.

Mrs McCarthy was not ‘a qualified person’⁴¹ and her husband was subsequently not the spouse of ‘a qualified person’.⁴² The ECJ decided the case to Mrs McCarthy’s disadvantage and based its argumentation on the absence of a cross-border element needed for the application of Article 21 TFEU⁴³ and the Directive 2004/38⁴⁴.

Even though it might seem, on the one hand, that the ECJ in *McCarthy* departed from *Zambrano*, it is submitted that, on the other hand, the ECJ only clarified its cross-boarder argument that EU citizens can still fall within the scope of EU law when a cross-border element is present in case the infringement of their citizenship rights is not intense enough.⁴⁵ As a consequence, a sufficiently serious infringement of an EU citizen’s right will after *McCarthy* still fall ‘by its nature and its consequences’⁴⁶ within the scope of EU law despite of the lack of explicit cross-border element.⁴⁷

As will be further discussed, *Rottmann*, *Zambrano* and *McCarthy* offer a great potential for enhancing the protection of fundamental rights in the EU. However, the ECJ’s judgment in *Dereçi* casts some doubts on the Court’s willingness to keep this hope alive.

⁴¹ Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 29 April 2004, 2004/38/EC. Article 3 of Directive 2004/38, entitled ‘Beneficiaries’, provides in paragraph 1:

‘This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.’

⁴² Case C-434/09, op. cit., para. 17.

⁴³ Case C-434/09, op. cit., para. 56.

⁴⁴ Case C-434/09, op. cit., para. 43.

⁴⁵ This follows from para 56 of *McCarthy* that states as follows: ‘It follows that Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States’.

⁴⁶ Case C-135/08, op. cit., para. 42.

⁴⁷ Van den Brink (2012), op. cit.: 279.

III Dereçi: A Step Backwards in the Protection of Fundamental Rights of EU Citizens

The ECJ in *Dereçi* refused the relationship between EU citizenship and EU fundamental rights. In this case, the Austrian authorities refused residence permits for applicants, a third country nationals, who wished to live with their family members – EU citizens who have never exercised their right to free movement.⁴⁸ The referring court asked the ECJ whether such a refusal would have deprived their family members – EU citizens – of the genuine enjoyment of the substance of their EU citizenship rights.⁴⁹ While narrowly interpreting *Zambrano* and *McCarthy*, the ECJ stated that:

‘[t]he criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.’⁵⁰

The ECJ’s approach in *Dereçi* leads to strict separation between EU citizenship and EU fundamental rights.⁵¹ However, neither *Zambrano* nor *McCarthy* established that relying on fundamental rights, in these cases the right to respect for family life, is not enough to fall within the scope of EU law in the absence of a cross-border element. Moreover, it is argued that the wording ‘genuine enjoyment of the substance of the rights’, mentioned by the ECJ implicitly already in *Rottmann* and explicitly in *Zambrano*, implies more than just the right not to be dispossessed of nationality and therefore of EU citizenship and the right not to be expelled from EU territory. Such a limitation would go completely against *Zambrano* and the meaning of the substance of rights of EU citizens.⁵²

At this point, it is interesting to take a closer look on AG Mengozzi’s opinion on *Dereçi* that the ECJ seemed to follow. Reflecting *Zambrano* and *McCarthy*, AG Mengozzi stated that the substance of the rights doctrine ‘does not include the right to respect for family

⁴⁸ Case C-256/11, op. cit., para. 22.

⁴⁹ Case C-256/11, op. cit., para. 33.

⁵⁰ Case C-256/11, op. cit., para. 66.

⁵¹ S. I. Sánchez (2014), op. cit.: 477.

⁵² Van den Brink (2012), op. cit.: 282-283.

life enshrined in Article 7 of the Charter (...) and the Article 8 (1) of the ECHR'.⁵³ With all respect to the learned AG, such a conclusion cannot be accepted. The AG based his argument on Article 6(1) TEU and Article 51(2) of the Charter that both intend to prevent the Charter from extending the scope of EU law or the competences of the EU. However, it is in the present context the concept of EU citizenship that has extended the scope of EU law, not the Charter. Nowadays, EU fundamental rights contained in the Charter apply in cases falling within the field of application of EU law.⁵⁴ The same is true about EU fundamental rights recognized by the Court as general principles of EU law.⁵⁵ As a consequence, EU fundamental rights still apply within the personal and the material scope of EU law extended by EU citizenship.

