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Citation for published version:

Kalaitzaki, K 2021, 'The application of EU Fundamental Rights during the financial crisis: EU citizenship to the rescue?', *European Public Law*, vol. 27, no. 2, pp. 331-354.
<<https://kluwerlawonline.com/JournalArticle/European+Public+Law/27.2/EURO2021015>>

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Published In:

European Public Law

Publisher Rights Statement:

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The Application of EU Fundamental Rights During the Financial Crisis: EU Citizenship to the Rescue?

Katerina KALAITZAKI^{*}

The procedure of challenging austerity measures for EU fundamental rights violations during the financial crisis has revealed a serious ‘review gap’ due to the – often atypical – nature of financial measures and the Charter’s limited application. This article examines a different way to address the ‘review gap’ by focusing on EU citizenship’s role to provide the ‘way into’ EU law, allowing Charter rights to be invoked in a broader scope of application that would encompass austerity measures challenges. Specifically, Article 20 Treaty on the Functioning of the European Union (TFEU) and the ‘substance of rights’ doctrine can provide that opening, when placed into a different jurisdictional test that also involves the ‘operationalisation’ of Article 2 Treaty on European Union (TEU). This ‘inverse applicability of EU law’ test will allow further rights to be judicially incorporated into the list already expressly articulated in Article 20 TFEU, creating a bridge between what are traditionally conceived as ‘purely internal situations’ and establishing the necessary ‘connecting factor’ to EU law.

Keywords: EU Citizenship, Fundamental Rights, Financial Crisis, Effective judicial review, Substance of rights doctrine, Jurisdictional test

1 INTRODUCTION

The recent Eurozone crisis has not only resulted in serious financial and economic consequences challenging the viability of the Economic and Monetary Union’s (EMU) integration mechanisms, it rapidly developed into a constitutional and societal crisis as well.¹ Multiple responses were adopted to cope with the ‘economic dimension’ of the crisis, both within and outside the scope of EU law, including mechanisms of financial assistance for the Member States in need. The financial assistance packages granted therefrom and agreed under the relevant

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¹ Kaarlo Tuori, *The Eurozone Crisis: A Constitutional Analysis* by Kaarlo Tuori and Klaus Tuori (Cambridge: CUP 2014); Agustín J. Menéndez, *The Existential Crisis of the European Union*, 14 Ger. L. J. 453, 455 (2013).

memoranda of understanding (MoUs) were accompanied by strict conditionality based on austerity,² as a way of alleviating the budgetary concerns. Numerous austerity measures were seemingly in contradiction with EU fundamental rights protection giving the crisis a ‘human rights dimension’. These measures were repeatedly challenged before the courts and proceedings still continue in some Member States.³

However, the procedure of challenging austerity measures for EU fundamental rights violations, has proven extremely difficult and sometimes even impossible. In particular, the structural difficulties of the mechanisms used to grant financial assistance and the restricted application of the EU Charter of Fundamental Rights (hereinafter ‘the Charter’) by the courts,⁴ revealed a serious ‘gap’ in effective judicial review that this paper is attempting to fill. In fact, the Court of Justice (hereinafter ‘the Court’) has repeatedly referred to the Charter in its rulings, when preliminary references from national courts reached it, only to conclude in most of them that the Charter cannot be successfully invoked due to a lack of connection between the disputed national measure and EU law, even when such a connection was arguably (at least remotely) identifiable. Consequently, a factual assessment of the alleged violations, examining the level of protection the Charter could offer has rarely occurred, driving citizens to a deadlock state in their legal actions, while adversely affecting the effectiveness of EU law in national proceedings.

While coordinated actions are constantly taken on the Union level to maintain the stability of the Euro, the equally serious challenges to fundamental rights remain largely the structural difficulties of the mechanisms linked to EU law and its foundational values, and must fall by their nature under its scrutiny. It is thus necessary for the Court to ‘instrumentalize’ any means available in an inclusionary way, to address this ‘review gap’, make it easier for citizens to find their ‘way into EU law’ and protect their rights, especially during periods of crises when fundamental rights violations are more perceptible. This necessity is again at the forefront as it was recently decided by the European Council to use the same – often

² Opinion of AG Kokott in Case C-370/12, *Pringle*, ECLI:EU:C:2012:675, paras 142–143; Paul Craig, *Pringle and the Nature of Legal Reasoning*, 21 Maastricht J. Eur. & Comp. L. 205, 208 (2014).

³ *Republic of Cyprus v. Avgousti and others*, Appeals against the decision of the Administrative Court No. 177/18, 75/19, 76/19, 77/19, 79/19, 80/19, 84/19 and 85/19, 10 Apr. 2020, 10 Apr. 2020, ECLI:CY:AD:2020:C122. The Supreme Court of Cyprus overruled the decision of the Administrative Court which previously held that the laws enacted during the financial crisis for salary cuts and pension reductions in the public sector violated Art. 23 of the Constitution, guaranteeing the right to property, and were thus unconstitutional. As part of the assessment, the Supreme Court clarified that ‘Article 17 of the Charter is not even included in the picture to be examined, nor, of course, has it been mentioned in the relevant Laws, nor is there a question of interpretation of EU law in this case’.

⁴ Claire Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts*, 35 Oxford J. Legal Stud. 325, 331 (2015); Pablo M. Rodríguez, *A Missing Piece of European Emergency Law: Legal Certainty and Individuals’ Expectations in the EU Response to the Crisis*, 12 Eur. Const. L. Rev. 265, 270 (2016).

legally and structurally atypical – financial assistance measures such as the European Stability Mechanism (ESM), as a pandemic crisis support in response to the situation with Covid-19.⁵

This article departs from the well-rehearsed discussion of ineffective judicial protection and the need to rethink Article 51 to solve it⁶ and examines a different way to address the ‘review gap’ created by focusing on the role of EU citizenship. Although EU citizenship has not played a substantial role in the financial crisis case-law, the paper asserts that due to its constructive nature, EU citizenship can provide the ‘way into’ EU law, allowing Charter rights to be invoked in a broader scope of application that would then encompass austerity measures challenges. Specifically, Article 20 TFEU and the ‘substance of rights’ doctrine⁷ can provide that opening, to address the problematic gaps of the Charter when placed into a different jurisdictional test that also involves the ‘operationalization’ of Article 2 TEU. This ‘inverse applicability of EU law’ test will allow further rights to be judicially incorporated into the list of rights already expressly articulated in Article 20 TFEU, creating a bridge between what are traditionally conceived as ‘purely internal situations’ and establishing the necessary ‘connecting factor’ to EU law.

Part Two of the paper will discuss the role of fundamental rights in the EU legal order focusing on the effectiveness and application of Charter rights. Part Three will proceed to examine the protection of fundamental rights during the financial crisis, demonstrating the ‘review gap’ created by the restrictive use of Article 51 of the Charter. Part Four will then focus on EU citizenship and the connections established with fundamental rights both by adding new rights to the list in Article 20 TFEU and by linking the status of citizenship with specific Charter provisions. The paper will show that the increasing focus on fundamental rights observed, *albeit* limited thus far to movement, residence and voting dimensions of EU citizenship, can be further developed to address the problematic gaps of the Charter during the financial crisis. Accordingly, Part Five will introduce the ‘inverse applicability of EU law’ test, which aims to expand the core of rights protected under Article 20(2) TFEU towards including the fundamental rights violated during the financial crisis so that they can then be invoked more confidently and more effectively in areas beyond the ‘traditional’ scope of EU law, using the ‘substance of rights’ doctrine.

⁵ <https://www.consilium.europa.eu/en/press/press-releases/2020/04/23/conclusions-by-president-charles-michel-following-the-video-conference-with-members-of-the-european-council-on-23-april-2020/>.

⁶ Anastasia Poulou, *Financial Assistance Conditionality and Human Rights Protection: What Is the Role of the EU Charter of Fundamental Rights?*, 54 C.M.L. Rev. 991 (2017); Filippo Fontanelli, *The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights*, 20 Colum. J. Eur. L. 194 (2014).

⁷ Case C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124, para. 42.

In a constitutionalized Union, fundamental rights of citizens must not be compromised at the expense of the Member States' financial needs without effective access to judicial review of the relevant measures. It is thus necessary to address this gap to ensure effective constitutional governance according to the foundational values of the EU, while at the same time giving more meaning to the unique and crucial construction of EU citizenship.

