

**The European Master's Programme in Human Rights and
Democratisation**

Utrecht, The Netherlands

**THE EUROPEAN UNION AS A 'HUMAN RIGHTS
ORGANISATION'**

Master's thesis by Ruta Satrovaite

Supervisor: Prof. Dr. Anja Mihr

2012

List of Abbreviations

EU	European Union
CECE	<i>Comité d'études pour la constitution européenne</i>
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IGC	Intergovernmental Conference
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the Union

Abstract

After the entry into force of Lisbon Treaty (2009), the European Union set a high standard of respect for fundamental rights within the EU. However national authorities of EU Member States acting outside the scope of EU law were left almost free to decided on their own fundamental rights standards. The example of Hungary showed that democracy that is inseparable from the respect for fundamental rights can't not be taken for guaranteed. Even in 21st century the EU Member State can attempt to turn to authoritarianism by restricting fundamental rights through the legislative changes. Therefore the objective of this thesis is to examine what kind of measure are available at EU level that could prevent internal fundamental rights violations from occurring at the same time safeguarding democracy in its Member States. Taking Hungary as the test case study, the thesis will examine how effective are currently available EU tools. After presuming that they have just a very narrow practical impact on internal fundamental rights violations, the thesis will propose new far-reaching EU mechanism, which could be developed from the EU Treaties and exercised by the Court of Justice of European Union. This proposal will be based on the recent case law of the Court, that shows the Court's attempt to wider fundamental rights policy.

Contents

Introduction	5
1. The Protection of Fundamental Rights in the European Union legal order	11
1.1. Background.....	11
1.2. Foundations	13
1.2.1. The case law of CJEU	13
1.2.2. The conventional provisions	16
2. Hungary as a litmus test for a fundamental rights protection by the European Union.....	20
2.1. Hungary’s controversial legal reforms.....	21
2.2. The EU action in regards to the controversial legal reforms in Hungary	24
2.2.1. Infringement procedure Art. 258 TFEU	25
2.2.2. Art. 7 TEU: An opportunity for the EU to demonstrate that it takes its values seriously	28
2.2.3. Is Hungary a new „Haider” case?	31
3. The Role of the Court of Justice of European Union in protection of Fundamental Rights	36
3.1. The Court of Justice of the European Union.....	37
3.2. The relation between EU citizenship and EU fundamental rights	40
3.3. EU Citizenship	41
3.4. The EU citizenship and the fundamental rights protection in the case law of the CJEU (<i>Rottman, Zambrano, McCarthy, Dereci</i>).....	44
4. The possible future role of the Court of Justice of European Union in Protection of Fundamental Rights	54
4.1. The substance of EU citizenship rights: Article 2 TEU	54
4.1.1. The content of Article 2 TEU as the essence of fundamental rights	56
4.1.2. The content of Article 2 TEU in the light of the grey shadow of communism hanging over it	58
4.2. The situations when the Hungarians’ legislation interference with the rights of EU citizens and hinders the genuine enjoyment of the substance of rights of EU citizenship: Article 2 TEU	61
Conclusion	67
Bibliography.....	71

Introduction

Until fairly recently, Hungary was seen as one of the most successful and promising Member States of the European family among other post-communist countries. Unfortunately, the times, better to say the government, have changed and today the situation looks less optimistic. The negative changes emerged due to the financial crisis which hit the country in 2008. Since then, the economy has been stagnating due to heavy public debt which also caused an increase in social tension. In 2010, after a number of corruption scandals and growing economic problems, more than half of the electorate, deeply disappointed with the ruling socialist government, voted for the opposition party *Fidesz*. *Fidesz* defined itself as a conservative, nationalist party. This newly elected Hungarian government was led by the Prime Minister Viktor Orbán. Due to the Hungarian electoral system, which combines single-seat constituencies and seats by proportional representation, the party obtained a two thirds majority in the Parliament which allowed them to change more than three hundred laws, including Hungary's Fundamental Law (Constitution).¹ Unfortunately the changes did not favor people, but those in power. Critics even started to argue that the new laws were moving Hungary away from the principles and practice of liberal democracy.² The government, *vice versa*, claimed that they have been given a popular mandate to finally move away from the communist legacy and complete the regime change of 1989.³

¹ The Norwegian Helsinki Committee report, Democracy at stake in Hungary - The Orbán government's Constitutional revolution", 29 February 2012, available at <http://nhc.no/no/nyheter/Democracy+at+stake+in+Hungary+-+The+Orb%C3%A1n+government%27s+Constitutional+revolution.9UFRHU18.ips> (last consulted 1 June 2012).

² Marc F. Plattner describes *liberal democracy* as follows: the principle majority rule does not by itself constitute democracy. For a regime to be considered democratic today, it also must protect the rights of individuals and minorities. So understood democracy is called *liberal democracy*. Plattner, Marc F, Populism, Pluralism and Liberal Democracy, *Journal of Democracy*, Volume 21, Number 1, January 2010, p. 84. The warnings that Hungary is moving away from liberal democracy were found in several articles including: Pillar, Paul, Hungary and the Reversibility of Liberal Democracy, *The National Interest*, 2012, available at: <http://nationalinterest.org/blog/paul-pillar/hungary-the-reversibility-liberal-democracy-6392>; Bito, Laszlo, The voice of liberal democracy needs to be preserved in Hungary, available at <<http://www.opendemocracy.net/laszlo-bitó/voice-of-liberal-democracy-needs-to-be-preserved-in-hungary>>.

³ The Norwegian Helsinki Committee report, Democracy at stake in Hungary - The Orbán government's Constitutional revolution, 29 February 2012.

However, despite the repeated government statements denying these undemocratic developments, the human rights crisis is evident.⁴ It is not only the widely discussed media law that conflicts with human rights.⁵ The judiciary and the electoral system have also been affected. Additionally, the Government has designed policies to ensure that its political decisions cannot be reversed even under future administrations, potentially entrenching the threat to the enjoyment of human rights and democracy. Human rights and democracy goes hand in hand. This means that deterioration of one will equally effect another. We cannot have democracy if human rights are not safeguarded. Where democracy is lacking, the respect for human rights is usually wanting. As a result, it is important to secure human rights protection within States in order to ensure a democratic regime – the most common and acceptable form of governance in the modern world. Nevertheless, the main questions arising from this discourse are: who the relevant actors of such a change are to be, if the people who democratically elected the government are not able to change the situation? Should the external institutions intervene or should it be left up to Hungary? Living in the 21st century means the actual enjoyment of democracy where the true sovereignty belongs to the people. In turn, the people delegate this sovereignty to their governments, not *vice versa*. The measures capable of protecting fundamental rights violations happening in a European country must be ascertained and applied. Hungary is a Member of the European Union and Hungarians are EU citizens. As a result the democratic problems in regard to fundamental rights protection in one of its Member State is also a European issue.

⁴ The Venice Commission an advisory body of the Council of Europe, composed of independent experts in the field of constitutional law has issued plenty of opinions on the controversial laws in Hungary, including an opinion on the New Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session, 17-18 June 2011, para. 145, CDL-AD(2011)016; The opinion of the Venice Commission on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts of Hungary, adopted by Venice Commission at its 90th Plenary Session, 2011. Also as EuroActiv states that an astonishing 8,000 individual claims have been filed to the Strasbourg Court since December. Access via: <http://www.euractiv.com/future-eu/hungary-european-rule-law-analysis-513032>.

⁵ In regard to Hungarian media law there were serious concerns about the lack of independence of the new Hungarian media law. The Hungarian Constitutional Court in its decision on the media laws (Decision No. 165/2011. (XII. 20.)) declared that certain provisions of the Hungarian media law unconstitutionally limited the freedom of the written press.

The European Economic Community was formed in pursuit of narrow economic objectives and its original EEC Treaty⁶ did not include any provisions for a regime of fundamental rights protection. Nonetheless, the evolution of the economic community into a political one with wider political and social aims, as well as the capacity to have an adverse impact on the individual citizens of Member States, led to the necessity of the establishment and development of a fundamental rights protection mechanism within the European Union (hereafter EU or the Union). The ongoing development of fundamental rights and principles which primarily started with the Court of Justice of the European Union (hereafter CJEU) case law, has culminated with the entering into force of the Treaty of Lisbon in 2009. According to Art. 6 TEU, the Union recognizes the legally binding nature of the Charter of Fundamental Rights of European Union. It expresses the intention to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms and states that constitutional traditions common to the Member States shall constitute general principles of the Union's law. The main reason which has eventually led to the adoption of the fundamental rights protection mechanism within the EU, was the EU integration process, without which such protection would not have been possible. As Mauro Cappelletti stated - the most successful integration occurs in the protection of rights. Cappelletti writes that there is hardly anything that has greater potential to foster integration than a common bill of rights.⁷ It has been contended that the protection of human rights could legitimize the EU, because of the assumption which states that benefits for European citizens that would emanate from the establishment of a common market are not adequate enough to justify the competence transferred to the EU institutions. Accordingly, the necessary justification could be secured through the expression of the commitment to human

⁶ The original EEC Treaty is called the Treaty of Rome, also known as the Treaty of the European Economic Community. It was signed in 1957 and all the subsequent European treaties have built upon or amended the Treaty of Rome. Its provisions still form the majority of EU treaty law. The EEC Treaty was the result of eleven years of attempts to reconstruct the European continent after World War II. The European Coal and Steel Community (ECSC) laid the ground for the EEC by opening the markets for those products between several countries in continental Europe. The Treaty of Rome adopted many of the institutional structures of the ECSC but set out to have far greater reach. It tried to combine federalist and intergovernmental ideas. Access via: <http://www.civitas.org.uk/eufacts/FSTREAT/TR1.htm>.

⁷ Cappelletti, M., *The Judicial Process in Comparative Perspective*, New York: Clarendon Press, 1989, p. 395.

rights, since they have been assigned ‘symbolic preeminence’.⁸ Therefore, taking into consideration that fundamental rights protection is important not just for people, but also for the EU itself, this thesis will analyze the extent to which European Union is capable of providing adequate protection for fundamental rights within its Member States through political as well legal means. The enforcement of EU fundamental rights against the Member States is a highly sensitive topic due to the fact that the European Union is based on constitutional pluralism and the respect for the constitutional autonomy of its member states (Art. 4(2) TEU). However Hungary, among 27 other countries is an EU member State and Hungarians, as well as citizens from other EU member states, are EU citizens. As a result the EU should step in and use available human rights protection mechanism.