According to *Dereçi*, the ECJ unfortunately threatens the proclaimed effectiveness of EU citizenship⁵⁶ and maintains the paradoxical situation in which it is possible for an EU citizen to rely on EU fundamental rights 'when exercising an economic right (...) or when national law comes within the scope of the Treaty (...) or when invoking EU secondary legislation (...), but [not] when merely residing in that Member State'.⁵⁷ Reverse discrimination remains reality in the everyday life of EU citizens and this outcome only highlights the failure of the status of EU citizenship to provide equality among EU citizens with regard to the enjoyment of fundamental rights.⁵⁸

IV Fundamental Rights as a Part of Substance of Rights Doctrine: Reasons, Importance and Consequences

In *Dereçi*, the ECJ set out a dangerous precedent depriving EU citizenship from a big part of its substantive meaning. Using this precedent based on the limitation of the substance of rights doctrine could have worrisome effects not only for the fundamental status of EU

⁵³ View of Advocate General Mengozzi in Case C-256/11, op. cit., para. 37.

⁵⁴ See Article 51(1) of the Charter of Fundamental Rights (OJ C 83, 30 March 2010, p. 404) as further interpreted by the ECJ in Case C-617/10, op. cit., para. 19.

⁵⁵ See, to this end, Editorial Comments, 'The scope of application of the general principles of Union law: An ever expanding Union?' 47 *Common Market Law Review*, Issue 6 (2010): 1595; See also Case C-159/90, op. cit., para. 31; Case C-112/00, op. cit., para. 75.

⁵⁶ Case C-256/11, op. cit., para. 67.

⁵⁷ Opinion of Advocate General Sharpston in Case C-34/09, op. cit., para. 84.

⁵⁸ S. I. Sánchez (2014), op. cit.: 470; see also D. Kochenov (2009), op. cit.; A. Tryfonidou (2008), op. cit.

citizens,⁵⁹ but also for the protection of EU fundamental rights. If fundamental rights did not form part of the substance of rights of EU citizens, what otherwise would? It is submitted that there should be no reluctance on the part of the ECJ to apply the formula to other violations of fundamental rights having the effect of depriving EU citizens of the possibility to enjoy the substance of their EU citizenship rights.⁶⁰ Even though the ECJ seems not to leave its undesirable position in its current citizenship related decisions in *O. and S.*, *Ymeraga* and *Alokpa*, the Court will sooner or later have to override *Dereçi* and include EU fundamental rights in the substance of rights doctrine if it is still determined to protect the genuine enjoyment of EU citizenship rights.⁶¹

An extension of the scope of application of EU law by the means of EU citizenship would have the consequence of extending the field of application of EU fundamental rights. The inclusion of EU fundamental rights into the substance of rights doctrine, which does not necessarily collide with the Charter,⁶² would enable an EU citizen to rely on EU fundamental rights in any case, even in the purely internal situations, and to overcome the problem of reverse discrimination.

IV. i. EU Citizenship, EU Fundamental Rights and EU Competences

At this point, it is necessary to examine more in detail the relationship between EU citizenship, EU fundamental rights and EU competences since the desire to promote appropriate protection of fundamental rights must not lead to the usurpation of competence.⁶³ In this regard, AG Sharpston proposes to equate the scope of EU fundamental rights with the ambit of EU competences whether or not such competences have or have not been exercised.⁶⁴

This approach has a lot of arguments in its favour. In the first place, equating the field of EU fundamental rights protection with EU competences would lead to *a uniform scope of protection*, ensuring the application of EU fundamental rights in the public policy areas in

⁵⁹ Case C-184/99, *Rudy Grzelczyk and Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458, para. 31.

⁶⁰ S. I. Sánchez (2014), op. cit.: 478.

⁶¹ Van den Brink (2012), op. cit.: 286.