2 PROTECTING THE INDIVIDUAL UNDER EU LAW

Since the establishment of the European Economic Community, a shift has occurred from viewing citizens predominantly as factors of production within the common market to seeing them as individuals with rights. The intense focus of the legal framework on economic integration during the early years of the Union urged the Court to 'breathe life into the bare bones of the Treaties'⁸ and fill in the gaps in other legal areas. The Court soon recognized fundamental rights as forming an 'integral part of the general principles of law protected by the Court of Justice',⁹ while the subsequent inclusion of fundamental rights as general principles in the Treaty enhanced their authority, role and standing.¹⁰ General principles of EU law, inter alia, assist with judicial interpretations and legal reviews,¹¹ but more importantly, they are also used to fill legal gaps where relevant EU laws are lacking.¹² In the words of Gualco, they constitute an unlimited source of fundamental rights protection 'as far as – thanks to their inner flexibility – their content and their effects can be easily adapted to any situation where the respect of a fundamental right is questioned'.¹³

Regardless of the influence exerted by general principles of EU law in forming EU fundamental rights, a significant role was also played by the 'effects of institutional interaction', which produced, in particular, the Charter of Fundamental Rights.¹⁴

⁸ Armin Cuyvers, *General Principles of EU law*, in *East African Community Law: Institutional, Substantive and Comparative EU Aspects* 219 (Emmanuel Ugirashebuja et al. eds, Brill/Nijhoff 2017).

⁹ Case C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, para. 4; Case C-29/69, *Stauder v. City of Ulm*, ECLI:EU:C:1969:57, para. 7.

¹⁰ Article 6(3) TEU; Cuyvers, *supra* n. 8, at 219.

¹¹ Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy*, ECLI:EU:C:1991:428, para. 30; Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, ECLI:EU:C:1996:79, paras 27–36; Joined Cases C-293/12 and 594/12, *Digital Rights Ireland and Seitlinger and Others*, ECLI:EU:C:2014:238, para. 10.

¹² Case C-555/07, *Küçükdöveci*, ECLI:EU:C:2010:21, para. 21; Case C-294/83, *Les Verts v. Parliament*, ECLI:EU:C:1986:166 para. 12.

¹³ Elena Gualco, *General Principles of EU Law as a Passe-partout Key Within the Constitutional Edifice of the European Union: Are the Benefits Worth the Side Effects?*, Institute of European Law Working Paper No. 5 10 (2016).

¹⁴ Dora Kostakopoulou, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, 68 Mod. L. Rev. 233, 264 (2005); Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 Eur. Const. L. Rev. 375 (2012); George Arestis, *Fundamental Rights in the EU: Three Years After Lisbon*,

There are, however, several restrictions on the field of application of the Charter. Most significantly for present purposes, Article 51(1) severely limits the scope of EU fundamental rights protection, by setting its scope through the concept of ‘implementation of EU law’ when addressed to the Member States. According to this concept, internal measures adopted in the exercise of exclusively domestic competence, should remain unaffected by the Charter, although it continues to be difficult to predict whether a domestic measure will be found to be bound by the Charter.¹⁵ In the famous *Åkerberg Fransson* case, the Court interestingly interpreted ‘implementing Union law’ under Article 51(1) broadly as meaning to ‘fall within the scope of EU law’.¹⁶ That ruling, can be said to adopt an ‘extensive interpretation’, since the Court accepted that a remote connection with EU law was enough to trigger the Charter, stressing the considerable uncertainties that remain in the interpretation of this provision.¹⁷ In contrast, the Court has also on many occasions departed from its broader characterization of ‘implementing Union law’. For example, in *Dano*,¹⁸ the applicability of the Charter was denied, despite explicitly stating that the national rules at issue delivered an objective of Article 7(1)(b) of the Citizens’ Rights Directive,¹⁹ a rather narrow approach to the scope of the Charter.²⁰ However, the Court has also ruled that the Member States are under the general duty of loyal co-operation enshrined in Article 4(3) TEU to observe EU law and the objectives of the Treaties, even when they act outside of the Union, such as when entering into mixed agreements and/or signing bilateral agreements where the Union is not a party.²¹ In other words, the Member States have an obligation to respect the Charter even acting outside the scope of EU law in some circumstances.

The scope of EU fundamental rights is thus interpreted variously, with the Charter being more likely to apply to national measures when a ‘stronger interest of the EU is at stake’.²² Therefore, although the Court predominantly interprets Article 51(1) broadly,

the Luxembourg Perspective, College of Europe Cooperative Research Paper No. 2 2 (2013); Cacilia B. Schneider, *The Evolution of the First Bill of Rights of the European Union and Its Position Within the Constellation of National and Regional Fundamental Rights Protection Systems*, Bridging Europe Working Paper 2 (2014).

¹⁵ Fontanelli, *supra* n. 6.

¹⁶ Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, paras 20–22; See Case C-206/13, *Siragusa*, ECLI:EU:C:2014:126.

¹⁷ Eleanor Spaventa, *The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures*, European Parliament’s PETI Committee, PE 556.930 14 (2016).

¹⁸ Case C-333/13, *Dano*, ECLI:EU:C:2014:2358, para. 87.

¹⁹ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L158/77.

²⁰ Niamh Nic Shuibhne, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, 52 C.M.L. Rev. 889, 915 (2015).

²¹ Case C-45/07, *Commission v. Greece*, ECLI:EU:C:2009:81, paras 16 and 30; Case C-246/07, *Commission v. Sweden*, ECLI:EU:C:2010:203, para. 103.

²² Spaventa, *supra* n. 17, at 5.

the level of discretion available promotes a differentiated understanding of the Charter's scope of application in selected cases. The Charter's 'variable' application is not only a matter of competences,²³ but it also diminishes the effectiveness of EU fundamental rights protection. The vagueness and uncertainty deriving therefrom,²⁴ have been criticized by the European Parliament, stating that citizens' expectations 'go beyond the Charter's strictly legal provisions' and stressing the need to do more to meet citizens' expectations.²⁵ The need to address the problems created by Article 51 and provide a more effective 'way into' EU law protection, is further demonstrated through consideration of the financial crisis challenges, where the 'variable' application of the Charter resulted in a severe judicial 'review gap'.

3 EU FUNDAMENTAL RIGHTS PROTECTION DURING THE FINANCIAL CRISIS: A DEAD-END?

To cope with the crisis on the EU level, emergency mechanisms were created to safeguard financial stability and assist the Member States in need. The two initial funding programmes namely, the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) were established pursuant to Article 122(2) TFEU and as an international agreement within the framework of the Ecofin Council respectively, but were proven to constitute only short-term solutions.²⁶ More importantly, the permanent ESM was concluded and ratified by the Member States as an intergovernmental Treaty (ESMT),²⁷ beyond the EU legal order and activated only if indispensable to safeguard the stability of the Euro.²⁸ The conditionality attached to the relevant financial assistance packages agreed under the MoUs, was based on austerity including reductions in public spending, cuts in wages and pensions and increases in tax revenues.²⁹ Although necessary for the effectiveness of the mechanism,³⁰

²³ Eleanor Spaventa, *Should We 'Harmonize' Fundamental Rights in the EU? Some Reflections About Minimum Standards and Fundamental Rights Protection in the EU Composite Constitutional System*, 55 C. M.L. Rev. 997, 1008 (2018).

²⁴ Fontanelli, *supra* n. 6, at 200.

²⁵ European Parliament resolution of 21 Jan. 2016 on the activities of the Committee of Petitions, 2014/2218(INI), para. 24.

²⁶ Regulation (EU) No. 407/2010 of 11 May 2010 establishing a European Financial Stabilization Mechanism OJ L118/1; Council Document 9614/10 of 10 May 2010 regarding the Decision of the Representatives of the Governments of the Euro Area Member States Meeting Within the Council of the European Union 1–4 (2010); Non-eurozone programmes were also granted on the basis of Art. 143 TFEU.

²⁷ Treaty Establishing the European Stability Mechanism (ESM) (2012) D/12/3, Recitals 1 and 5.

²⁸ Article 136(3) TFEU.

²⁹ Sotiria Theodoropoulou & Andrew Watt, *Withdrawal Symptoms: An Assessment of the Austerity Packages in Europe*, European Trade Union Institute Working papers No. 2/2011 11 (2011).

