A Rescue Package for EU Fundamental Rights – Illustrated with Reference to the Example of Media Freedom

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Fundamental rights protection, once a side show, has become important for the EU, as proved by the newfound treaty recognition of the EU fundamental rights charter (CFREU), and the upcoming accession to the European Convention on Human Rights (ECHR). At the same time the fundamental rights situation in a considerable number of Member States is an increasing cause for concern. This has mostly been illustrated with reference to minorities and asylum seekers. However, recent reports of organizations like the Council of Europe, the OSCE and various NGOs have also highlighted serious problems with regard to media freedom, such as overt political influence, media concentration, disproportionate sanctions on journalists, misuse of counter-terrorism legislation against the press, deficient protection of journalistic sources and failure to investigate violence against reporters.

While the Union is supposed to promote fundamental rights around the world (Article 21 TEU) and intensely scrutinizes the respective situations in candidate countries (Article 49 TEU), there is scant action so far in case of serious fundamental rights violations in Member States. In this respect, the defense of the Union's foundational values (Article 2 TEU) is largely left to national and international institutions. The Commission, which is supposed to be the 'Guardian of the Treaties', seems reluctant to

fully protect fundamental rights and rather prefers to concentrate on less sensitive 'technical' issues of the internal market. The assertion that the scope of EU fundamental rights protection is strictly limited is omnipresent.

Such a restrictive approach has traditionally been explained by concerns for the constitutional identity of the Member States. As the respective experience undergone by the USA shows, central enforcement of one single set of fundamental rights against member state action bears the risk of centralization. For this reason, the Charter of Fundamental Rights does not generally apply to the Member States but only "when they are implementing Union law" (Article 51(1) CFREU). This does not mean that there is a legal vacuum beyond the Charter's scope: According to Article 2 TEU the Member States are bound to "respect for human rights". Enforcement of this obligation is subject to a political decision (Article 7 TEU). However, this mechanism has severe drawbacks. Firstly, by its very nature it involves considerations of political opportunity which arguably might lead to a habit of mutual indulgence amongst Member States governments: The prevailing unwillingness to initiate the Article 259 TFEU procedure can serve as an illustration. Secondly, the negative experience of the *Haider affair* has apparently led to a considerable inhibition threshold.

The lack of credible enforcement mechanisms not only undermines the Union's legitimacy in the eyes of the individuals affected, it is also of systemic concern: A massive deterioration of fundamental rights protection in some Member States might eventually threaten fundaments of European integration, namely the principle of mutual confidence and the premise that the Union can rely on the functioning polities of the Member States. Democracy in the Union would be seriously affected if Union citizens were hampered in expressing their opinions in or informing themselves via independent media. It is not surprising that the Court of Justice of the European Union (CJEU) itself has searched for a way to ensure fundamental rights protection by stretching the "scope of Union law" in which EU fundamental rights apply to the Member States. This jurisprudence has however not offered a satisfactory solution: On the one hand it is far from addressing the most problematic situations, on the other hand it has sometimes transgressed the limits of what is doctrinally justifiable.

In this light we argue for an innovative approach to EU fundamental rights protection with regard to Member State action. Our proposal is to open up "respect for human rights" set out by Article 2 TEU for individual legal actions via Union citizenship. This might come as a surprise given that today – despite the famous opinion by AG Jacobs in *Konstantinidis* – citizenship and fundamental rights are usually treated as distinct concepts. There is, however, a close historic and teleological connection: Both discourses developed around the same period in reaction to the pressing legitimacy question. Citizenship and fundamental rights are therefore two mutually strengthening concepts which essentially pursue the very same objective, i.e. to bring the Union closer to the individual. In systematic terms this is also reflected in today's positive law in that the Charter of Fundamental Rights not only contains the so-called citizens' rights but also refers to citizenship as a whole (2nd consideration). Finally, if Union citizenship is

to be taken seriously, it cannot be completely separated from fundamental rights questions: In theory it would seem odd to exclude the -literally- most fundamental rights in EU law (cf. Article 2 TEU) from the "fundamental status" of the citizen. In practise effective exercise of Union citizenship is often heavily dependent on fundamental rights.

Our doctrinal starting point is the "substance" of Union citizenship which the CJEU in *Ruiz Zambrano* has held to apply even to purely internal situations. According to the Court "Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union". What emerges from this reasoning is that the CJEU views Union citizenship not only as a bunch of transnational free movement rights but as a truly "fundamental status" which the Union is called to protect against particularly serious encroachments. We argue that this rationale serves as a link between EU citizenship and fundamental rights: Even in purely internal situations the "substance" of Union citizenship precludes violations of fundamental rights that amount to emptying the "fundamental status" of its practical meaning.