⁶² S. I. Sánchez (2014), op. cit.: 476.

⁶³ *Ibid.*, para. 162.

⁶⁴ *Ibid.*, para. 163-176.

which the EU has been called to exercise a substantive determination of the material legal framework.⁶⁵ Furthermore, the added value of this option would also lie in an increase in *legal certainty* as a consequence of the clear alignment of the protective functions of the EU with its material scope of competence. *Clarity* would be definitely a citizen-friendly attribute regarding the framework for the protection of individual rights in a system whose contours are sometimes neither obvious nor decipherable.⁶⁶

In order to set a proper balance, the objections against a competence-based approach must be pointed out. Primary objection arises out of the aforementioned *principle of attribution of powers*. Some authors reject a system based on competences simply because the EU is not a federation.⁶⁷ It must be acknowledged that the system of allocation of competences within the EU rests on the ability of empowerment to achieve specific tasks in pursuit of broader objectives while respecting the principle of subsidiarity.⁶⁸ The traditional reluctance of Member States towards a broad interpretation of shared competences of the EU underlines this objection. Under a competence based system, a situation might arise in which the ECJ would be called upon to engage in the determination of balance of interests between individual rights and Member States' interests even though the EU has not exercised its competences in the respected fields.⁶⁹

The protective effort of the ECJ has already pushed the borders of the application of EU fundamental rights to Member States not only to the implementation of EU law or derogation situations, but also to situations in which Member States enjoy the margin of appreciation granted by EU legislative acts.⁷⁰ Nevertheless, the ECJ could not unilaterally decide on the competence-based system since such a step would contradict to the wording of article 51 (1) of the Charter and it would shift the balance of the attribution of competences to the EU.⁷¹ In order to make such a system possible, member states would have to agree to the modification of Treaties.

⁶⁵ Ibid: 472.

⁶⁶ S. I. Sánchez (2014), op. cit.: 472.

⁶⁷ F.G. Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice', *European Law Review*, vol. 26 (2001): 331, 337.

⁶⁸ On the importance of the principle of subsidiarity in the framework of EU citizenship: U. Everling, 'Die Stellung des Bürgers in der Europäischen Gemeinschaft', 33 *Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht* 241 (1992).

⁶⁹ S. I. Sánchez (2014), op. cit.: 473.

⁷⁰ Case C-540/03, *Parliament v. Council*, ECLI:EU:C:2006:429; Joined Cases C-411 & 493/10, *N.S. and others*, ECLI:EU:C:2011:865.

⁷¹ Opinion of Advocate General Sharpston in Case C-34/09, op. cit., paras. 172-173.

To meet this objection, EU fundamental rights should only be applied complementary to national systems of protection of fundamental rights. As a consequence, EU citizens could only rely on EU fundamental rights in the purely national situations regarding substance of their EU citizenship rights when the national protection of fundamental rights would not be sufficiently guaranteed. In this regard, AG Sharpston concludes her opinion in *Zambrano* stating that:

‘Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law.’⁷²

Member states would thus still remain free to apply national standards of protection provided that the level of protection of EU fundamental rights, as well as the primacy, effectiveness and unity of EU law would not be compromised.⁷³

Contribution to better protection of EU citizenship rights cannot be overruled by the potential federalizing effect of a complementary application of EU fundamental rights. Across the Atlantic ocean, the US Bill of Rights serves as the primary source of protection of fundamental rights despite of being initially applicable only to the federal level and despite of guaranteeing only a minimal level of protection.⁷⁴ The Charter of Fundamental Rights is having a great impact on the citizenship-building project, amounting to a true ‘Bill of Rights’ for EU citizens.⁷⁵ Therefore, a development similar to the United States cannot be excluded on the European level. For some Member States, such a development would certainly be undesirable.⁷⁶ On the other hand, ‘(...) from the perspective of (...) human rights, it is indisputably good that the kinds of rights traditionally associated with citizenship are

⁷² Opinion of Advocate General Sharpston in Case C-34/09, op. cit., para. 144.

⁷³ Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, ECLI:EU:C:2013:107, para. 60.