³⁰ Hans Gilliams, *Stress Testing the Regulator: Review of State Aid to Financial Institutions After the Collapse of Lehman*, 36 E.L. Rev. 3, 5–10 (2011); Hernan R. B. Avalos, *Moral Hazard in the Euro-Zone*, MPRA Papers No. 61103 2 (2012); Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, paras 69 and 111.

conditionality was highly criticized and austerity measures were repeatedly brought before the courts for violations of inter alia the right to an effective remedy and to a fair trial,³¹ the right to property,³² and the principles of equal treatment and non-discrimination.³³

However, the differentiation and complexity of the financial assistance mechanisms used rendered the judicial challenges an arduous process.³⁴ Especially for present purposes, the 'variable' application of the Charter widened the gap in effective protection of fundamental rights.³⁵ In fact, the Court has repeatedly denied the application of the Charter in its rulings both against the acts of EU institutions and of the Member States, due to the alleged lack of connection between the disputed measure and EU law, preventing any examination of the merits of the cases.

This was primarily the case for claims against the Member States, which are under a duty to implement the agreed conditionality into national law, to restore stability and return to sustainable growth.³⁶ The Court in *Pringle*,³⁷ and later in *Sindicatos dos Bancários*,³⁸ ruled that Charter provisions do not apply to the implementation of the MoUs for the provision of stability support under the ESM, since the Member States are not implementing Union law within the meaning of Article 51(1) of the Charter.³⁹ The *Pringle* ruling had raised intense debate, given the Court's own approach in previous rulings, confirming the obligation of EU Member States, to respect the rights of the Charter even when acting outside the scope of EU law.⁴⁰ Further reluctance was manifested, in *Sindicato Nacional*,⁴¹ where the Court, narrowly ruled that it had no jurisdiction to determine the request for preliminary ruling, since no link with EU law was found.⁴² Although

³¹ Article 47 of the Charter: Case C-258/14, *Florescu and Others*, ECLI:EU:C:2017:448.

³² Article 17 of the Charter: Case C-134/12, *Corpul Național al Polițiștilor*, ECLI:EU:C:2012:288; Case C-434/11, *Corpul Național al Polițiștilor*, ECLI:EU:C:2011:830; Case C-258/14, *Florescu and Others*.

³³ Articles 20 and 21 of the Charter: Case C-128/12, *Sindicato dos Bancários do Norte and Others*, ECLI:EU:C:2013:149; Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins*, ECLI:EU:C:2014:2036.

³⁴ Kilpatrick, *supra* n. 4, at 331; Nicholas Lusiani & Ignacio Saiz, *Safeguarding Human Rights in Times of Economic Crisis*, Council of Europe Commissioner for Human Rights (2014), <https://rm.coe.int/safeguarding-human-rights-in-times-of-economic-crisis-issue-paper-publ/1680908dfa> (accessed 1 Sep. 2020).

³⁵ Rodríguez, *supra* n. 4, at 270.

³⁶ https://www.esm.europa.eu/sites/default/files/esm_ffa_cyprus_publication_version_final.pdf (accessed 5 Sep. 2020).

³⁷ Case C-370/12, *Pringle*, para. 178.

³⁸ Case C-128/12, *Sindicato dos Bancários do Norte and Others*.

³⁹ Stanislas Adam & Francisco M. Parras, *The European Stability Mechanism Through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle*, 38 E.L. Rev. 848, 850–855 (2013); Case C-370/12, *Pringle*, para. 180.

⁴⁰ Case C-45/07, *Commission v. Greece*; Case C-246/07, *Commission v. Sweden*.

⁴¹ Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins*.

⁴² See Case C-134/12, *Corpul Național al Polițiștilor*.

the Portuguese Government seemed to ‘have gone further than its commitments in the MoU’,⁴³ a tight link with EU law is evident since the challenged national legislation explicitly refers to the Council Decision on granting financial assistance.⁴⁴ The Court was straightforwardly asked about the validity and interpretation of specific national provisions in *Florescu*,⁴⁵ where it had for the first time indicated that since the MoU is an act of the EU institutions, the impugned national legislation must be regarded as implementing that law according to Article 51(1), despite the amount of discretion exercised when implementing the measures.⁴⁶ Although, in *Florescu* the Court appears to reconnect with its well-established case-law on the Charter’s scope of application, the ruling only pertains to the balance-of-payments assistance mechanism.⁴⁷ Therefore the ‘review gap’ still remains for measures deriving from other financial assistance mechanisms, especially the ESM.

The application of the Charter has been more successfully triggered in claims against the acts of EU institutions tasked with negotiating the MoUs and overseeing the austerity plan.⁴⁸ Nevertheless, although hardly any doubt existed on the obligations of EU institutions under the Charter, even when acting beyond the EU legal framework,⁴⁹ the Court initially evaded explicit reference to it. In her view in *Pringle*, AG Kokott emphasized that the Commission remains a Union institution and is bound by the full extent of EU law, even within the framework of the ESM.⁵⁰ Likewise, the Court in *Ledra Advertising* ruled that the Commission retains its role as guardian of the Treaties within the framework of the ESMT, and should refrain from signing a MoU whose consistency with EU law and the Charter is doubtful.⁵¹ *Ledra* was the first ruling of the Court that expressly pronounced the obligations of EU institutions under the Charter within the ESM context, responding to one of the questions left unresolved since *Pringle*. The Court then proceeded to an examination of the preconditions for establishing non-contractual

⁴³ Catherine Barnard, *The Charter in Time of Crisis: A Case Study of Dismissal*, in *Resocialising Europe in a Time of Crisis* 262 (Nicola Countouris & Mark Freedland eds, CUP 2013).

⁴⁴ Kilpatrick, *supra* n. 4, at 339; Arts 17, 21 and 68 of Law No. 64-B/2011 of 30 Dec. 2011, the Lei do Orçamento do Estado para. 2012.

⁴⁵ Case C-258/14, *Florescu and Others*.

⁴⁶ Case C-258/14, *Florescu and Others*, para. 48.

⁴⁷ The case concerns the programmes granting assistance to Romania following Council Decision 2009/458/EC (2009–11).

⁴⁸ Article 13(3) of the ESM Treaty states that ‘the Board of Governors shall entrust the European Commission – in liaison with the ECB ... with the task of negotiating, with the ESM Member concerned, a memorandum of understanding ...’.

⁴⁹ Poulou, *supra* n. 6, at 1008.

⁵⁰ Opinion of AG Kokott in Case C-370/12, *Pringle*, ECLI:EU:C:2012:675, para. 176; Committee on Constitutional Affairs, *Opinion*, 2013/2277(INI), para. 11.

⁵¹ Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising v. Commission and ECB*, ECLI:EU:C:2016:701, para. 59.

liability of the Commission.⁵² Although the case was dismissed on the facts, it constituted one of the few judgments where the Court proceeded to consider the Charter on the merits of the case within the context of the crisis, against acts of EU institutions.

In contrast, EU citizens were largely deprived of the ability to proceed in litigation to the factual assessment of the disputed measures against the Member States due to the structural difficulties caused by Article 51(1). Even in cases where the disputed national measures did not make explicit reference to EU law, such as those deriving from the ESM, a more remote link to EU law could be established, if the Charter was instrumentalized in an inclusive rather than exclusive way, following previous rulings.⁵³ The intense involvement of EU institutions throughout the negotiation, conclusion and overseeing the austerity plans,⁵⁴ as well as the references of the ESMT to EU law,⁵⁵ further attest to the fact that this line of challenges must fall by its nature under the protection of EU law.

Interestingly, however, the legal barrier imposed by Article 51(1) was recently overcome by the Court, in a different context, where it managed to establish the necessary connection of the impugned national measure with EU law using other primary law provisions. Specifically, the referring court in *Associação Sindical dos Juízes Portugueses*⁵⁶ questioned the compatibility of austerity measures imposed on the judiciary with the principle of judicial independence. The Court of Justice sought to fill the applicability gap of the Charter by first invoking the principle of effective judicial protection under Article 19(1) TEU, disengaging the principle from Article 51(1) and clarifying that its material scope goes beyond that of the Charter. Following the ‘opening of the door to EU law’ through Article 19(1) TEU, the Court then re-engaged the importance of maintaining judicial independence as guaranteed in Article 47 of the Charter, ‘which refers to the access to an “independent” tribunal as one of the requirements linked to the fundamental right to an effective remedy’.⁵⁷ On the one hand, this judicial approach constitutes a

⁵² The three conditions: unlawfulness of the conduct of the EU institution, existence of damages and existence of a causal link between the institution’s conduct and the harm caused.

⁵³ Case C-45/07, *Commission v. Greece*; Case C-246/07, *Commission v. Sweden*.

⁵⁴ Gianni Lo Schiavo, *The ESM Treaty: A New Form of Intergovernmental Differentiated Integration to the Benefit of the EMU?*, *Evolving Europe: Voices of the Future* 19 (2013), https://www.uaces.org/archive/papers/abstract.php?paper_id=627 (accessed 5 May 2020).