The thesis assumes that over its long history the EU has developed a strong legal basis of tools capable to ensure fundamental rights protection. Their practical significance however depends on the EU institutions (the EU Commission, CJEU etc.) that implement those EU provisions. Thus the recent fundamental rights crisis in Hungary is a big challenge, but at the same time a great opportunity for the EU institutions to progress further in the fundamental rights issues by showing that it takes EU fundamental rights issues seriously.

Therefore the thesis will progress based on this central research question:

To what extend are the currently available EU Treaties provisions applied by the EU institutions significant in providing the help for internal fundamental rights violations and what other fundamental rights protection mechanisms could be developed from the EU Treaties and applied by the EU institutions in regard to internal fundamental rights issues?

The thesis is organized as follows: The first chapter gives a brief overview of the development of the EU fundamental rights policy and its current state. The second chapter provides the review of the currently available EU mechanism which could be

⁸ Dogan, Yasar, The fundamental rights jurisprudence of the European Court of Justice: Protection for Human Rights within the European Union legal order, p. 57, *Ankara Law Review*, Vol. 6, No. 1, 2009.

helpful in tackling internal fundamental rights issues. After concluding that the current available EU mechanisms have a very narrow practical impact on fundamental rights protection, Chapter three and four focus on the second part of the research question of whether there is an alternative to the current fundamental rights protection mechanism in regard to internal fundamental rights matters. The analysis of the latest CJEU case law practice will be presented in order to show the possibility of coming up with a new mechanism which could be developed from the treaties and exercised by the CJEU, in order to prevent fundamental rights violations in the Member State. The need for a new legal EU mechanism will be based on the assumption that national remedies have been exhausted and ultimately futile. The option to apply before the European Court of Human Rights (hereafter ECtHR) has appeared to be ineffective not just because of work-load issues leading to long delay, but also because of the risk that judgment by the ECtHR would not be effectively enforced on the national level.⁹ The recent CJEU case law operating through the EU citizenship provisions, extend the scope of *rationae materiae* of the Treaty to internal situations. This thesis will argue in regard to the *Heidelberg proposal*¹⁰, that the new *substance of rights* doctrine introduced by the CJEU in regard to EU citizenship provision, has a potential in the future to also cover the fundamental rights issues, that fall outside the scope of the EU fundamental rights protection.

The reason for limiting the research just to one single case-study is that recently no other country has been so submitted to systematic criticism as Hungary. Therefore in the context of a highly political and at the same time biased debate, the analysis undertaken in this thesis seeks to rely on the facts and to show the scope of fundamental rights violations in Hungary in order to be able to assess the current and potential scope of the EU fundamental rights protection in internal matters.

In addition it is also important to clarify the fundamental rights language used in the thesis. The definition EU fundamental rights, after the entry into force of the Lisbon Treaty on 2009, refers to the Charter of Fundamental Rights of European Union. While

⁹ Kumm, Mattias, Rescue package for Fundamental Rights: Comment, 2012, available at: <<http://verfassungsblog.de/rescue-package-fundamental-rights-comments-mattias-kumm/>>.

¹⁰ Bogdandy, Armin, Reverse Solange – Protecting the essence of fundamental rights against EU Member States, in *Common Market Law Review*, 2012.

the general definition of fundamental rights is much broader category, which does not lift the limitation of Article 51(1) of the Charter of Fundamental Rights of European Union, because it includes also other sources of fundamental rights falling outside the Charter. Noting that the Charter is not only one, but merely one of the sources clarifying the substance and scope of EU human rights.

1. The Protection of Fundamental Rights in the European Union legal order

According to *Craig and de Burca*, from the late seventies there was a constitutionally significant line of case law of the Court of Justice of European Union on the subject of human rights. Nevertheless, these issues did not actually feature prominently in the EU law at that time. Despite the scattered human rights activity across the field of external relations and in the area of gender discrimination, the EU did not have a human rights policy. The big changes in the EU human rights field just happened over the past ten years. Now there is an emerging constitutional regime for human rights protection, and rich academic literature on EU human rights law.¹¹ Human rights protection and promotion have come to represent an important part of the European Union's identity today and the future developments in the field of human rights law are lying ahead.

But in order to assess where we might be heading, we have to understand where we are and how we came to be here, states Andrew Williams, in the context of the evolving human rights protection system on the EU level.¹² With this in mind the first chapter will take a brief look at the development of EU system of human rights in order to provide a complete picture of this aspect of the EU legal order. The historical overview of the development of EU human rights policy will help to understand its present 'shortcomings', that have a significant impact on the chosen case study of Hungary.

1.1. Background

Regardless of the fact that the introduction of fundamental rights protection within the EU is usually associated with the CJEU's jurisprudence¹³, it was actually in

¹¹ De Burca, 2011, p. 465

¹² Williams, Andrew, *Respecting Fundamental Rights in New Union: A Review*, p. 72, Catherine Barnard, *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*, Oxford: Oxford University Press, 2007.

¹³ Case 29-69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR 419; Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

1951 when the issue of human rights protection found its way to the agenda of those promoting the process of European integration.

In the early 1950s prior to the creation of the European Communities, the human rights provisions were drawn up in the draft European Political Community Treaty and the Resolutions of the *Comité d'études pour la constitution européenne* (CECE).¹⁴ These early attempts to protect human rights on the EU level were most likely influenced back then by the human rights protection mechanisms, including: the UN Universal Declaration of Human Rights (1948) and the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), in regard to the post-war realities.

The *Comité d'études pour la constitution européenne* which was set up in 1952 by members of an influential European movement (a group of influential lawyers, scholars, politicians who wanted to further the project of European integration¹⁵) and was supposed to contribute to the process of drafting a constitution for a European Political Community.¹⁶ The draft articles produced by the Committee envisaged a European Community with a strong role in the field of human rights protection, with the emphasis on the Community's power to protect and preserve human rights within the member States, even though the Member States themselves were clearly expected to take primary responsibility for this task. The Ad Hoc Assembly (drawn from the newly formed Assembly of the European Coal and Steel Community, and supplemented with a number of additional members co-opted from France, Italy and Germany, to serve as a pre-constituent body for the European Political Community) was established later. It was tasked with drafting the European Political Community Treaty. The CECE on the other hand would have enabled the Community to intervene in the absence of a request.

¹⁴ De Burca, Grainne, *The Evolution of EU Human Rights Law*, 2011, p. 467.

¹⁵ De Burca, Grainne, *The Road Not Taken: The EU as a Global Human Rights Actor in American Journal of International Law*, Vol. 105, 2011.

¹⁶ In the early 1950s, European policy-makers recognized the need to go beyond the restricted scope of the treaties for European Coal and Steel and Defense Communities and to provide them with a democratic and comprehensive political structure. The debate related to this topic reach the highest peak in the discussion surrounding the European Political Community. Risso, Linda, *The "Forgotten" European Political Community, 1952-54*, Cambridge: Cambridge University Press, 2004.

Where a member state was unwilling to act, it provided for an intervention only where the Member State in question requested such assistance.¹⁷

However, none of these documents came into force; most likely because the ambitious early attempts to promote European political integration were abandoned in favor of a significantly more restrained and pragmatic strategy in the shape of the European Economic and Atomic Energy Communities established in 1957.¹⁸ Nevertheless, it is important to emphasize that these first attempts to guarantee human rights protection on the EU level was not without consequences. According to the Grainne de Burca, *perhaps in reaction to what were perceived to be overreaching integration proposal, the 1957 EEC Treaty was restricted essentially to the aim of economic integration, and <...> no mention of political union or of human rights was included.*¹⁹

1.2. Foundations

1.2.1. The case law of CJEU

The human rights legal vacuum, which lasted from 1957 until 1969, came to an end with the judicial developments. The CJEU case law produced a new constitutional account of the role of human rights in the EC legal order. There was no Treaty basis for the Court's original human rights jurisprudence. Halter remarked that the CJEU had invented, *out of thin air, unwritten European human rights.*²⁰

The Court introduced the fundamental rights language in the EU vocabulary, triggered by challenges from national Courts. The predominantly economic and technical nature of the original Union integration agenda, later extended beyond the economic realm. The Union established itself as a powerful entity, the actions of which had considerable impact on many broader political and social issues.²¹ The tip of the

¹⁷ *idem* p. 470.

¹⁸ *idem* p. 475.

¹⁹ Craig and de Burca, *EU Law: Text, Cases and Materials*, Oxford: Oxford University Press, 2009, p. 380.

²⁰ Weiler J. and Haltern U., 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in Slaughter, *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context*, Oxford: Hart Publishing, 1998.

²¹ *idem* p. 381.

iceberg was reached after the Union adopted the doctrines of direct effect²² and supremacy²³ of EU law. In response to their national courts, most notably Germany, Italy, France and Denmark threatened to reject the supremacy of EU law over national law if the EU did not adequately protect human rights.²⁴ The insistence of national courts in asserting their own human rights standards as long as the EU standard was found lacking, was the main reason that led to the development of the EU human rights mechanism.²⁵

In order to defend the primacy of constitutional and other courts of the Member States, which had sovereign power to secure human rights protection, the CJEU made fundamental rights part of the Union legal order. Nonetheless, this did not itself guarantee respect for fundamental rights.²⁶ Coppel and O'Neill makes it clear by arguing that *ECJ was motivated mainly by preserving and enhancing its own power in the face of the rival supremacy claims from the constitutional courts in some Member States, rather than with human rights protection.*²⁷ By making this step the Union also added one more constitutional ingredient to its evolving *sui generis* legal order.

The first attempt of CJEU to introduce human rights language into the EU legal order was linked to the cases where the infringement of fundamental rights by EU institutions was at issue.²⁸ The original CJEU case law shows that human rights were

²² Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, 1963.

²³ Case 6/64, *Costa v ENEL*, 1964.

²⁴ The European Union, *The Evolution of Fundamental Rights Charter and Case Law*, Director General for Internal Policies, Policy Department C: Citizens' rights and constitutional Affairs, by the request of the European Parliament's Committee on Constitutional Affairs, Brussels, 2011, available at: <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>.