How can one frame this *in concreto*? We propose that inspiration should be drawn from the German Federal Constitutional Court's *Solange*-doctrine. As is well known, the Karlsruhe Court no longer exercises its competence to control EU secondary law as long as the Union ensures fundamental rights protection which is "essentially similar to the protection of fundamental rights required unconditionally by the Basic Law." This is further defined by the requirement to "generally safeguard the essential content of fundamental rights" and operated as a presumption to be disproved by the claimant. We argue that this two-pronged test should be taken up by the CJEU and turned towards the Member States: Outside the Charter's scope of application a Union citizen cannot rely on EU fundamental rights as long as it can be presumed that their respective *essence* is safeguarded in the Member State concerned. However, should this presumption be rebutted, the "substance" of Union citizenship – within the meaning of *Ruiz Zambrano* – comes into play. On this basis Union citizens can seek redress before national courts and the CJEU.

As regards the first prong, the essence of fundamental rights is set out in Article 2 TEU as one basic condition for the exercise of public authority in the European legal space, be it by the Union or by the Member States, and as such is not limited to the scope of the CFREU. Its content however is far more restricted than the full range of fundamental rights protection enshrined in Article 6 TEU and the CFREU. This can be drawn inductively from the jurisprudence of the ECtHR, the CJEU and national constitutional courts: With regard to media freedom it only precludes measures inhibiting political speech or debates on questions of public interest.

The second prong is based on the principles of subsidiarity and respect for national identities (Articles 4(2) and 5(1) TEU). In this light it can and should be assumed that the national systems of fundamental rights protection comply with their obligations arising out of Article 2 TEU. How can this presumption be rebutted? Not by simple and

isolated fundamental rights infringements. Instead, one has to look for violations of the essence of fundamental rights which in number or seriousness account for *systemic* failure and are not remedied by an adequate response within the respective national system. Such violations not only put into question the basics of the European legal space but also deprive Union citizenship of its practical meaning. This threshold is not to be mistaken as instrumentalizing the individual for general purposes but seen as focusing on these cases which demand EU intervention. Further guidance for interpretation can be taken from the criterion of a "serious and persistent breach" in Article 7(2) TEU. Conceivable examples therefore include the refusal to abide by a final judgment of the ECtHR in a domain that touches upon the essence of fundamental rights, the defiance, bypassing or intimidating of domestic courts in such cases or intentional, reckless or evidently illicit conduct of highest state authorities.

Put into practice our proposal could then work as follows: If a national of a Member State feels that her rights have been violated she would turn to the national judge. In court she could rely on the domestic (and possibly ECHR) standard of fundamental rights protection. Outside the scope of the CFREU she could not invoke EU fundamental rights, nor could she rely on Union citizenship to claim a violation of Article 2 TEU unless the presumption of compliance was rebutted. However, in case of systemic violation of the essence of fundamental rights the "substance" of Union citizenship, within the meaning of *Ruiz Zambrano*, would be activated as a basis for her redress. First of all it would be up to the national court to establish the facts and to apply the respective provisions of Union law. Yet, according to Article 267 TFEU the latter would be enabled and, in a case of last instance, by and large obliged to refer to the CJEU for a preliminary ruling on the interpretation of Articles 2 TEU and 20 TFEU.

At this point one can already hear critics shout: "ultra vires". Our proposal, they might argue, would breach the federal order of competences emphatically underscored in Article 51 CFREU. In our view however this criticism is not persuasive: Firstly, our proposal does not extend the scope of the CFREU beyond the limits of Article 51 but merely implies better enforcement of the essence of fundamental rights enshrined in Article 2 TEU. It is beyond question that the latter binds *any* exercise of public authority by the Member States and can be enforced by the EU under Article 7 TEU. Therefore our approach neither creates new and unexpected obligations for the Member States nor adds new competences for the Union as such; only the *Organkompetenz* of the CJEU, but not the *Verbandskompetenz* of the EU is affected.

Secondly, while the former Treaties have kept the EU's foundational principles out of the reach of the CJEU the Lisbon Treaty subjects Article 2 TEU to the Court's jurisdiction and thus to its mandate to ensure that "the law is observed" (Article 19(1) TEU). Our proposal would therefore not constitute an unwarranted arrogation of institutional powers but simply put flesh on what has already been laid down by the framers of the Treaties. It resembles the famous *Van Gend en Loos* line of jurisprudence inasmuch as it complements a centralized enforcement mechanism with "the vigilance of individuals concerned to protect their rights" and interjudicial cooperation. This not

only has the well-known advantage of combining the interpretative rulings of the CJEU with the authority and enforceability of domestic court decisions. Arguably, it can also provide national judges with some backing from the side of Union law through the voice of the CJEU speaking on behalf of a Union founded on respect for human rights. Hence, one could say that our proposal ultimately aims at strengthening domestic courts in critical situations.

An extended version will be published in the Common Market Law Review.

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All the best, *Max Steinbeis*