⁵⁵ Recital 4 of the Preamble of the ESMT states that the EU framework should be observed by the ESM members especially ‘the economic governance rules of the European Union’ set out in the TFEU, despite the fact that the ESMT is concluded outside the Union legal order; Gunnar Beck, *The Court of Justice, Legal Reasoning, and the Pringle Case – Law as the Continuation of Politics by Other Means*, 39 E.L. Rev. 234, 240 (2014); Alicia Hinarejos, *The Court of Justice of the EU and the Legality of the European Stability Mechanism*, 72 Cambridge L. J. 237 (2013).

⁵⁶ Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117; See Case C-49/18, *Escribano Vindel*, EU:C:2019:106.

⁵⁷ Case C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 41.

notable demonstration of the Charter's weaknesses, forcing the Court to resort to concepts from the pre-constitutionalization years, where the protection of rights solely depended on general principles. Observing it from a different perspective though, the Court went beyond merely interpreting Article 51(1) differently and affirmed that the review gap created by the Charter can be addressed through the exploitation of other Treaty provisions as well.

The restricted applicability of the Charter during the financial crisis cast serious doubts on its effectiveness since fundamental rights protection seemed to be more easily restricted than invoked, due to the limited routes available to access justice.⁵⁸ Read in conjunction with *Ledra*, the *Florescu* ruling suggests the Court's new readiness to address this deficiency and narrow down the 'applicability gap';⁵⁹ yet the ruling is heavily attached to its factual circumstances, which could prevent its application by analogy to other financial assistance mechanisms. On the contrary, the Court in *Associação Sindical dos Juizes Portugueses* gave the green light to assessing new legal paths towards opening the door to EU law and subsequently to the Charter by exploiting further Treaty provisions such as Article 19 TEU. This article argues that to provide more effective protection of EU fundamental rights during crises, such a sustainable and inclusive connection with the scope of the Charter can be established through EU citizenship and the substance of rights doctrine, when developed through the elaboration of a new jurisdictional test.

4 EU CITIZENSHIP TO THE RESCUE?

The status of EU citizenship constituted a decisive step towards a constitutionalized Union⁶⁰ and since its formal incorporation in the Maastricht Treaty it has played a great role in deepening European integration and broadening the potential impact on EU fundamental rights.⁶¹ EU citizenship demonstrated a shift away from 'economic and market citizens' to a social and political dimension,⁶² establishing protection against discrimination based on nationality and a free-standing right to

⁵⁸ René Repasi, *Judicial Protection Against Austerity Measures in the Euro Area: Ledra and Mallis*, 54 C.M.L. Rev. 1123 (2017); Dalila Ghailani, *Violations of Fundamental Rights: Collateral Damage of the Eurozone Crisis*, in *Social Policy in the European Union: State of Play* 158 (Bart Vanhercke, David Natali & Denis Bouget eds, ETUI 2017).

⁵⁹ Menelaos Markaris & Paul Dermine, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu*, 55 C.M.L. Rev. 643, 670 (2018).

⁶⁰ Antje Wiener, *The Constructive Potential of Citizenship: Building European Union*, 27 Pol'y Pol. 271 (1999).

⁶¹ Rebecca Welge, *Union Citizenship as Demoi-cratic Institution: Increasing the EU's Subjective Legitimacy Through Supranational Citizenship*, 22 J. Eur. Pub. Pol'y 56 (2015); Theodora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester University Press 2010).

⁶² Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, ECLI:EU:C:1998:217; Siofra O'Leary, *Putting Flesh on the Bones of European Union Citizenship*, 24 E.L. Rev. 68 (1999); Dmitry Kochenov, *Ius*

move and reside freely.⁶³ Moreover, despite the criticism of its scope been largely based on the logic of economic growth,⁶⁴ the Court extended the Treaties protection to an increasing number of ‘citizenship cases in which the element of true movement is either barely discernible or non-existent’,⁶⁵ while the *ratione materiae* of EU law was further stretched to cover virtually hypothetical cross-border situations.⁶⁶ Significantly for present purposes, the Court has also managed to overcome the strict requirement for a cross-border element by creating independent, Article 20-based rights, returned to in section 4.2 below, which have refined the material and personal scope of EU citizenship to allow more cases to fall within the Court’s jurisdiction.⁶⁷

Nevertheless, EU citizenship has not played any substantive role in the austerity measures case-law.⁶⁸ This is primarily due to the limited list of rights explicitly attached to Article 20 TFEU which, although non-exhaustive, falls short of establishing the full range of modern citizenship rights, including civil, political and social rights.⁶⁹ In other words, the crisis has further affirmed the exclusionary dynamics at the core of Union citizenship. However, despite the futility of engaging Union citizenship to protect fundamental rights during the crisis, the empowerment of EU citizenship as a fundamental status and the reinforcement of the protection of EU fundamental rights have been two closely connected phenomena throughout the integration process more generally.⁷⁰ This close inter-

Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights, 15 Colum. J. Eur. L. 169 (2009).

⁶³ Case C-456/02, *Trojani*, ECLI:EU:C:2004:488; Case C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458; Case C-413/99, *Baumbast and R*, ECLI:EU:C:2002:493, para. 83; Case C-192/05, *Tas-Hagen and Tas*, ECLI:EU:C:2006:676; Opinion of AG Kokott in Case C-192/05, *Tas-Hagen and Tas*, ECLI:EU:C:2006:223, para. 33.

⁶⁴ Niamh Nic Shuibhne, *The Resilience of EU Market Citizenship*, 47 C.M.L. Rev. 1597, 1621 (2010); Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 C.M.L. Rev. 945, 971 (2002); Sionaidh Douglas-Scott, *In Search of Union Citizenship*, 18 Y.B. Eur. L. 29, 30–40 (1998).

⁶⁵ Opinion of AG Sharpston, in Case C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2010:560; Hanneke van Eijken & Sybe A. de Vries, *A New Route Into the Promised Land? Being a European Citizen After Ruiz Zambrano*, 36 E.L. Rev. 704 (2011); Alina Tryfonidou, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens’ Europe*, 35 Legal Issues Econ. Integration 43 (2008); See Case C-353/06, *Grunkin and Paul*, ECLI:EU:C:2008:559.

⁶⁶ Case C-200/02, *Zhu and Chen*, ECLI:EU:C:2004:639, para. 45; Case C-403/03, *Schempp*, ECLI:EU:C:2005:446, para. 47; Case C-148/02, *García Avello*, ECLI:EU:C:2003:539, para. 45; Spaventa, *supra* n. 17, at 21.

⁶⁷ Charlotte O’Brien, ‘Hand-to-mouth’ Citizenship: Decision Time for the UK Supreme Court on the Substance of *Zambrano* Rights, *EU Citizenship and Equal Treatment*, 38 J. Soc. Welfare & Family L. 228, 229 (2016); Case C-115/08, *Rottmann*, ECLI:EU:C:2010:104; Case C-34/09, *Ruiz Zambrano*.

⁶⁸ Agustín J. Menéndez & Espen D. H. Olsen, *Challenging European Citizenship; Ideas and Realities in Contrast* 114 (Palgrave Macmillan 2020).

⁶⁹ Wiener, *supra* n. 60, at 288; European Parliament, Bindi Report on Union Citizenship, Doc. A 3–0139/91 (23 May 1991); Carlos Closa, *Citizenship of the Union and Nationality of Member States*, 32 C. M.L. Rev. 487, 490 (1995).

⁷⁰ Sara Iglesias Sánchez, *Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?*, 20 E.L. Rev. 464, 465 (2014); Siofra O’Leary, *The Relationship Between*

relation and co-dependence is often reflected in the Court's case-law, since in many of its citizenship rulings it seemed to be guided by a fundamental rights discourse in all but name.⁷¹ According to the argument in this article, the close relationship between the two concepts has scope for much broader reach, which can arguably help addressing the 'review gap' identified during the financial crisis. This connection has become more attainable due to the fundamental rights dimension increasingly attributed to citizenship case-law. Prominent examples of this approach can be found within the sphere of Article 21 TFEU, where a link with fundamental rights was established based on economic freedoms inter alia for family reunification (section 4.1), as well as in the Article 20 TFEU 'substance of rights' doctrine cases (section 4.2).