²⁵ German Federal Constitutional Court, *Internationale Handelsgesellschaft* BVerfGE 37, 271 2 BvL 52/71 ('Solange I') German Federal Constitutional Court, *Wünsche Handelsgesellschaft* BVerfGE 73, 339 2 BvR 197/83 ('Solange II').

²⁶ Rosas A. and Armati L. EU Constitutional law. An introduction, p. 143 in *Journal of Common Market Studies*, Vol. 50, 2012.

²⁷ Conway, Gerard, *The Limits of Legal Reasoning and the European Court of Justice*, p. 44, Cambridge: Cambridge University Press, 2012.

²⁸ De Vries, Sybe, *The protection of fundamental rights within Europe's internal market after Lisbon – An endeavour for more harmony*, p. 11, Sybe A. de Vries, Xavier Groussot, Gunnar Thor Petursson, *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice As 'Tightrope' Walker*, Utrecht: Eleven International Publishing, 2012.

used as a standard for assessing the legality of EU action and as constraints on the acts of the EU institutions.

In the case of *Stauder v. City of Ulm* (1969) the CJEU asserted a human rights jurisdiction for the first time. The Court responded positively to an argument based on the fundamental right to dignity, which the applicant alleged had been violated by the implementation of an EU provision concerning a subsidized-butter scheme for welfare recipients. Despite the fact that no violation was ultimately found by the Court, it established its jurisdiction with a brief reference to *the fundamental rights enshrined in the general principles of Community law and protected by the Court*.²⁹ In this case, the ECJ did not elaborate on the interpretative basis of human rights as general principles. In the *Internationale Handelsgesellschaft* (1970) case the CJEU went one step further and not only held that *respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice*, but also referred to the constitutional traditions common to the Member States as source of inspiration.³⁰ Since its ruling in the *Internationale Handelsgesellschaft* the CJEU has continually emphasized the autonomy of Union ‘general principles’ of law, while simultaneously stressing that the source of these general principles is not entirely independent of the legal cultures and traditions of the Member States. However, later Courts went even further. In the case *Nold* (1974), the CJEU identified *the common constitutional traditions of the Member States and international treaties* as sources to guide its human rights jurisprudence.³¹ While the EU has not yet been able to adhere to the ECHR in its own right, there was a clear rapprochement between the EU judicial system and the system set up under the ECHR, including European court of Human Rights. Since the 1980s, the ECJ has recognized that the ECHR enjoys special relevance and later the Union Courts started to cite regularly not only Convention provisions but also individual judgments of the ECtHR.³² From this follows that EU human rights law has its origins in judicial development. As the Court indicated in its case law, there were

²⁹ Case 29/69 *Stauder v. City of Ulm*, 1969.

³⁰ Case 11/70 *Internationale Handelsgesellschaft*, 1970.

³¹ Case 4/73 *Nold v. Commission*, 1974.

³² Rosas A. and Armati L., 2012, p. 144.

three sources of ‘inspiration’ for the EU human rights law: the general principles of EU, common national constitutional traditions and international human rights agreements.

As already noted the original EU human rights protection policy was primarily oriented to the EU itself, but over time the CJEU also ruled that fundamental rights are binding not only on the EU institutions, but also on the Member States when they are acting *within the scope of application of EU law*. From the Court case law emerged three categories of situations where it ruled that Member States are bound by all of the same general principles and fundamental rights which bind the Union in its action.³³ The first category covers the situations in which Member State were implementing or enforcing EU measures.³⁴ The second one, when they act autonomously in such a manner as it affects the economic freedoms.³⁵ The final category includes situations where the Member States act autonomously in a field covered by harmonized Union law.³⁶ In all other situations Member States are not obliged to comply with the EU fundamental rights requirements, because it is presumed that those situations lie outside the scope of EU law.³⁷ However the jurisdiction test based on this ‘vague’ formulation (*within the scope of application of EU law*) caused unpredictability in the application of EU fundamental rights law.³⁸ This issues will be discussed in another part of the thesis, where the second jurisdiction test³⁹ of the CJEU will be presented in order to show, that the CJEU case law in the fundamental rights matters is apparently moving forward.

1.2.2. The conventional provisions

Coming back to the development of the EU fundamental rights policy, the next step is associated with the codification of the judicial developments in the EU Treaties. For the first time the basic principle of respect for fundamental rights found its way into

³³ Basselink, Leonard, The Protection of Fundamental Rights post-Lisbon, The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights and National constitution, FIDE (Fédération Internationale pour le Droit Européen) Conference, 2012.

³⁴ C-5/88 Wachauf v Germany, 1989.

³⁵ C-260/89 ERT, 1991.

³⁶ C-465/00 Österreichischer Rundfunk and Others, 2003.

³⁷ Craig and de Burca, p. 400, 2009.

³⁸ C-60/00 Mary Carpenter v. Secretary of State for the Home Department, 2002; Case C-109/01 Secretary of State for the Home Department v Akrich (ECJ), 2004.

³⁹ Kochenov, Dimitry, A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe in *Columbia Journal of European Law*, Vol. 18, 2011.

written primary law at Maastricht via what became Article 6 TEU and now is enshrined in Article 2 and 6 TEU, under the Treaty of Lisbon. The importance of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law was proclaimed in Article 2 TEU as the foundation of the Union. Article 6 TEU, as amended by the treaty of Lisbon, identifies a three-pronged approach to the EU system of fundamental rights. Firstly, the Charter of Fundamental Rights elevated to the same status as the Treaties. Secondly, EU accession to the ECHR was provided and finally the Article reaffirms the general principles of the Union law as a source of fundamental rights in the EU, taking into account the ECHR and the constitutional traditions common to the Member States.

Article 7 TEU adds a mechanism according to which the European Council has a possibility to take sanctions against a Member States in case of a “serious and persistent breach” of the values referred to in Article 2 TEU.

The statement that fundamental rights protection is gaining more and more importance in the European Union is supported by the drafting of the Charter of Fundamental Rights of the European Union. The drafting of the Charter in 2000 marked a politicization of what had previously been a predominantly judicial process of development of fundamental rights.⁴⁰ As states De Burca, *the central aim of the Charter was to make protection more visible, yet its mode of drafting ensured an instrument with a wide range of rights and progressive tenor.*⁴¹

With the coming into force of the Treaty of Lisbon (Lisbon Treaty) in December 2009, the Charter has become directly enforceable by the EU and national courts. Despite the fact that there is no direct incorporation of the Charter in the Lisbon Treaty, the Charter is given the same legal status. The Charter is part of national law and, after the Lisbon Treaty, has become directly enforceable in national courts if cases involve the application of EU law (Article 51(1)).

⁴⁰ The European Union, *The Evolution of Fundamental Rights Charter and Case Law*, Director General for Internal Policies, Policy Department C: Citizens' rights and constitutional Affairs, by the requested of the European Parliament's Committee on Constitutional Affairs, Brussels, 2011, available at: <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>.

⁴¹ De Búrca, Grainne, 'The Drafting of the EU Charter of Fundamental Rights', p. 26 in *European Law Review*, 2001.

But the haunting question related to the changed status of the Charter was whether these changes will have an effect on the scope of application of EU fundamental rights as regards measures adopted by Member States. The Charter itself in Article 51(1) sets a negative answer to this question. As was already mentioned in the previous part, the pre-Lisbon case law established a rule according to which, the jurisdiction of the Court to review national acts for their conformity with EU fundamental rights is limited to situations where the Member States are acting *within the scope of Union law*. In favor to this Courts' approach, the Article 51 (1) of the Charter codifies this line of case law, by stating that *the provisions of this Charter are addressed <..> to the Member States only when they are implementing Union law*. The decision to keep this narrow scope of application of EU fundamental rights was also influenced by the acts coming from some Member States that made clear their disagreement to extend the ability of the CJEU to rule also on internal fundamental rights matters.⁴²

Moreover, a closer look to the Article 51(1) of the Charter shows that it even narrows the pre-Lisbon reach of EU fundamental rights as it explicitly provides that the Member States must respect these rights *only when they are implementing Union law*. From this follows then that Charter establishes just one of the several categories developed by the CJEU in which Member States are bound by EU fundamental rights. But as states Groussot, *the Court will eventually remedy the drifting deficiencies of the Charter on this point* because explanations coming from the drafters of the Charter show that they did not have an intention to reduce the Court's scope of review of national measures on fundamental rights grounds.⁴³

To sum up, from the analysis of EU fundamental rights development we see that actually the Member States were the ones that decided to trigger the development of the

⁴² Protocol 30 to the Lisbon Treaty on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom (the Protocol), and endorsed by the Czech Republic upon signature of the Lisbon Treaty, has cast some doubt on the enforceability of the Charter in courts of those member states. However, the general consensus is that article 1(1) of the Protocol merely clarifies that the Charter does not extend the ability of the EU courts to find domestic legislation incompatible with it. The Charter can only be used when a case falls within the scope of EU law. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2008/C115/01), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:en:HTML>.

⁴³ Groussot, Xavier, 2012, p. 4.

protection of fundamental rights in the EU. What started out as provocation on the EU to subject itself to a fundamental rights standard, later led to the situation in which Member States themselves have become subject in more and more intrusive ways.⁴⁴ However, the Member States put clear limits on the scope of interference of EU fundamental rights provisions in internal matters. The CJEU case law later developed into the Charter of Fundamental Rights of European Union shows that CJEU has no power to review any provision of national law in the light of EU fundamental rights. In other words the national authorities of the Member States acting outside the scope of EU law, are not bound by EU fundamental rights provisions. The primary addressees of the Charter are EU institutions (Article 51(1) CFR states that *Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity* and the scope of the Charter reach the actions of the Member States only then they are *implementing EU law*).⁴⁵

This brief introduction to EU fundamental rights law development and the scope of its reach in the second chapter will be followed by the case study of Hungary. The large-scale legal reforms which were undertaken in the country over the last few years caused grave fundamental rights violations. In light of these events the EU institutions were seen as the most influential and powerful forces, capable of providing protection to people, who enjoy the status of EU citizens. How the things turned out and to what extent EU fundamental rights policy was effective, will be presented in the following chapters.