⁷⁴ A. Knook, ‘The Court, the Charter, and the vertical division of powers in the European Union’ 42 *Common Market Law Review*, Issue 2 (2005): 374–376.

⁷⁵ E. Guild, ‘The European Union after the Treaty of Lisbon Fundamental Rights and EU Citizenship’ *Global Jean Monnet/European Community Studies Association World Conference*, 25–26 May 2010, CEPS. Available at http://aei.pitt.edu/15107/1/Guild_Jean_Monnet_speech_e-version.pdf.

⁷⁶ Van den Brink (2012), op. cit.: 288.

increasingly being guaranteed at the international level because, quite simply, it means that more people are likely to enjoy more protection more of the time.⁷⁷

IV. ii. Role of National Judicial Authorities: No Fear, Constitutional Courts

National judicial authorities would be charged with the complementary application of EU fundamental rights. This might arise in some serious issues regarding national supreme and constitutional courts and their persisting reluctance to EU law in general and to EU fundamental rights in particular. The post-Lisbon reality requires, however, national constitutional courts to end their isolation.⁷⁸ The framework of EU fundamental rights created by the Charter and the ECJ's recent case law does not exist in a vacuum.

Now it is time that Member States, and particularly their supreme and constitutional courts, actively participate in this system and contribute to make it work properly.⁷⁹ This step can bring them not only losses, but also benefits in terms of their decisive power. They may be required to occasionally submit a request for a preliminary ruling to Luxembourg and to give a more serious consideration to the case law of the ECJ. On the other hand, cooperation within the Charter would mean regaining a direct voice for constitutional courts, a voice they lost by choosing to remain silent in their isolationist national constitutional structure.⁸⁰

The argument that national and supreme constitutional courts have nothing to be afraid of is nicely illustrated by the division of three particular situations concerning the level or protection of fundamental rights. Sarmiento draws the line between situations characterised by complete determination by EU law, partial determination and derogations from EU fundamental freedoms.⁸¹

In situations where EU has completely determined the way in which member states must act, Charter and general principles of EU law remain the sole relevant fundamental rights instrument applicable, with the exception of the ECHR.⁸² In these situations, Member

⁷⁷ L. Bosniak, 'Citizenship Denationalised', *Indiana Journal of Global Legal Studies* 2 (2000): 492.

⁷⁸ M. Bobek, 'The impact of the European mandate of ordinary courts on the position of constitutional courts' in M. Claes et al. (eds.), *Constitutional Conversations in Europe*, Cambridge, Intersentia (2012).

⁷⁹ D. Sarmiento, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe' 50 *Common Market Law Review*, Issue 5 (2013): 1298.

⁸⁰ M. Bobek (2012), *op. cit.*

⁸¹ D. Sarmiento (2013), *op. cit.*: 1287-1298.

⁸² This follows from case C-399/11, *op. cit.*; see also D. Sarmiento (2013), *op. cit.*: 1289.

States retain powerful ex ante and ex post mechanisms safeguarding the integrity of their essential constitutional traits. If a Member State unsuccessfully asks for an exception to protect a domestic constitutional rule, it will always have the chance to bring a direct action before the ECJ⁸³ on the grounds of violation of the Charter but also of the national identity clause.⁸⁴ Moreover, Member States are obliged to derogate from EU rules based on mutual recognition that contain systematic flaws resulting in a serious breach of fundamental rights.⁸⁵

If EU law determines the action of a Member State only partially, ‘national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.’⁸⁶ In this setting, EU fundamental rights will only come into play in the case of lower national standards. National supreme and constitutional national courts can hardly be surprised or unfamiliar with this outcome. This is exactly what the role of the ECHR in domestic legal systems is.⁸⁷

Third category comprises situations in which member states derogate from fundamental freedoms. In *ERT*, the ECJ launched a well-based jurisprudential line declaring that member states are obliged to comply with EU fundamental rights when justifying derogations to a fundamental freedom.⁸⁸ In *Schmidberger*, *Omega* and *Viking*, the ECJ further specified that the margin involved when justifying derogations to a fundamental freedom is very different from that found pursuant to a regulation or a directive.⁸⁹ Justifications to free movement rules deal with concepts such as ‘public policy’ or ‘public security’⁹⁰ which are autonomous and thus subject to the ECJ’s interpretative jurisdiction. It would be contradictory if the ECJ became empowered to define the scope of ‘public policy’, but not to impose limits to such justification on the grounds of fundamental rights.⁹¹