4.1 THE INTERSECTION OF FREE MOVEMENT AND FUNDAMENTAL RIGHTS

Over the years, EU citizenship has substantially broadened the personal and material scope of fundamental economic freedoms.⁷² Within the sphere of eliminating obstacles to the exercise of the fundamental freedoms guaranteed by the Treaties, the Court has on several occasions emphasized the importance of ensuring the protection of the family life, attributing a fundamental rights dimension to citizenship case-law regarding family reunification rights.

The right to respect for family life, guaranteed in Article 7 of the Charter, but recognized distinctly as a general principle of EU law, made its first 'controversial imprint' in the *Carpenter* case.⁷³ The Court had specifically construed the refusal to grant a residence permit to an EU citizen's spouse providing services in another Member State as a barrier to movement, which then had to be justified in the light of fundamental rights, principally the right to respect for family life.⁷⁴ The link between family life and the conditions under which EU citizens exercised their free movement rights was maintained in subsequent case-law, *albeit* increasingly in

Community Citizenship and the Protection of Fundamental Rights in Community Law, 32 C.M.L. Rev. 519 (1995).

⁷¹ Opinion of AG Jacobs in Case C-168/91, *Konstantinidis*, ECLI:EU:C:1992:504; Opinion of AG Jacobs in Case C-148/02, *García Avello*, ECLI:EU:C:2003:311, para. 27; Opinion of AG Tizzano in Case C-200/02, *Zhu and Chen*, ECLI:EU:C:2004:307, para. 94; Opinion of AG Geelhoed in Case C-413/99, *Baumbast*, ECLI:EU:C:2001:385, para. 58.

⁷² Siofra O'Leary, *Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer Law International 1998); Dimitry Kochenov, *A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe*, 18 Colum. J. Eur. L. 56 (2011).

⁷³ Case C-60/00, *Carpenter*, ECLI:EU:C:2002:434, para. 41; Niamh Nic Shuibhne, *(Some of) The Kids Are All Right*, 49 C.M.L. Rev. 349, 373 (2012).

⁷⁴ Eleanor Spaventa, *Family Rights for Circular Migrants and Frontier Workers: O and B, and S and G*, 52 C. M.L. Rev. 753, 767 (2015).

the safer normative terrain of Union citizenship.⁷⁵ The Court insisted that ‘if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed’.⁷⁶

This approach established the ‘centrality of the right to family life’ namely, that the protection of the citizen’s family was a value in itself and not merely instrumental to the achievement of internal market objectives.⁷⁷ Although this ‘fundamental-rights view’ of family rights is by no means an all-embracing approach of the Court,⁷⁸ it demonstrates a clear link between the concept of EU citizenship and fundamental rights in the specific EU law area of free movement,⁷⁹ which is a crucial starting point towards the idea that EU citizenship can constitute the ‘way into’ EU law for the protection of fundamental rights in the framework of financial crisis mechanisms.

Additionally, Article 21 TFEU constituted the idea that EU citizenship can constitute the ‘way into’ EU law for the protection of the citizen’s family. Particularly, the Court in *Petruhhin* stated that Article 21 TFEU constituted the idea that EU citizenship can constitute the ‘way into’ EU law for the protection of the citizen’s family. Particularly, the Court in *Petruhhin* stated that the ‘decision of a Member State to extradite a Union citizen ... comes within the scope of Article 18 TFEU and Article 21 TFEU and, therefore, of EU law for the purposes of Article 51 (1) of the Charter’.⁸⁰ Thus, Member States were bound to respect the rights guaranteed by the Charter for the purposes of extradition.⁸¹ Also important is the fact that the Court engaged in an analysis of Article 18 TFEU, determining its scope by reference to Article 21 TFEU and concluding that the alleged difference in treatment gave rise to a restriction of movement, within the meaning of Article 21 TFEU.⁸²

The Court in *Delvigne* went further to recognize a free-standing right to vote in the European Parliament elections, attached to EU citizenship and departed from free movement or non-discrimination rights.⁸³ Importantly, the judicial

⁷⁵ Nic Shuibhne, *supra* n. 73, at 374; Case C-459/99, *MRAX*, ECLI:EU:C:2002:461; Case C-413/99, *Baumbast and R*; Case C-127/08, *Metock and Others*, ECLI:EU:C:2008:449.

⁷⁶ Case C-127/08, *Metock and Others*, para. 62.

⁷⁷ Spaventa, *supra* n. 74, at 767.

⁷⁸ Case C-86/12, *Alopa and Moudoulou*, ECLI:EU:C:2013:645; Case C-457/12, *S. and G.*, ECLI:EU:C:2014:136.

⁷⁹ See Case C-291/05, *Eind*, ECLI:EU:C:2007:771; Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*, ECLI:EU:C:1992:296; Case C-456/12, *O.*, ECLI:EU:C:2014:135, paras 46–50; Case C-673/16, *Coman and Others*, ECLI:EU:C:2018:385.

⁸⁰ Case C-182/15, *Petruhhin*, ECLI:EU:C:2016:630, para. 52.

⁸¹ *Ibid.*, para. 60; Case C-247/17, *Raugevicius*, ECLI:EU:C:2018:898, para. 49.

⁸² Stephen Coutts, *From Union Citizens to National Subjects: Piscioti*, 56 C.M.L. Rev. 521, 528 (2019); Case C-182/15, *Petruhhin*, para. 33.

⁸³ Stephen Coutts, *Delvigne: A Multi-levelled Political Citizenship*, 42 E.L. Rev. 867, 874 (2017).

approach in *Delvigne*, demonstrates some resemblance with the approach in *Julzes Portugueses* discussed above.⁸⁴ More particularly, the Court in *Delvigne*, had similarly constructed a protective framework, without engaging the Treaty statements on citizenship but rather by drawing together Treaty provisions on representative democracy (Article 14(3) TFEU) to assert jurisdiction and hence to protect the right to vote under the Charter (Article 39(2)). The case constitutes another crucial demonstration bringing the Charter into the scope of citizenship law by harnessing different primary law provisions other than the Charter and/or the citizenship Treaty provisions.

These crucial developments have not only reaffirmed EU citizenship's dynamic and evolving nature but have also contributed towards more effective protection of fundamental rights. The 'substance of rights' cases have also contributed towards this aim and can arguably constitute the key to addressing the deficiencies of the Charter and altering the architecture of fundamental rights application.

4.2 SUBSTANCE OF RIGHTS DOCTRINE AND ARTICLE 20 TFEU AS A SUFFICIENT LINK TO EU LAW

In a far-reaching demonstration of judicial activism in *Ruiz Zambrano*, the Court developed the 'substance of rights' doctrine, marking a process of re-delimiting the scope of EU law while granting more value to EU citizenship and the rights attached thereto. In answering the question of whether Article 20 TFEU has an autonomous character and serves as a sufficient connection with EU law, the Court developed a jurisdictional test, whereby national measures are precluded if they deprive EU citizens of the genuine enjoyment of the substance of EU citizenship rights.⁸⁵ Consequently, third-country nationals obtain a derived right to reside in their children's Member State of nationality under Article 20 TFEU when the conditions are met.⁸⁶ Just as it did earlier in *Rottmann*, the Court substantially focused on the idea that decisions taken by the Member States and the EU should leave the substantive core of EU citizenship rights intact.⁸⁷ Without opening the gates to an unconditional application of EU citizenship rules to all purely internal situations,⁸⁸ the ruling completely departed from the traditional

⁸⁴ Case C-650/13, *Delvigne*, ECLI:EU:C:2015:648.

⁸⁵ Case C-34/09, *Ruiz Zambrano*, para. 42.

⁸⁶ *Ibid.*, para. 45.

⁸⁷ *Ibid.*; Case C-115/08, *Rottmann*.

⁸⁸ Peter Van Elsuwege & Dimitry Kochenov, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, 13 Eur. J. Migration & L. 443, 448 (2011).

cross-border concept and interpreted Article 20 TFEU as constituting a sufficient link to EU law in itself.