⁴⁴ Basselink, 2012, p. 42.

⁴⁵ Viviane Reding (Vice-President of the European Commission, EU Justice Commissioner), the restricting wording set in the Charter in regard to its application *only when they [Member States] are implementing Union law*, is even more restrictive than the case-law of the Court has traditionally been. The Court also saw national authorities as bound to national law when they acted *within the scope of EU law* and under this definition fall different categories of the case-law. However she thinks that the Court will not accept such a restriction easily. Reding Viviane, Vice-President of the European Commission, EU Justice Commissioner Observations on the EU Charter of Fundamental Rights and the future of the European Union XXV Congress of FIDE (Fédération Internationale pour le Droit Européen) Tallinn, 31 May 2012.

2. Hungary as a litmus test for a fundamental rights protection by the European Union

In 1993 the European Council in Copenhagen took a decisive step towards the fifth enlargement, agreeing that the associated countries in Central and Eastern Europe shall become members of European Union. At the same time the European Council defined the membership criteria, often called as the ‘Copenhagen criteria’, according to which, accession of the new members is possible as soon as an associated country meets the required criteria, including respect for human rights.⁴⁶ The Copenhagen Criteria were originally designed for the purpose of avoiding incorporation of some serious human rights problems existing in the post-communist states into the EU order. But how should the EU react when members turn to violate fundamental rights? What kind of measures can the EU undertake if the domestic legislation of one of its Member States is incompatible with its fundamental rights protect by EU?

Despite the fact that the Lisbon Treaty in 2009 introduced some major changes to the nature of fundamental rights protection in the EU⁴⁷, it did not change the scope of fundamental rights protection with the EU Member States. In other words, the Lisbon reform even narrowed down the scope of EU fundamental rights protection within its Member States.⁴⁸ The Charter of Fundamental Rights of the EU, which brings together in a single document the fundamental rights protected in the EU, is very restrictive in its wording. As states Vivienne Reading, *the Member States are only bound by the Charter when they act as agents for the Union, e.g. when they execute an EU decision, when they apply an EU Regulation at national level or when they implement an EU Directive.*

⁴⁶ European Council in Copenhagen, Accession criteria, 1993. Accession via internet:<http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/93/3&format=HTML&aged=1&language=EN&guiLanguage=en>.

⁴⁷ The importance of fundamental rights in the EU is clearly stressed in Article 6 TEU, which states that the Charter of Fundamental Rights of EU shall have the same legal values of the Treaties; that the EU shall accede to the European convention for the Protection of Human Rights and Fundamental Freedoms and that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

⁴⁸ According to Article 51(1) CFR, the Charter binds the Member States *only when they are implementing Union law*. It narrows down the formula used by the CJEU which states, that EU fundamental rights bind Member States *when acting within the scope of Union law*.

*When Member States act on their own initiative, there is no need to bind them to the Charter, as in these cases, they are subject to their national fundamental rights law.*⁴⁹

But what if national law itself is incompatible with international fundamental rights requirements? What then can the EU do, as an institution that is based on the human rights values (Article 2 TEU)?

The opportunity to answer these questions arose in the light of Hungarian case. Over the past few years, Hungary has adopted plenty new laws, including so-called cardinal laws adopted directly under the constitution, which raised big fundamental rights concerns and also came under analysis in the Council. In view Article 51 of the Charter, the EU had to limit its legal analysis to those matters where there was a clear link with EU law.⁵⁰ How helpful and far-reaching EU actions were, in the light of Hungarian fundamental rights crisis, is going to be discussed below.

2.1. Hungary's controversial legal reforms

In 2010 a new Hungarian Government came to power. The *Fidesz* Party led by Prime Minister Victor Orban gained two third majority in Parliament and this made it possible for a government in first 20 months in office to pass 365 laws, including twelve amendments to the old constitution. together this changed more than 50 individual constitutional provisions. Many of these changes to the old constitution assisted the government in carrying out its new constitutional drafting process without challenge from other State bodies.⁵¹ This complex revision of the legal system has created a great deal of legal problems and uncertainty in the Hungary.

The grave legal changes in Hungary started with the media legislation that was the first step in a troubling trend for human rights in Hungary. In its report, the Office of the OSCE Representative on Freedom of the Media, warned about the chilling effect on

⁴⁹ Viviane Reding Vice-President of the European Commission, EU Justice Commissioner Observations on the EU Charter of Fundamental Rights and the future of the European Union XXV Congress of FIDE (Fédération Internationale pour le Droit Européen) Tallinn, 31 May 2012.

⁵⁰ *idem*

⁵¹ Halmai, G., Scleppele, K. L., Opinion on Hungary's New Constitutional Order: Amicus Brief for Venice Commission on the Transitional Provisions of the fundamental Law and the Key Cardinal Laws, 2012, p. 6.

media freedom and independence. It also had concerns on the exercise of freedom of expression by introducing new and unnecessary bodies of oversight and supervision and with many decision-making processes involving a succession of inputs by disparate bodies that will multiply opportunities for political control.⁵² The European Commissioner responsible for the media, Neelie Kroes, and the Commission President, Jose Manuel Barroso, met with the Hungarian Prime Minister Viktor Orban. Together they sought clarification on the media law and to demand changes just after the law had come into force. This was done notwithstanding the fact that before the adoption of the media law, members of the European Parliament as well as some EU governments, OSCE and other international institutions, had all expressed concern about the media law.⁵³ The Hungarian government took these concerns into consideration and changed several provisions. But subsequent amendments to the law were seen as cosmetic.⁵⁴ As stated in the latest Amicus brief submitted to the European Commission for Democracy through Law (hereafter Venice Commission) on 16 February 2012, the problems related to media freedom haven't disappeared and still pose a threat to the freedom of expression.⁵⁵

Unfortunately, the media reform was only the tip of the iceberg in a series of reforms and a new constitution, later passed by the parliament, that seriously threatened

⁵² Jakubowicz, K., *Analysis and assessment of a package Hungarian legislation and draft legislation on media and telecommunications*, Office of the OSCE Representative on Freedom of the Media, September 2010, at <<http://www.osce.org/fom/71218>>.

⁵³ In the Amicus Brief addressed to the Venice Commission, the prominent Hungarian scholars, listed these concerns in regard to media laws: a) political dependence of the Hungarian Media and Telecommunication Authority and its overbroad regulatory authority powers; b) unreasonable and unconstitutional regulation of the print and on-line press; c) political influence on public service media; d) disproportionate and unpredictable sanctions causing chilling effects. *Opinion on Hungary's New Constitutional Order: Amicus Brief for Venice Commission on the Transitional Provisions of the fundamental Law and the Key Cardinal Laws*, 2012, p. 33.

⁵⁴ Human Rights Without Frontiers International, *EU Agency for Fundamental Rights: A Reality Check*, 8 November 2011, access via internet:

<http://www.religlaw.org/content/blurp/files/fra%20a%20reality%20check.pdf>.

⁵⁵ The Amicus Brief for Venice Commission states that the most problematic areas of the new regulatory system are the independence of the "super-regulator" NMHH, the rules applicable to the press, and the establishment of direct political influence, both on the public service media and on the sanctions to which media providers may be subject. Halmay, G., Scleppelle, K. L., *Opinion on Hungary's New Constitutional Order: Amicus Brief for Venice Commission on the Transitional Provisions of the fundamental Law and the Key Cardinal Laws*, 2012, p. 33.

core principles of democracy, human rights and justice.⁵⁶ The second step towards this troubling trend in human rights in Hungary was made in respect to the changes of the Constitution (hereafter the Fundamental Law).

Two leading European organizations (Council of Europe and European Union) have issued an opinion about the Fundamental Law before it entered into force. The Venice Commission was the first European institutional body to analyze the new draft Fundamental Law of Hungary and its compatibility with EU values. In its opinion on the Fundamental Law of Hungary adopted in 17-18 June 2011, and also latter submitted to the European Parliament, the Commission identified several legal weaknesses in the draft text of the Fundamental Law. First, the Hungarian Constitutional Courts had limited power in fiscal and budgetary matters. Second, the reforms lacked creditable protection of judicial independence. Finally, there was weak protection of fundamental rights at the constitutional level.⁵⁷

At the same time, similar debates were also going on at the EU level. The European Commission paid particular attention to the developments related to the new Hungarian Fundamental Law and its implementation, to the extent that it raises EU law issues. In the 2011 June plenary session of the European Parliament, the European Commission underlined that the Constitution of every Member State should reflect and comply with the European values of freedom, democracy, equality, the rule of law, human dignity and the respect of human rights, including the rights of persons

⁵⁶ In the "Opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87th plenary session (Venice, 17-18 June 2011; CDL-AD(2011)016), the Venice Commission makes it clear that democratic structures are endangered by several provisions of the Fundamental Law. Examples include upholding the limited powers of the Constitutional Court to review laws, the new rules on limiting fundamental rights, the system of laws requiring a two-thirds majority that allows for the cementing of the current Government's decisions on tax and social policy, or the Budgetary Council's anti-democratic possibility to hinder the Parliament in adopting the state budget. In March, 2012, at its plenary session Venice Commission adopted the "Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act XLXI of 2011 on the Organization and Administration of Courts of Hungary". The Commission found that "the [new Hungarian judicial] reform as a whole threatens the independence of the judiciary."

⁵⁷ *Idem.* para 146, 147, 148. Later on Venice Commission issued opinions on several other issues, including Opinion on the Act on the Elections of Members of Parliament of Hungary adopted by the Council for Democratic Elections at its 41st meeting (Venice, 14 June 2012) CDL-AD(2012)012; Opinion on the Act on the Rights of Nationalities of Hungary adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012) CDL-AD(2012)011; Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary at its 91st Plenary Session (Venice, 16-17 March, 2012) CDL-AD(2012)008 etc.

belonging to minorities, without discrimination, as laid down in Article 2 of the Treaty.⁵⁸ In December, the Commission expressed its concern regarding potential violations of EU law by certain provisions of the draft legislation in the Hungary.⁵⁹

Regrettably the Venice Commission concerns and the concerns expressed by the European Commission have not been fully taken into consideration by the Hungarian Parliament. Several months after the adoption of these opinions, the controversial Fundamental Law and later a number of cardinal laws entered into force in Hungary. In light of these legal changes, an important question arose as to whether the EU possesses any power over its Member States in the face of democratically implemented constitutional change? The next part of the thesis will provide a case-study based answer to this question.