On the part of national supreme and constitutional courts, it can be argued that they will need to submit a preliminary reference to the ECJ in every case since it is only the ECJ

⁸³ Article 263 (2) TFEU

⁸⁴ Article 4(2) TEU; On the national identity clause see F. X. Millet, ‘L’Union Européenne et l’identité constitutionnelle des États membres’, *LGDJ*, Paris (2013).

⁸⁵ Case C-411/10, op. cit.

⁸⁶ Case C-617/10, op. cit., para. 29.

⁸⁷ D. Sarmiento (2013), op. cit.: 1298-1299.

⁸⁸ Case C-260/89, *ERT v. DEP*, ECLI:EU:C:1991:254, para 42.

⁸⁹ Case C-112/00, op. cit., paras. 79-82; Case C-36/02, *Omega*, ECLI:EU:C:2004:614, paras 32-39; Case C-438/05, *Viking*, ECLI:EU:C:2007:772, paras. 107-111.

⁹⁰ Articles 36, 52, 62 TFEU.

⁹¹ D. Sarmiento (2013), op. cit.: 1297.

that can determine the standards of protection of the Charter. According to Sarmiento, this concern is unfounded. In the first years, national courts will increasingly ask the ECJ on interpretation concerning each specific right. But this situation is only transitory and will stabilize in the course of time, as the ECJ continues to define the scope and content of each provision of the Charter. In a few years' time the national supreme and constitutional courts will be perfectly aware of the standards set by the Charter and will thus not consider themselves to be under a wrongly perceived 'supervision' from the ECJ.⁹²

Principal role of national constitutional courts in Europe lies in the protection of fundamental rights of an individual whose identity is tied to several political communities, both national and European. Therefore, as a cosmopolitan approach to fundamental rights becomes inevitable, the need for constitutional courts to adapt their framework to such context becomes not only convenient, but also an existential concern. The interaction of both national and the EU systems of fundamental rights protection does not result in the exclusive pre-eminence of EU law, but in a balanced compromise in which both systems are taken into account.⁹³

V Conclusion

EU citizenship accounts for a great basis for enhancing the protection of EU fundamental rights. The jurisprudential line of the ECJ inaugurated in *Rottmann*, *Zambrano* and *McCarthy* could have profound consequences for EU fundamental rights architecture since it makes clear that the protection of EU fundamental rights is likely to spread across the nationality divide.

Unfortunately, the ECJ launched out a new episode of its case-law refusing the connection between EU citizenship and EU fundamental rights in *Dereçi*. More recent cases *O. and S.*, *Ymeraga* and *Alokpa* follow this precedent and represent a step backwards in the protection of EU fundamental rights. Reverse discrimination and related lack of legal certainty remains reality in the everyday life of EU citizens. This outcome only highlights the failure of the status of EU citizenship to provide equality among EU citizens with regard to the enjoyment of fundamental rights.

⁹² Ibid.: 1299.

⁹³ Ibid.: 1300.

This article argues that the ECJ should not hesitate to apply the substance of the rights doctrine to violations of fundamental rights having the effect of depriving EU citizens of the possibility to enjoy the substance of their EU citizenship rights. This step would imply the possibility for EU citizens to rely on the complementary application of EU fundamental rights in the purely internal situations regarding substance of their rights as EU citizens. It would also eliminate the problem of reverse discrimination while, at the same time, respecting the framework of EU competences.

Future EU citizenship cases of the ECJ will show its approach to the protection of EU fundamental rights. Decisions following the precedent set out in *Dereçi* could have worrisome effect on both the fundamental status of EU citizens and the protection of EU fundamental rights. If the ECJ is willing to further develop and protect these two crucial concepts of EU law, it will endow the substance of rights doctrine with fundamental rights content and complete the EU citizenship puzzle.

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