The Court's reasoning following the establishment of the doctrine were greatly focused on respect for the division and balance of competences.⁸⁹ In an initial attempt to delimit the reach of the doctrine, the Court emphasized that not every limitation of a right will trigger the protection of the Treaty. If no cross-border situation occurs, only a deprivation of the substance of rights will trigger EU law.⁹⁰ A mere 'impediment' of the right or 'purely hypothetical prospects of [a] right being obstructed' do not establish a sufficient link with EU law.⁹¹ Moreover, in the context of family reunification, the 'deprivation' of the substance of rights was defined as referring to situations in which the Union citizen not only has to leave the territory of the Member State but the EU territory as a whole if residence rights are not conferred by their home State on the family member(s) on whom they are dependent.⁹² Despite the triggering of the doctrine depending upon the seriousness of the restraint to the substance EU citizenship rights, rather than, for example, the age of an EU citizen, a high degree of dependency on (or by) the concerned EU citizen increasingly became an integral part of the substantive assessment under the doctrine.⁹³ Dependency based on 'merely' economic reasons or the desire to keep a family together will not suffice.⁹⁴ Consequently, it has proven more difficult for adults to meet the dependency requirement and benefit from the doctrine.⁹⁵

More recently, however, the Court has highlighted the need to take Charter rights into consideration, particularly Article 24(2) in conjunction with Article 7, inter alia when assessing the degree and nature of dependency existing. This pioneering turn of the Court towards a more citizen-friendly Union seems at odds with the ruling in *Dereci*, which indicated that there is room for assessment of Charter provisions only 'when the situation is covered by EU law',⁹⁶ emphasizing the restrictive provisions (mainly Article 51) therein. Confirming the reasoning in *Rendón Marín* and *CS*,⁹⁷ the Court stated in *Chavez-Vilchez and Others* that as part

⁸⁹ Article 5 TEU; Tom Royston & Charlotte O'Brien, *Breathing and Not-Incarcerated, Estranged Fathers do not Automatically Cancel Out Mothers' Zambrano Rights*, 24 J. Soc. Sec. L. D62-D64 (2017).

⁹⁰ Case C-434/09, *McCarthy*, ECLI:EU:C:2011:277, para. 56.

⁹¹ Case C-40/11, *Iida*, ECLI:EU:C:2012:691, para. 77; Koen Lenaerts, 'Civis Europeus Sum': From the Cross-border Link to the Status of Citizen of the Union, 3 Online Journal on free movement of workers within the European Union 6, 8 (2011).

⁹² Case C-256/11, *Dereci and Others*, ECLI:EU:C:2011:734, para. 66.

⁹³ See Case C-87/12, *Ymeraga and Ymeraga-Tafarshiku*, ECLI:EU:C:2013:291; Case C-86/12, *Alokpa and Moudoulou*; Case C-333/13, *Dano*, para. 80.

⁹⁴ Case C-256/11, *Dereci and Others*, para. 68.

⁹⁵ Case C-82/16, *K.A. and Others (Regroupement familial en Belgique)*, ECLI:EU:C:2018:308.

⁹⁶ *Ibid.*, paras 70–72.

⁹⁷ Case C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675; Case C-304/14, *CS*, ECLI:EU:C:2016:674; Päivi J. Neuvonen, *EU Citizenship and Its 'Very Specific' Essence: Rendón Marín and CS*, 54 C.M.L. Rev. 1201 (2017).

of assessing the existence of a relationship of dependency, the competent authorities must take account of the best interests of the child and the right to respect for family life under Articles 7 and 24(2) of the Charter.⁹⁸ The substance of rights doctrine has thus changed the understanding of what falls within the scope of Union law. The *Tjebbes* judgment is a further demonstration of the more intensive focus on fundamental rights.⁹⁹ As in *Chavez-Vilchez*, the Court firmly referred to the Charter as being a vital part of the proportionality examination that must be conducted by the competent national authorities.¹⁰⁰ The Court also held that the unity of the nationality of the family must take into account ‘the best interests of the child’, suggesting that depriving a minor of their EU citizenship for the sake of the ‘unity of the family’s nationality’ does not always equate with such interests.¹⁰¹

The judicially developed substance of rights doctrine is of great significance, not only concerning its numerous implications but also in relation to its prospects for further development. Crucially, the doctrine grants more meaning to the concept of EU citizenship and establishes pivotal connections with EU fundamental rights in two critical ways. First, besides expanding the scope of the ‘written’ rights attached to EU citizenship, the substance of rights doctrine has expanded the non-exhaustive list further. The ‘inter alia clause’ in Article 20(2) TFEU suggests that citizens can enjoy rights beyond those expressly stated therein, not only through the procedure enshrined under Article 25 TFEU but also through the judicial incorporation of unwritten rights.¹⁰² Following the substance of rights doctrine, the list was expanded to include new rights, contrary to the allegation in *McCarthy* that the *Ruiz Zambrano* approach was only applicable to the ‘rights listed in Article 20(2) TFEU’.¹⁰³ In particular, it has given EU citizens the ability to benefit from equality in a wholly internal situation that is now nevertheless deemed to be within the scope of EU law;¹⁰⁴ in this sense, the Court has acknowledged the construction of a ‘right to stay within the territory of the European Union’ not expressly listed in Article 20(2) TFEU.¹⁰⁵ The extent

⁹⁸ Case C-133/15, *Chavez-Vilchez and Others*, ECLI:EU:C:2017:354, para. 70; Royston & O’Brien, *supra* n. 89.

⁹⁹ Case C-221/17, *Tjebbes and others*, ECLI:EU:C:2019:189.

¹⁰⁰ *Ibid.*, para. 45.

¹⁰¹ *Ibid.*, para. 47; Hanneke van Eijken, *Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights*, 15 Eur. Const. L. Rev. 714 (2019).

¹⁰² Dimitry Kochenov, *On Tiles and Pillars: EU Citizenship as the Federal Denominator*, in *EU Citizenship and Federalism: The Role of Rights 25* (Dimitry Kochenov ed., CUP 2017).

¹⁰³ Lenaerts, *supra* n. 91, at 9.

¹⁰⁴ Case C-300/04, *Eman and Sevinger*, ECLI:EU:C:2006:545, para. 61; Leonard M. Besselink, *Annotation of Spain v. UK, Eman en Sevinger, and ECtHR Case Sevinger and Eman v. The Netherlands*, 45 C.M.L. Rev. 787 (2008).

¹⁰⁵ Case C-133/15, *Chavez-Vilchez and Others*, para. 41; Niamh Nic Shuibhne, *The ‘Territory of the Union’ in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives*, 38 Y.B Eur. L. 267, 282 (2019).

of Union citizenship rights is thus much broader than what is defined in a textual sense.¹⁰⁶

Secondly, the judicially developed doctrine constituted the leeway through which Charter rights could be used by the Court, changing the understanding around the elements of EU citizenship and their scope. Specifically, the Court emphasized the need to take into consideration Articles 7 and 24 of the Charter when determining the existence of a relationship of dependency within the sphere of the substance of rights analysis under Article 20 TFEU.¹⁰⁷ In this way, the Court opened the door even further towards establishing a connection with EU fundamental rights.

Despite its significance, however, it is important to keep the test within the limits of an acceptable federal and legal balance within the EU. A *de facto* loss of a citizenship right that cannot be remedied at the national level is required, which rightly reduces the consequences of the test without being too intrusive.¹⁰⁸ Therefore, the question boils down to whether these developments can have profound consequences for fundamental rights protection in the financial crisis case-law as well, to fill the ‘review gap’ left by the Charter sufficiently while, at the same time, complying with the division of Union and Member State competences.

5 THE WAY FORWARD: THE ‘INVERSE APPLICABILITY OF EU LAW’ TEST

The analysis of the judgments above has revealed a growing consideration and protection of fundamental rights by the Court in different dimensions of EU citizenship law, culminating in the substance of rights doctrine. The common ground of these developments is that the Court managed to overcome the structural difficulties of Article 51(1) by asserting jurisdiction under Articles 20 and 21 TFEU to bring the matter into EU law, thereby opening the door to consideration of Charter rights. Although limited thus far to movement, residence and voting dimensions of EU citizenship, this article’s core argument is that Article 20 TFEU and the substance of rights doctrine can similarly provide a ‘way into’ EU law for financial crisis measures review.

The proposed way forward, namely the ‘inverse applicability of EU law’, brings these developments a step further by proposing a jurisdictional test which will establish a connection between the core of the rights protected under Article 20(2)

¹⁰⁶ Kochenov, *supra* n. 102, at 26.

¹⁰⁷ Case C-133/15, *Chavez-Vilchez and Others*, para. 70.

¹⁰⁸ See Cyril Ritter, *Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234*, 31 E. L. Rev. 690 (2006); Anja Wiesbrock, *Disentangling the ‘Union Citizenship Puzzle’? The McCarthy Case*, 36 E.L. Rev. 861 (2012); Iglesias Sánchez, *supra* n. 70, at 465.