2.2. The EU action in regards to the controversial legal reforms in Hungary

In order to show the practical fundamental rights protection approach at the EU level, this section will present the currently available EU treaty-based mechanisms and their application in the situation of fundamental rights violations in Hungary. The infringement procedure set up in Art. 258 TFEU and its practical implementation in the case of Hungary will show the scope to which the European Commission is applying Art. 258 TFEU in relation to fundamental rights violations. After stating that the infringement procedure does not ensure appropriate protection from fundamental rights violations and does not eliminate the threat to EU values (Art. 2 TEU), the second part of this chapter will examine another mechanism which is at the disposal of the EU institutions for ensuring compliance by Member States with fundamental rights. This second mechanism stipulated in Art. 7 TEU foresees the possibility to apply as a last resort the sanctions against EU Member States. It operates when there is a serious and

⁵⁸ Report on European Parliament session, Strasbourg 6-9 June 2011. <<http://www.europarl.europa.eu/news/en/pressroom/content/20110516NEW19404/html/Newsletter-6-9-June-2011-Strasbourg-plenary-session>>

⁵⁹ The report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2011 Report on the Application of the EU Charter of Fundamental Rights. 2012, COM(2012)169, p. 4.

persistent breach to the Union's foundation values set up in Art. 2 TEU, including human rights protection. Despite the very promising rhetoric of the Art. 7 TEU and its potentially broad scope of implementation, covering also internal fundamental rights violations, this article was never applied in practice. Therefore the aim of second part analysis will be to find the reasons why Art. 7 TEU is inactive and to assess its possible implementation in the case of Hungary.

2.2.1. Infringement procedure Art. 258 TFEU

Each EU Member State, including Hungary, is responsible for the implementation of EU law within its own legal system.⁶⁰ If the Member State fails to comply with its obligations under EU law, then European Commission can step in. The Lisbon Treaty gives the Commission the power to take legal action against those Member States that are not respecting obligations under the EU law. This power includes Commission's competence to launch the infringement procedure laid down in Article 258 TFEU against its Member State. The procedure has three stages: formal notice, reasoned opinion and referral to the Court.

In regard to the Hungary's case, the European Commission immediately after the entry into force of new Fundamental law, conducted a full legal analysis of the new Hungarian legislation and their compatibility with European Union Treaties. They decided to launch three accelerated infringement procedures (Art. 258 TFEU),⁶¹ namely on the independence of Hungary's central bank and data protection authorities, as well as over measures affecting the judiciary.⁶² On the 25 April 2012 the Commission noted progress on a number of issues, notably as regards Hungary's central bank statute where the Hungarian Government committed to take into account the Commission's legal concerns and to amend its national legislation. But in two other cases, the legal concerns

⁶⁰ This obligation comes from the CJEU case-law, in which principles of direct effect (Case 26/62, *Van Gend en Loos*, 1963) and supremacy of EU law (Case 6/64, *Costa/ENEL*, 1964) were developed.

⁶¹ Art. 258 TFEU states that if the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

⁶² The European Commission, European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary', 2012, press release, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24>.

of the Commission were not remedied and therefore the Commission decided to refer Hungary to CJEU for two infringement cases concerning the independence of the data protection authority and the retirement age of judges, prosecutor and public notaries.⁶³

The Commission was able to start the infringement procedure in regard to the independence of the Hungarian data protection authority. This was because EU rules on data protection (Directive 95/46/EC) require Member States to establish a supervisory body to monitor the application of the Directive acting in complete independence. In addition, the independence of data protection supervisors is guaranteed under Article 16 of the Treaty on the Functioning of the EU and Article 8 of the Charter of Fundamental Rights.⁶⁴

The second infringement procedure launched by the Commission was related to the early retirement of around 236 judges and public prosecutors in Hungary caused by a sudden reduction of the mandatory retirement age for this profession from 70 to 62. The basis that allowed Commission to start the infringement procedure was the EU rules on equal treatment in employment (Directive 2000/78/EC) which prohibit discrimination at the workplace on grounds of age. According Viviane Reding, *this case thus helps to implement the general prohibition of discrimination, including on grounds of age, as guaranteed by Article 21 of the Charter.*⁶⁵

Apart from these above mentioned controversial laws that raised concerns about their compatibility with EU Treaties, there were numerous other legal changes that posed threat to the fully enjoyment of fundamental rights. Worth noting is the Hungarian media law where there were serious concerns also, notably about the lack of independence of the new Hungarian media authority from the government. These concerns were also directly linked to the Article 11 of the Charter which provides for freedom of expression, freedom of information and freedom of media.

⁶³ The European commission, Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary, 25/04/2012, press release: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/395&type=HTML>.

⁶⁴ *idem*

⁶⁵ Viviane Reding Vice-President of the European Commission, EU Justice Commissioner Observations on the EU Charter of Fundamental Rights and the future of the European Union XXV Congress of FIDE (Fédération Internationale pour le Droit Européen) Tallinn, 31 May 2012.

However the absence of direct connection with EU law left these issues unexamined. As states Viviane Reding, *in view of Article 51 of the Charter, the Commission had to limit its legal analysis to those matters where there was a clear link with EU law.*⁶⁶

Nevertheless this thesis argues that despite the limited scope of fundamental rights protection on the EU level, other violations such as those related to the media freedom, right to free and fair elections, and prohibition of discrimination should also draw the EU's attention. The EU should understand that the Hungarian Government's attempts to extend its control over important branches of public life, including some (like independence of judiciary and protection of personal data) that ought to enjoy a status of independence, restricts the interest of Hungarians (who at the same time enjoy the status of European citizenship) to live in the Union founded on the values of respect for democracy, rule of law and human rights Art. 2 TEU.

Accordingly, Hungary's case demonstrates the limitations of the infringement procedure laid down in Art. 258 TFUE in providing a depoliticized and swift response to national measures, of which the compliance with fundamental rights remains questionable. This statement is supported by two reasons. First of all, the wide discretion of the Commission to handle the developments and to negotiate in an 'informal' way with the Member States during the entire procedure, as well as a wide room of discretion to decide to bring the case before the Court of Justice of European Union makes this procedure limited in its political scope. The Commission, like any political actor, has policy preferences that affect how it shapes its overseeing role.⁶⁷ Bernard Steunenberg states that, *the Commission can be described as a gatekeeper, that decides whether or not to challenge a member state.*⁶⁸ The second reason that decreases the practical impact of the infringement procedure set up in Art. 258 TFUE on the fundamental rights protection is its limited scope. This makes it applicable only in relation to EU law and does not cover internal fundamental rights violations within

⁶⁶ *idem*

⁶⁷ Carrera, Sergio and Atger, Anaïs Faure, *L'Affaire des Roms: A Challenge to the EU's Area of Freedom, Security and Justice*, Brussels: Centre for European Policy Studies, 2010, p. 16.

⁶⁸ Steunenberg, Bernard, Is big brother watching? Commission oversight of the national implementation of EU directives, *European Union Politics*, Vol. 11, 2010, p. 361.

Member States. Taking into consideration, that after the adoption of the Lisbon Treaty Charter of Fundamental Rights of the European Union has gained the same legal status as the Treaties, the infringement procedure of Art. 258 TEU could also be used in the situations where the Member State's national legislation violates fundamental rights. But as the example of the Hungary shows the infringement procedure in regard to fundamental rights matters is limited, because it requires a clear link with EU law, otherwise the domestic fundamental rights violations are not the EU's business.

In the light of these limitations, the critics within the European Parliament and also other international bodies have urged the EU to make use of the procedure provided for in Art. 7 TEU in the case of Hungary.⁶⁹

2.2.2. Art. 7 TEU: An opportunity for the EU to demonstrate that it takes its values seriously

The evolution of the EU towards a more political entity and the anticipation of its enlargement leading up to a much more heterogeneous membership with the explicit human rights provisions resulted in the need to set up a sanctioning mechanism for human rights violation.⁷⁰ It was with the Maastricht Treaty (1992), that human rights were eventually placed on Union's agenda. It must be remembered that it is widely thought that a transitional system committed to human rights is not complete unless it contains some elements of sanctions, and optimally, also prevention. Accordingly, it

⁶⁹ The European Parliament resolution on the recent political developments in Hungary (2012/2511(RSP)). On 16 February 2012, European Parliament adopted a resolution calling on the Hungarian government to comply with the recommendations, objections and demands of the European Commission, the Council of Europe and the Venice Commission and calling on the European Commission, the guardian of the Treaties, to monitor closely the possible amendments and the implementation of the said laws and their compliance with the letter and spirit of the European treaties and if needed apply Art. 7 TEU. Belgian MEP Guy Verhofstadt, who heads the Alliance of Liberals and Democrats for Europe, was the first to call for making use of Article 7 in the case of Hungary, <<http://www.euractiv.com/central-europe/eu-parliament-places-hungary-scrutiny-news-510938>>. The Human Rights Watch memo calls on the Council of the European Union, with support from the European Parliament and European Commission, to take action against Hungary under Article 7 of the EU Treaty, on the grounds that deteriorating media freedom in the country constitutes a clear risk of a breach of common EU values. Human Rights Watch, Hungary: Media Freedom Under Threat, EU Action Needed to Halt Slide on Rights, 2012, available at <http://www.hrw.org/news/2012/02/16/hungary-media-freedom-under-threat>.