TFEU and fundamental rights breached during the financial crisis, so that the latter can be invoked in traditionally ‘purely internal situations’ according to ‘substance of rights’ logic. The test is built on the ideas that: (1) the non-exhaustive list of citizenship rights in Article 20(2) TFEU should be interpreted in compliance with Article 2 TEU, which will create the bridge between the core of the rights protected under Article 20(2) TFEU and financial crisis measures; and (2) that beyond the scope of Article 51(1) of the Charter, fundamental rights issues are appropriately left to national legislation and courts, provided that they safeguard the values enshrined under Article 2 TEU.

5.1 STEP ONE: DELIMITING THE TEST IN ACCORDANCE WITH ARTICLE 2 TEU

The first step of the test consists in the delimitation of the content eligible to be judicially incorporated into the non-exhaustive list of EU citizenship rights in Article 20(2) TFEU. Broadening the scope of application of fundamental rights cannot be achieved merely by extending without limits the list of EU citizenship rights falling within the sphere of the substance of rights doctrine towards including the rights violated during the financial crisis. Such a possibility would significantly affect the Member States’ regulatory autonomy and disrespect the constitutional principle of conferral enshrined in the Treaties.¹⁰⁹

This article argues that the ‘inter alia’ clause suggesting a non-exhaustive list of rights in Article 20(2) TFEU, must be interpreted as safeguarding the values enshrined under Article 2 TEU by which both the Union institutions and the Member States are bound. Although Article 2 TEU works as a legal standard of assessment, it cannot be interpreted as meaning that the Member States are fully bound by the entire EU fundamental rights *acquis*, since this is expressly prevented by the Charter and by the Treaty itself.¹¹⁰ On the contrary, it aims at safeguarding the essentials which are ‘common to the Member States’,¹¹¹ covering long-standing national traditions used by several constitutional courts¹¹² and infringements of certain rights which cannot be justified in accordance with the Court’s case-law.¹¹³ To this end, the Court recently held that the Member States are committed to

¹⁰⁹ Stanislas Adam & Peter Van Elsuwege, *Citizenship Rights and the Federal Balance Between the European Union and Its Member States: Comment on Dereci*, E.L. Rev. 176, 177 (2012).

¹¹⁰ Article. 51(1) of the Charter and Art. 6 TEU.

¹¹¹ Armin von Bogdandy, *Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States*, 49 C.M.L. Rev. 489, 500 (2012).

¹¹² The need to protect the essence of fundamental rights and not to impose any unjust limitations is expressly enshrined in most of the Member States’ national constitutions or fundamental rights charters: Art. 19(2) German Basic Law, Art. 4(2) Czech Fundamental Rights Charter, 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.

¹¹³ von Bogdandy, *supra* n. 111, at 491.

protect judicial independence which forms ‘part of the essence of the right to effective judicial protection ... which is of cardinal importance as a guarantee that ... the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded’.¹¹⁴

Moreover, violations of the essence of fundamental rights that reflect the values laid down in Article 2 TEU undermine the basic foundations of EU legal order and, therefore, the substantive meaning of Union citizenship.¹¹⁵ Therefore, the use of Article 2 TEU allows the test to only focus on cases requiring EU intervention, when the essential core of rights common to the Member States, which cannot be diminished without losing their value either for the rights-holder or for society, is at stake.¹¹⁶ For instance, in *Tele2 Sverige*, the Court ruled that the right to freedom of expression (Article 11 of the Charter)¹¹⁷ constitutes one of the EU’s foundational values under Article 2 TEU and is an essential foundation of a pluralist democratic society.¹¹⁸ The right to effective judicial review, largely exposed during the financial crisis, also falls in the ambit of Article 2 TEU, as its ‘very existence ... designed to ensure compliance with EU law is of the essence of the rule of law’ on which the Union is built.¹¹⁹

As such, within the understanding of Article 2 TEU, the ‘inter alia’ list of rights under Article 20(2) TFEU should be interpreted as protecting the essence of fundamental rights whose alleged violation cannot be adequately remedied within a Member State, but which, due to its extent and seriousness, must rather be addressed at the Union level to preserve the effectiveness of EU law. This interpretation fits the extremity of situations already protected under Article 20(2) within the realm of loss of nationality¹²⁰ and forced departure from the territory of the EU.¹²¹ However, the use of Article 2 TEU in the proposed test does not aim to establish its infringement per se. It serves the dual purpose of incorporating

¹¹⁴ Case C-619/18, *Commission v. Poland (Indépendance de la Cour suprême)*, ECLI:EU:C:2019:531, paras 42 and 58.

¹¹⁵ Opinion of AG Poiares Maduro in Case C-380/05, *Centro Europa 7*, ECLI:EU:C:2007:505, para. 22: ‘Only serious and persistent violations which highlight a problem of systemic nature in the protection of fundamental ... by virtue of the direct threat they would pose to the transnational dimension of European citizenship and to the integrity of the EU legal order’.

¹¹⁶ Maja Brkan, *The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core*, 14 Eur. Const. L. Rev. 332, 340 (2018); Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 Cambridge L. J. 174, 176–180 (2006).

¹¹⁷ Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB*, ECLI:EU:C:2016:970.

¹¹⁸ Yumiko Nakanishi, *The EU’s Rule of Law and the Judicial Protection of Rights*, 46 Hitotsubashi J. L. & Pol. 1, 5 (2018).

¹¹⁹ Case C-216/18 PPU, *Minister for Justice and Equality*, ECLI:EU:C:2018:586, para. 51; Case C-64/16, *Associação Sindical dos Juizes Portugueses*, para. 37.

¹²⁰ Case C-115/08, *Rottmann*; Case C-133/15, *Chavez-Vilchez and Others*.

¹²¹ Case C-34/09, *Ruiz Zambrano*.

only the ‘essentials’ within Article 20(2) as a balance of powers safety valve and, subsequently, of opening the door to EU law – and thus to Charter – protection.

5.2 STEPS TWO AND THREE: OPENING A DOOR TO EU LAW PROTECTION

After engaging Article 2 TEU – both to suggest and delimit the rights eligible to be judicially incorporated into the ‘inter alia’ list of EU citizenship rights in Article 20(2) TFEU – the next step focuses on assessing whether such a right can be granted protection under the scope of EU law according to the substance of rights ‘rationale’, when the impugned national measure is not implementing Union law in the strict sense.

As discussed, the Court has illustrated a growing propensity towards protecting EU fundamental rights in citizenship cases, where Article 20 TFEU served as a sufficient link to EU law in itself, and thus allowed the assessment of the disputed matter in light of the Charter.¹²² This inclusion changed the understanding of what falls within the scope of Union law through Article 20 TFEU, and subsequently within the scrutiny and protection of the Charter. Yet, this differentiated understanding only corresponds to the very specific assessment of determining the existence of a relationship of dependency, for a case already falling under the umbrella of the citizenship’s substance of rights doctrine.

If the ‘implementation’ concept is interpreted according to *Åkerberg Fransson*,¹²³ the Charter can be considered applicable in situations ‘falling within the scope of EU law’ and be invoked in relation to the substance of rights doctrine.¹²⁴

However, even if the Court applies its narrower interpretation of Charter scope, it does not necessarily prevent the application of EU fundamental rights in purely internal situations,¹²⁵ depending on the extent to which the narrowed scope of the Charter can also restrain or affect the scope of fundamental rights as general principles of EU law.¹²⁶ Through a particularly interesting legal reasoning, the Court in *Associação Sindical dos Juízes Portugueses* opened the door to EU law using Article 19(1) TEU, before moving to consider Article 47 of the Charter, since the scope of the former was considered to be broader than that of the latter.¹²⁷ In a far-

¹²² Case C-133/15, *Chavez-Vilchez and Others*, para. 70.

¹²³ Case C-617/10, *Åkerberg Fransson*.

¹²⁴ Martijn van den Brink, *EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously*, 39 *Legal Issues Econ. Integration* 273, 282 (2012).

¹²⁵ *Ibid.*, at 287.

¹²⁶ Editorial Comments, *The Scope of Application of the General Principles of Union Law: An Ever Expanding Union*, 47 *C.M.L. Rev.* 1589, 1590 (2010); See Opinion of AG Bot in Case C-108/10, *Scattolon*, ECLI:EU:C:2011:542, para. 120.

¹²⁷ Case C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 29.

reaching demonstration of the Court's judicial activism in favour of European integration, the Court built on 'operationalising' Article 2 TEU by stating that Article 19 TEU 'gives concrete expression to the value of the rule of law' and brought the matter under the scope of EU law.¹²⁸

Crucially, after overcoming the barrier in Article 51(1), the Court proceeded to consider the 'respective' Charter right, enabling natural and legal persons to challenge a broader set of national measures using this route. It is argued here that the new approach towards Article 19 TEU has great resemblance with the substance of rights doctrine, not just in how Treaty provisions are engaged but, more fundamentally, since both aim to overcome the barrier created by the narrow scope of application of the Charter to enhance fundamental rights protection. Accordingly, the argument put forward by AG Mengozzi in *Dereci* that the Charter prevents the inclusion of EU fundamental rights in the substance of rights doctrine is not entirely correct,¹²⁹ or at least not the only possible explanation.

The last part of the proposed test, which has a more conventional character, requires the alleged infringement of the right in question to constitute a *deprivation* according to the logic of the substance of rights doctrine and not just a mere *inconvenience or impediment*. The requirement of a de facto loss of one of the rights protected under Article 20(2) TFEU further prevents alleged interferences with the division of competences and preserves the constitutional balance between the powers of the EU and those of the Member States.

5.3 FILLING THE REVIEW GAP AND REINTRODUCING THE FINANCIAL CRISIS CLAIMS

According to the core argument of the paper as developed above, fundamental rights violations deriving from the financial assistance mechanisms can fall under the scrutiny of EU law when a connection with the core of rights protected under Article 20(2) TFEU is established. According to the 'inverse applicability of EU law' test, this connection can be achieved through the 'operationalization' of Article 2 TEU (as per *Associação Sindical dos Juizes Portugueses*), to trigger the protection of Article 20(2) TFEU, which serves as a sufficient EU law connection (as per the substance of rights doctrine) to open the door to Charter protection (as per *Chavez-Vilchez*).

As discussed in section 3, during the financial crisis, numerous measures were challenged for violations of EU fundamental rights. Taking the example of the right to an effective remedy and fair trial, austerity measures have threatened access

¹²⁸ *Ibid.*, paras 29–38.

¹²⁹ Opinion of AG Mengozzi, in Case C-256/11, *Dereci and Others*, EU:C:2011:626, paras 37–39.

to justice by weakening the capacity of the judicial system. As part of the mandated reductions in public expenditure, the judicial systems' budgets were reduced and court fees had increased while legal aid was subject to significant cuts.¹³⁰ However, the 'variable' interpretation of Article 51(1) of the Charter would likely prevent its application, especially against national measures implementing a MoU adopted as part of an ESM financial assistance package. How does the 'inverse applicability of EU law' test proposed here address this gap in protection?

The first step of the test consists in delimitation according to Article 2 TEU, i.e., requiring the allegedly violated right or principle to form part of the essence of rights common to the Member States within the meaning of Article 2 TEU. The concept of 'effective judicial protection' is dual-faced, referred to as a self-standing 'principle' of EU law¹³¹ or as a 'fundamental right' under the Charter.¹³² Relatively early in the case-law, the Court insisted that the Union is based on the rule of law and has since developed a catalogue of elements inherent to the rule of law, within the meaning of Article 2 TEU, including the principle of separation of powers,¹³³ the principle of effective judicial protection,¹³⁴ and effective application of EU law.¹³⁵ Through the lens of Article 19 TEU, the principle of effective judicial protection has been characterized as a 'concrete expression of the value of the rule of law as enshrined under Article 2 TEU', entrusting the responsibility for ensuring judicial review in the EU legal order both to the Court and to national courts and tribunals.¹³⁶ The Court further emphasized that the existence of effective judicial review, designed to ensure compliance with the provisions of EU law, is also inherent in the rule of law.¹³⁷ Consequently, a violation of the right to effective judicial protection would likely undermine the basic foundations of the EU legal order. Therefore, according to the 'inverse applicability' test, the 'inter alia' list of rights under Article 20(2) TFEU must be interpreted as protecting the essence of the right to effective judicial protection within the meaning of Article 2 TEU. In consequence, the combination of the rule of law, which evidently incorporates effective judicial protection as one of the EU's values

¹³⁰ https://fra.europa.eu/sites/default/files/annual-report-2012_en.pdf (accessed 1 June 2020).

¹³¹ Case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, ECLI:EU:C:2002:462, para. 39; Case C-263/02 P, *Commission v. Jégo-Quéré*, ECLI:EU:C:2004:210, para. 29; Case C-12/08, *Mono Car Styling*, ECLI:EU:C:2009:466, para. 46.

¹³² Case C-275/06, *Promusicae*, ECLI:EU:C:2008:54, para. 62; Dorota Leczykiewicz, 'Effective Judicial Protection' of Human Rights After Lisbon: Should National Courts be Empowered to Review EU Secondary Law, 35 E.L. Rev. 326, 330 (2010).

¹³³ Case C-477/16 PPU, *Kovalkovas*, ECLI:EU:C:2016:861.

¹³⁴ Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236; Case C-362/14, *Schrems*, ECLI:EU:C:2015:650.

¹³⁵ Brkan, *supra* n. 116, at 332; Case C-441/17, *Commission v. Poland (Forêt de Białowieża)*, ECLI:EU:C:2018:255; Case C-64/16, *Associação Sindical dos Juizes Portugueses*, para. 31.

¹³⁶ Case C-64/16, *Associação Sindical dos Juizes Portugueses*; Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* 13 (OUP 2013).

¹³⁷ Case C-216/18 PPU, *Minister for Justice and Equality*, para. 51; Nakanishi, *supra* n. 118, at 8.

under Article 2 TEU, with the right to an effective judicial remedy as protected by Article 47 of the Charter, provides grounds for extending the jurisdiction of the Court to ensure effective protection of fundamental rights.¹³⁸

Therefore, according to substance of rights 'logic', national measures are precluded if depriving EU citizens of the genuine enjoyment of the substance of the right to effective judicial protection as guaranteed under Article 2 TEU. Article 20(2) TFEU, which serves as a sufficient EU law connection, brings the matter under the scope of EU law and eventually under the scrutiny of the Charter. In assessing whether the reductions in the budgets of judicial systems have deprived the applicant of the right to effective judicial protection, Article 19 TEU and Article 47 of the Charter must be taken into consideration. Crucially, and based on the substance of rights rationale, the third step of the 'inverse applicability' test ensures that a *de facto* loss of the right is required since 'purely hypothetical prospects of [a] right being obstructed' do not establish a sufficient link with EU law. On the contrary, the extent and seriousness of the infringement should amount to a deprivation of the right's essence, which must rather be protected at Union level.¹³⁹ Having safeguarded the possibility of an assessment of the facts under EU law, it then rests with the courts to decide whether the interference with the right amounts to a total deprivation or whether it strikes a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

6 CONCLUDING REMARKS

From time to time, the ever-increasing pace of changes in the economy, society and the law, call for new measures to cope with the needs of an enlarged and multifaceted Union and to provide solutions to problems encountered. The recent financial crisis is such an example. New measures were rapidly adopted to manage its economic dimension, but the 'constitutional' consequences were poorly handled, especially regarding the protection of fundamental rights, as is still evident in some Member States. EU fundamental rights instruments have proven incompetent to protect citizens against violations of their rights, which has been profoundly demonstrated in the judicial review gap created by the Charter.

At the same time, recent judicial developments in the field of EU citizenship law have had profound consequences for the structure of EU law and the protection of fundamental rights, shedding further light on ways effectively to 'open a door to EU law' to protect fundamental rights during times of crises. Article 20

¹³⁸ Case C-362/14, *Schrems*, ECLI:EU:C:2015:650.

¹³⁹ von Bogdandy, *supra* n. 111, at 501.

TFEU has encouraged novel considerations of fundamental rights protection in specific dimensions of EU citizenship law, where the substance of rights doctrine went as far as to protect EU citizens' rights not expressly listed in Article 20(2) TFEU. The 'inverse applicability of EU law' test developed in this article takes the 'substance of rights' doctrine a step further through the operationalization of Article 2 TEU. It expands the core of the rights protected under Article 20(2) TFEU to include those violated during the crisis, subsequently allowing for their legal assessment under the Charter. The jurisdictional test proposed arguably fills the 'applicability' gap created by the Charter and overcomes its structural difficulties by exploiting other Treaty provisions to assert jurisdiction rather than trying to evade the limits established by the Charter. Crucially, the test is therefore built on a constitutional perspective of EU citizenship, without opening the gates to an unconditional application of EU citizenship rules, contrary to the principles of conferral and division of competences.

The concept of EU citizenship is not simply about passports and the feeling of belonging but also about individuals being able to draw on rights at multiple levels of political authority. It must thus be considered as a living instrument whose limits have not been determined. It is time for EU citizenship to 'come to the rescue' and mark an alternative inclusion path in cases involving the citizens who have suffered the 'real' consequences of the financial crisis.