⁷⁰ Sadurski, Wojciech, Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider, p. 2, in *Sydney Law School Research Paper*, No. 10/01, 2012 available at, <<http://ssrn.com/abstract=1531393>>.

was with the adoption of the Amsterdam Treaty (1997) when the sanctioning and preventive mechanism against member states violations of human rights was first settled on the Union's agenda.⁷¹ Besides technical reasons, there were practical reasons – in regard to the overriding ambitions of the Treaty of Amsterdam to prepare the Union for Eastern enlargement – which led EU to establish the sanctioning mechanism addressed to Member States if they breach or create a clear risk of breach of the values referred to in Art. 2 TEU. Art. 2 TEU states following:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The Article 7 mechanism of the Treaty on European Union sets up a system of early warning about the risk of breaches of values (Art. 2 TEU) in a Member State and a system of sanctions in the events of a determination that such breaches have occurred. Unlike the Art. 258 TFUE, which can be applied if a Member State has failed to fulfill an obligation under the Treaties the application of Art. 7 TEU is not limited to the scope of EU law. As stated in a Commission communication of 2003: Article 7 of TEU equips the Unions institutions with the means of ensuring that all Member States respect the common values, including human rights, and the Commission also emphasized that the scope of Article 7 TEU is not confined to areas covered by Union law, but also is horizontal and general in scope.⁷² Article 7 TEU provided the Union with the power to develop a general human rights policy in relation to the Member States and a competence to a general monitoring role.⁷³

The mechanism of Article 7 is designed for political actions and in order to

⁷¹ *idem* p. 3.

⁷² The European Commission, Communication from the Commission to the Council and the European Parliament of 15 October 2003 on Article 7 of the Treaty on European Union: Respect for and promotion of values on which the Union is based. Available at:http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/133500_en.htm.

⁷³ *idem* p. 34

impose any remedies on a member state, the Article 7.2 of TEU requires the unanimity from the Council (on a proposal by either one third of Member States or by the Commission, and after obtaining the assent of the European Parliament) to determine that a serious threat to human rights exists in the Member State.⁷⁴ When such a determination is made, the Council may decide to suspend certain membership rights, including the voting rights of the Member State in the Council. Such a strict requirements of the unanimity by the Council, reduction of the role for European Parliament, suppression of any role for the Court of Justice were set up, because the Member States, while clearly seeing the new mechanism in the context of the independent enlargement of the Union, were at the same time careful not to extend the scope of EU competence to the area of human rights and to restrict the possible control by the Union of their own behavior towards their own citizens.⁷⁵

In turn the softer provision of Article 7 TEU, namely the preventive mechanism provided for by Article 7.1 TEU, does not have such a high requirements. The preventive mechanism can be initiated by one – third of Member States, or the European Parliament, or Commission, while the end result of this procedure, namely the determination of a ‘clear risk of a serious breach’ of Article 2 TEU principles requires the majority of four-fifths of the Council plus consent of the European Parliament.⁷⁶ It is important to emphasize that the *preventive mechanism* of Art. 7 TEU was introduced later than *sanctioning mechanism*. In order to understand this late „strengthening” of Art. 7 TEU, the actual background will be briefly described.

As already mentioned it was evident at the time that several of the aspiring Member States from Eastern and Central Europe were new democracies with young and therefore weak human rights protection monitoring and enforcement mechanisms and despite the requirement to fulfill the membership criteria (The Copenhagen criteria), the sanctioning clause (Art. 7 TEU) was designed in order to ensure that a state would not

⁷⁴ The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2.

⁷⁵ Sadurski, Wojciech, 2010, p. 10.

⁷⁶ *idem*

fall back into undemocratic practice after the accession.⁷⁷ However, despite the fact how ironically it may seem, Austria, the country which was one of the initiators of a mechanism against Member States' violations of human rights in 1999 came to be governed by a coalition which itself became a source of strong human rights-related concerns by other member states.⁷⁸ The case of Austria (the so called „Haider affair”) needs a closer analysis, because its similarity to the situation in Hungary lately raise the question - if the Hungary is not moving towards a new „Haider” case ?

2.2.3. Is Hungary a new „Haider” case?

It was 1999 when the Austrian Freedom Party (FPÖ) led by Jörg Haider and usually characterized as far right-wing and xenophobic gained 27 per cent of the vote in the Austrian parliamentary election. The uncertainties about what level of populism and irrationality the member state may bring into the EU and anxieties streaming from those uncertainties, may explain why other 14 EU member states agreed on a plan drawn up by the Portuguese Presidency for a committee of “three wise men”⁷⁹ to report on Austria's compliance with “common European values”.⁸⁰ Apart from other important observations, the report made a recommendation to introduce the “preventive and monitoring procedure into Article 7 of the EU Treaty, so that situation similar to the current situation in Austria would be dealt with within the EU from the very start”.⁸¹ The report identified the negative side of the *sanctioning mechanism*, which can stirred up national feelings in the country and therefore proposed additional preventive measure, which would allow from the beginning an open and non-confrontational dialogue with the Member State.⁸² The proposed *preventive mechanism* was introduced into the EU legal order after the adoption of the Treaty of Nice in 2001.

⁷⁷ Neuwahl and Wheatley, *The EU and Democracy-Lawful and Legitimate Intervention in the Domestic Affairs of States*, p. 232 in Arnall and Wincott, *Accountability and Legitimacy in the European Union*, Oxford: Oxford University Press, 2002.

⁷⁸ Sadurski, Wojciech, 2010, p. 12.

⁷⁹ Ahtisaari, M., Frowein, J. and Oreja, M. (2000) 'Report by Martti Ahtisaari, Jochen Frowein, Marcelino Oreja', Paris, 8 September 2000, available at: <<http://www.mpil.de/shared/data/pdf/report.pdf>>.

⁸⁰ Sadurski, Wojciech, 2010, p. 18.

⁸¹ Ahtisaari, M., Frowein, J. and Oreja, M. 'Report by Martti Ahtisaari, Jochen Frowein, Marcelino Oreja', Paris, 2000, available at: <<http://www.mpil.de/shared/data/pdf/report.pdf>>.

⁸² *idem*

As the evolution of Article 7 TEU shows, the EU already in the mid nineties, almost ten years before its Eastward enlargement, became aware that the accession criteria (Copenhagen criteria), which sets human rights, democracy, rule of law and human rights as the preconditions for joining the EU are not enough to ensure the stability in the region. Therefore the Article 7 TEU with its sanctioning mechanism was introduced. The Article made it possible to sanction serious breach of the EU values, including human rights, in Member State, regardless of the application of EU law. Paradoxically not the Eastern or Central European country, but the country which was one of the initiators of a mechanism come to be the first which itself began to raise strong human rights-related concerns. Unfortunately the EU decided not use the sanctioning mechanism, because of the raised doubts about the legality of such action.⁸³ However even after the failed attempt to apply the sanctioning mechanism, it was believed that the Austrian episode triggered an important enhancement of the mechanism by building into it an early warning system. This step was seen as an important affirmation of the EU's commitment to "common values" and at even further EU preparation for its Eastwards enlargement.⁸⁴ But the recent example of Hungary shows that the expectations that EU will be more active in fundamental rights protection and will use its treaty based mechanism Art. 7 TEU were not met. However the worries that new Member States from Eastern and Central Europe could cause the threat to EU fundamental values have been confirmed.

The immediate threat to the EU fundamental value comes from *Fidesz*, the governing center-right party in Hungary that went much further than the Austrian Freedom Party (FPÖ) led by Jörg Haider.

According to Paul Krugman, Europe is now seeing the logical next step of a continent that's collapsed into depression: the rise of authoritarianism and the hard right wing domination. Krugman's brave statement is based on the following reasons: *Fidesz*

⁸³ The only response to the human rights concerns in Austria came from the 14 member states, which acting formally outside the EU framework introduced several sanctions against Austria. The common position at that time was that realization of sanctioning mechanism would mean an intolerable interference in a State's internal affairs and disrespect of the democratic will of the people of Austria. Sadurski, Wojciech, Adding a Bite to a Bark? A story of Article 7, The EU Enlargement, and Jorg Heider, 2010, p. 15.

⁸⁴ *idem* p. 35

party which is relying on overlapping measures to suppress opposition had proposed election law which creates gerrymandered districts designed to make it almost impossible for other parties to form a government; judicial independence has been compromised, and the courts packed with party loyalists; state-run media have been converted into party organs, and there's a crackdown on independent media; and a proposed constitutional addendum would effectively criminalize the leading leftist party. According to Krugman taken together, all this amounts to the re-establishment of authoritarian rule, under a paper-thin veneer of democracy, in the heart of Europe. And it's a sample of what may happen much more widely if this depression continues.⁸⁵

The calls to stop this depression, which causes the grave fundamental rights violations in the Hungary and to take stronger actions at the EU level, have already been made by the European Parliament. As stated the President of the Liberal Group in the European Parliament Guy Verhof: *By deciding to begin infringement procedures only on three specific issues that may breach European law, the Commission has missed the broader picture. The case of Hungary is not just about technical breaches of EU legislation, but a wider concern of gradual but persistent erosion of EU values, as spelled out in Article 2 TEU - eg. concerning freedom of expression, of the media and of religion.*⁸⁶ This position was also supported by an other political group in the European parliament – the Greens/European Free Alliance. Its co-president Rebecca Harms welcomed the decision of European Commission to refer Hungary to the Court of Justice of European Union over the failure of the Hungarian government to amend proposed laws threatening the independence of the judiciary and the data protection authority, but also expressed concern about the failure to address the wider concerns with constitutional changes, which are leading to a scale-back of democracy in Hungary. According the Greens co-president: *The EU must take stronger action in*

⁸⁵ Krugman, Paul, Depression and Democracy, *The New York Times*, 11 December 2011. Access via internet: http://www.nytimes.com/2011/12/12/opinion/krugman-depression-and-democracy.html?_r=1.

⁸⁶ Verhofstadt, Guy, Hungary: Commission infringements don't go far enough - article 7 TEU should be applied, press release: <<http://www.alde.eu/press/press-and-release-news/press-release/article/hungary-commission-infringements-dont-go-far-enough-article-7-teu-should-be-applied-37822/>>.

defense of core EU.⁸⁷ Also the European Parliament directly in its resolution on the recent political developments in Hungary called on the Conference of Presidents to consider whether Art. 7 (1) of the EU Treaty should be activated.⁸⁸

But regardless of these initiatives the further practical steps to application of the Art. 7 TEU were not made. Also the warnings that came from the European commissioner for the digital agenda, Neelie Kroes, asking Hungary to act on a recommendations from the Council of Europe on its media law, otherwise she will ask the Commission to invoke Art. 7 of TEU were not implemented.⁸⁹

The EU reluctance to activate Art. 7 TEU can be explained as its try to avoid a defensive position by the Hungary under scrutiny which could harden their position rather than closing the gap between the EU and the State concerned. These concerns are reasonable in light of Hungarian Prime Minister's statements. In one of them Viktor Orban, Hungary's Prime Minister, heightened the clash with EU and presented his position towards EU interference by saying: "we will not be a colony". Victor Orban pointed out that Hungarians "will not live as foreigners dictate it, will not give up their independence or their freedom."⁹⁰ Coming back to the earlier discussed „Haider's case", the Wise Men report declared at the time that sanctioning measures undertaken by the 14 other Member States (without the direct EU interference) were counterproductive, because they stirred up national feelings in the country, as they have in some cases been wrongly understood as sanctions directed against Austrian citizens.⁹¹ Therefore they recommended to introduce the preventive and monitoring procedure into Article 7 TEU, so that the a situation similar to the „Haider case" would

⁸⁷ The Greens/European Free Alliance in the European Parliament, Hungary- fundamental rights, Press release, 2012 April 25, access via internet: <<http://www.greens-efa.eu/hungary-fundamental-rights-7024.html>>.

⁸⁸ European Parliament resolution of 16 February 2012 on the recent political developments in Hungary 2012/2511 (RSP). Access via internet:<http://www.euoparl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-53>.

⁸⁹ Nielsen, Nikolaj, Kroes threatens nuclear option against Hungary, 2012, available at: <http://euobserver.com/9/115209>.

⁹⁰ Taylor, Simon, Orban accuses EU of colonialism, EuropeanVoice.com, 2012. Available at: <http://www.europeanvoice.com/article/2012/march/orban-accuses-eu-of-colonialism/73903.aspx>.

⁹¹ Ahtisaari, M., Frowein, J. and Oreja, M. (2000) 'Report by Martti Ahtisaari, Jochen Frowein, Marcelino Oreja', Paris, 8 September 2000, available at: <<http://www.mpil.de/shared/data/pdf/report.pdf>>.

be dealt with within the EU from the start.⁹² The preventive mechanism (now Art.7 (1) TEU) was introduced into the Treaty, but as a case of Hungary shows, it was not implemented at the beginning when the controversial legal reforms just started in the country. Now when more than 350 laws have been already changed and as the consequence of these changes - fundamental rights are at real stake, the use of Art. 7 (1) *preventive mechanism* is not the gate from the present situation anymore. The only possibility to secure EU fundamental values (Art. 2 TEU) and protect fundamental rights is the application of *sanctioning mechanism* Art. 7(2). Because despite the stamens made in the Wise Men report of the counterproductively of sanctioning measures, the later events in Austria showed, that the external pressure and the sanctioning mechanism used by other 14 EU Member States had positive effect on the fundamental rights situation in Austria.⁹³

Therefore the time will show if the EU political bodies will find a courage to activate the Art. 7(2) TEU.

But such sensitive issues as a protection of fundamental rights shouldn't be left just for the discretion of political bodies. Legal certainty and predictability must be granted for people in the relation to fundamental rights. Therefore the next chapter will analyze the CJEU case law in order to see if it is possible to create a new more predictable legal fundamental rights protection mechanism, which would be derived from the EU Treaties and applied by the EU institutions.

⁹² *idem*

⁹³ During that period the two first Directives on combating discrimination were adopted (Directive 2000/43 and Directive 2000/78) with the Austrian vote and a positive end to the European Convention on the European Charter of Fundamental rights was drawn, also last but not least, there has been a loss of popularity of the Haider Party (FPÖ) and its consequent exclusion from the Austrian government. European Union and Hungary: towards a new "Haider" case? Access via internet: <http://afsj.wordpress.com/about/>.

3. The Role of the Court of Justice of European Union in protection of Fundamental Rights

As the discussed case-study of Hungary showed, the current available EU's tools are inadequate to prevent fundamental rights violations from happening in the EU Member State. But as states Professor Peter Birks:

*There is no shortage of recurrent reminders of the necessity of deepening knowledge and understanding of the phenomenon which we call law, and the cost to the world of failures in that endeavour. That cost can be counted daily in injustice, cruelty, violence, and abuse of power.*⁹⁴

The necessity to deepen the knowledge of law is especially relevant in the field of fundamental right, because these rights are defined as absolute rights a human being of certain legal system possess, that cannot under the majority of circumstances be taken from him. According to theoretical orthodoxy, when a legal order recognizes a right as fundamental, this means that the public authorities have the burden of justifying restrictions upon it, or as Dworkin stated, the individual has a trump card against authorities given to him by the law.⁹⁵ These rights reveal the essential values of a given polity and receive the highest level of protection.⁹⁶ Different legal systems might consider different rights to be 'fundamental'. Thus rights protected by state constitutions and the EU as fundamental rights are not necessarily the same ones. However, in practice, there is substantial coincidence between the rights regarded as fundamental within the European and constitutional legal systems. It is mainly because the CJEU has repeatedly declared, one of main sources for interpreting EU rights is constitutional traditions common to the member states.⁹⁷ This high standard of

⁹⁴ Colneric, Ninon, Protection of Fundamental Rights through the Court of Justice of European Communities, Working paper, 2003, p.1, available at: <http://denning.law.ox.ac.uk/iecl/pdfs/working2colneric.pdf>.

⁹⁵ Dworkin, R, *Taking Rights Seriously*, London: Duckworth, 1978, p. 184.

⁹⁶ Pérez, Aida Torres, *Conflicts of Rights in the European Union*, Oxford: Oxford Scholarship Online, 2009, p. 9.

⁹⁷ Pérez, Aida Torres, 2009, p. 11.

fundamental rights protection should apply not just on paper but foremost on the practical ground and prevent fundamental rights violations from happening.

Coming back to the Hungarian case study, the analysis of the recent political realities in the country has showed that the currently available EU's tools demonstrate the limitations of the enforcement mechanisms in providing effective response to national measures whose compliance with EU law and fundamental rights remains questionable. Therefore the thesis argues that a new legal tool is needed at EU level to examine contested national measures which affect the fundamental rights in a more effective way. And it seems from the CJEU recent case law that the Court has a potential to come up with this new mechanism throughout the EU citizenship provision.

Why EU citizenship provision seems to be the most suitable option to widen the scope of fundamental rights protection and why the Court not an other EU institution should introduce these changes will be discussed in the following parts of this chapter.

3.1. The Court of Justice of the European Union

The above outlined need of the EU fundamental rights evolution should be complemented with an outline of the judicial evolution, which is the straightforward gate to it.

The Court of Justice of the European Union (CJEU) is today one of the most prominent high courts in the world. Its impact on the overall course of European integration has been deep and pervasive, and its rulings have exerted decisive influence on streams of outcomes in diverse policy sectors.⁹⁸ In its early days the CJEU was faced with two main challenges: to ensure its own effectiveness and the effectiveness of Union law in general while, at the same time, avoiding any involvement in national and political conflicts that might undermine both its own judicial credibility and the credibility of Union law.⁹⁹

⁹⁸ De Burca, Grainne, *The Evolution of EU Human Rights Law*, Sweet, Alec Stone, *The European Court of Justice*, Oxford University Press Inc. 2011.

⁹⁹ Maduro, Miguel Poiares, *We The Court - The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing, 1998, p. 7.

However one of the first moves the Court made was to construct Union law as the Union's own legal system.¹⁰⁰ The CJEU could achieve it because historically it has been placed absolutely central and has been able to consolidate this placements itself. This is partly due to the role law had in the EU as "the legal edifice it fostered was constitutive of the EU as a Union based on law. Law is central to self-definition of the Union and is thus to the framework of meaning that has grown up around the EU".¹⁰¹ Because of this centrality of law, the state of law following the doctrines established by the CJEU became very influential. A next step taken to enhance the effectiveness and influence of Union law even further was, as AG Maduro states, the *subjectivation* of the Treaties.¹⁰² By the *subjectivation* author means the move from a state-based interpretation of the Treaties into an individual-based interpretation. The Treaties started to be interpreted not simply as an agreement between States, but as having been created for the *peoples of Europe*. The *subjectivation* of EU law most importantly presented Union law as a source of new rights for nationals of all Member States and the decisions of the Court started to be seen not as deciding conflicts among states, but as protecting individuals from states: even from their own home-state in some cases.¹⁰³

Worth noting is also that the jurisdiction of the CJEU *inter alia* is an area that is not directly addressed by the competence provisions of the TFEU. Therefore principles of subsidiarity and conferral do not apply to CJEU decisions, it means that the CJEU action that completely corresponds to the realm of European legislative action are generally not thought of as a problem. On the other hand, the Court's decisions with direct and immediate effect in the Member States are often enough perceived as emanation of European competence.¹⁰⁴ Typically, there are many cases where CJEU jurisprudence clearly steps outside the wording of the treaties. The examples of the Court stepping outside the narrow wording of the treaties and referring to general

¹⁰⁰ *idem*

¹⁰¹ Laffan, Brigid (2004). "The European Union and Its Institutions as „Identity Builders“". In: Richard Herrmann, Thomas Risse and Marilyn Brewer (eds.): *Transnational Identities: Becoming European in the EU*. Oxford: Rowman & Littlefield Publishers. p. 87

¹⁰² Maduro, Miguel Poyares, 1998, p. 9.

¹⁰³ *idem*

¹⁰⁴ Mayer, Franz C.: *Competences – Reloaded? The Vertical Division of Powers in the EU after the New European Constitution*, Walter Hallstein-Institut für Europäisches Verfassungsrecht, Paper 19/04 (2004), available at: <http://www.whi-berlin.de/reloaded.htm>, p. 34.

principles and to *effet utile* are following: direct effect and supremacy of EU law in *Van Gend en Loos* and *Costa v. ENEL*¹⁰⁵, the jurisprudence on direct effect of directives, the *Francovich* jurisprudence¹⁰⁶, the entire fundamental rights jurisprudence, in particular the strand of cases from *ERT* to *Carpenter* extending the reach of European fundamental rights to the Member State level.¹⁰⁷ As has been already mentioned, since the European Union was formed in pursuit of narrow economic objectives, the original EU Treaty did not make provisions for a regime of fundamental rights protection. But once CJEU put in place the jurisprudence on the direct effect and supremacy of European law, which was meant to strengthen the EU integration, it became legally and politically imperative that a way to be found to vindicate fundamental human rights at the EU level. It was obvious that the Member states will not accept the direct effect and supremacy of EU norms, without an assurance that human rights would be protected within the EU legal order and individuals would not lose any of the protections afforded under national constitutional order. The protection of human rights became a joined political and legal imperative and the response to it was a rich CJEU case law practice, including *Stauder*, *Nold* etc.¹⁰⁸ In due course with adoption of Lisbon Treaty this unwritten Bill of Right, which emerged from the CJEU case law became a legally binding norms. Taking this through the CJEU case law practice evolving EU fundamental rights protection scope into the consideration, this thesis seeks to answer the question *whether there is a potential on the contribution of case law to the evolution of EU fundamental rights protection also in internal situations?* Because according to the present Treaty provisions and previous CJEU case law, the EU fundamental rights may be invoked when (but only when) the contested internal measure comes within the scope of application of EU law. The possible answer to question is that the extension of the fundamental rights protection could be possible through the EU citizenship provision. And because of the above mentioned particularities the Court seems the most

¹⁰⁵ Case 6/64, *Costa v ENEL*, 1964. Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, 1963.

¹⁰⁶ Cases C-6, 9/90, *Francovich and others v. Italy*, 1991.

¹⁰⁷ Case C-60/00, *Mary Carpenter/Secretary of State for the Home Department*, 2002; Case C-260/89, *ERT*, 1991.

¹⁰⁸ Weiler, J.H.H, *The Constitution of Europe, 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, Cambridge: Cambridge University press, 1999. p. 108.

suitable EU institution, which has the best chance and freedom of action to influence the changes in the EU fundamental rights area. Therefore the following part of the thesis will provide extensive analysis of the concept of citizenship in order to justify, why namely this provision should be used as the gate towards wider EU fundamental rights protection practice. It is assumed that the understanding of the essence of the citizenship concept and the understanding how this concept has developed in regard to the CJEU case law, will justify its significant potential to become a safeguard of fundamental rights also in regard to internal Member State matters.

3.2. The relation between EU citizenship and EU fundamental rights

The EU citizenship rights set in Article 20 TFEU have been incorporated in the Chapter V of the Charter of Fundamental Rights of European Union and are therefore part of EU fundamental rights. But whether all EU fundamental rights are EU citizenship rights is another question, which can not be answered easily. Because the positive answer to this question would imply a significant extension of the EU fundamental right's scope, since the CJEU and the Treaties so far have limited the application of EU fundamental rights to Member States.

As already noted Article 51(1) of the Charter states that *the Charter applies to the Member States only when they are implementing Union law*. This wording is even more restrictive than the case-law of the Court has traditionally been. The Court also saw national authorities bound to EU fundamental rights law when they acted *within the scope of Union law*. But as stated AG Sharpston in her Opinion on *Ruiz Zambrano*, this in some situation even artificial approach always to try to find some link to EU law and therefore to avoid the application of EU fundamental rights in purely internal situations, also creates some ridiculous situations, in which for instance: *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.*¹⁰⁹

The solution of this situation is the extension of the scope of EU law by means of the extension of EU citizenship substance, which would also include fundamental rights. The meaning of the concept of the EU citizenship as an empty shell is past and not relevant any more, because of the CJEU case law, which already have started to put *flesh on the bones of EU citizenship.*¹¹⁰ Therefore the fulfillment of the substance of EU citizenship with the fundamental rights would be a logical step in the Union, which is founded on the values of respect for human rights (Article 2, TEU). The EU citizenship as the formal common denominator is of paramount importance for the protection of fundamental rights which can only be ensured by judicial protection.¹¹¹

Where it has always been possible to rely on EU fundamental rights only if there was a relation with another aspect of EU law, an inclusion of fundamental rights into the substance of EU citizenship would create the possibility for EU citizens to rely on fundamental rights in any case, noting that *the Charter is not only one, but merely one of the sources clarifying the substance and scope of EU human rights.*¹¹² Why EU citizenship provision seems to be the most suitable option to wider the scope of fundamental rights protection, will be discussed in the following part.

3.3. EU Citizenship

The citizenship, mostly because of its importance to the legal status of every individual, was generally viewed as a key element of State sovereignty. But the EU was a first and so far the only supranational entity in the world to extend citizenship status to some of the persons within its jurisdiction.¹¹³ The concept of EU citizenship is relatively new. The Treaty of Rome in 1957 made references to several peoples rather than a

¹⁰⁹ Opinion of Advocate General Sharpston in Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi, 2011, para. 84.

¹¹⁰ O'Leary S., Putting flesh on the bones of European Union Citizenship, in *European Law Review*, 1999, p. 68.

¹¹¹ O'Keefe, D. and Bavasso, A, Fundamental Rights and the European Union. Edited by M. La Torre. In *European citizenship : An Institutional Challenge*, The Hague: Kluwer Law International, 1998, p. 253.

¹¹² Uitz, Renata, Rescue package for Fundamental Rights: Comment, 2012, available at: <<http://verfassungsblog.de/rescue-package-fundamentafl-rights-political-judicial-enforcement/>>.

¹¹³ Kochenov, Dimitry, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', in *Columbia Journal of European Law* No. 15, 2009, p. 182.

single entity. The Rome Treaty did not recognize a constitutional right to European citizenship, citizenship remained the prerogative of the Member States.¹¹⁴ However it was with the Maastricht treaty (1993) when a historically unprecedented event happened: for the first time in the history of the Westphalian political order, a design of citizenship beyond the nation state reared its head. At the time the most scholars tend to look down upon EU citizenship as an empty shell and the expectations about its impact on the EU legal order were quit low. But two decades later the transformation of the EU citizenship concept is obvious and its further development lies ahead.¹¹⁵

The EU citizenship is defined by the provisions found in the Articles 18-24 of the TFEU. The Art. 20 TFEU defines the essence of the EU citizenship. According to the Art. 20 TFEU every person who holds the nationality of a Member State is also a citizen of the EU, however the citizenship of the EU does not replays, but is additional to national citizenship.¹¹⁶ The EU citizenship thus offers a set of rights, that are concentrated in the Part II TFEU and elsewhere in the Treaty, including the right to move and reside within the territory of Member States; the right to vote and stand as candidate in elections of the European Parliament and in municipal elections in their Member State of residence; the right to enjoy the protection of the diplomatic and consular authorities of any Member State; the right to petition the European Parliament and to address the institutions and advisory bodies of the Union in any of the Treaty languages and the general prohibition of discrimination on the ground of nationality.¹¹⁷ However this list does not cover all citizenship rights. Art. 20 TFEU in addition contains a larger bundle of non-exhaustive rights, by stating that the explicitly in the Treaty mentioned rights are given to the EU citizens *inter alia*, and citizens also *shall*

¹¹⁴ Mancini F., The Making of a Constitution for Europe, p. 596, in *Common Market Law Review*, vol. 26, 1989.

¹¹⁵ De Waele, Henri, EU Citizenship: Revisiting its Meaning, Place, Potential, p. 335, in *European Journal of Migration and Law*, No. 12, 2010.

¹¹⁶ The supplementary of EU citizenship to national one is consistent with the *Micheletti* decision of the Court which was buttressed by the provisions of the Maastricht Treaty. The Court ruled in *Micheletti* that Member States alone hold exclusive and sole competence for the conditions of granting or revoking citizenship. Nonetheless, they do not have the power to restrict derived rights where citizenship has been vested by a different member state. Case C-369/90, *Micheletti v Delegación del Gobierno en Cantabria*, 1992.

¹¹⁷ The Treaty on the Functioning of the European Union, 2010, Art. 20. Access via internet: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>>.

*enjoy the rights <...> provided for in the Treaties.*¹¹⁸ It means that any right to be found in the EU Treaty is potentially a citizenship right and the article does not limit the citizenship right to those included in Part II TFEU.

As stated De Burca, the initial concept of EU citizenship introduced by the Treaty of Maastricht contained almost no novelties as far as the rights enjoyed by European citizens were concerned.¹¹⁹ Indeed all of the rights, except the right to vote in local elections and consular protection, could be found elsewhere in the text of the Treaty or other legal norms before the idea materialized in the TFEU text.¹²⁰ However with the contributions of the CJEU the evolution of the content of EU citizenship started to evolve further, because of the CJEU ability to fill these seemingly old rights with new substance. The CJEU has been instrumental not only in the elaboration of a new legal order in the EU but also in the evolution of EU citizenship specifically: *The CJEU phased approach in-between Treaty revisions has strengthened the constitutional importance of European citizenship.*¹²¹ In its case law the CJEU has promoted a far-reaching view of citizenship as *destined to become the fundamental status of nationals of the member States.*¹²² The potential of this *fundamental status* has been demonstrated in Courts judgments when it relied upon citizenship as an instrument to break open the Member States' national assistance system¹²³, correct the national rules governing surnames¹²⁴ and extend the residence right of non-national family members¹²⁵.

However worth emphasizing is that in all these cases the cross-border element has been considered as a precondition to bring a situation within the scope of EU law. Therefore, not surprisingly, the adoption of article 18-24 TFEU has often been deemed

¹¹⁸ TFEU Art. 20 (2).

¹¹⁹ De Búrca, G., Report on the Further Development of Citizenship in the European Union, p. 43, in *Zeitschrift für Schweizerisches Recht*, No. 39, 2001.

¹²⁰ Kochenov, Dimitry, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', p. 209, in *Columbia Journal of European Law* No. 15, 2009.

¹²¹ Kostakopoulou, Dora Ideas, Norms and European Citizenship: Explaining Institutional Change, p. 233, in *Modern Law Review*, Vol. 68(2), 2005.

¹²² About the EU citizenship as fundamental status the Court talks in Case C-184/99 Grzelczyk, 2001, ECR I-6193, para. 31, Case C-224/98 D'Hoop, 2002, ECR I-6191, para. 28; Case C-413/99 Baumbast and R., 2002, ECR I-7091, para. 82; Joined Cases C-482/01 and C-493/01 Orfanopoulos and Oliveri, 2004, ECR I-5257, para. 65; Case C-148/02 Garcia Avello, 2003, ECR I-11613.

¹²³ Case C-184/99 Grzelczyk, 2001.

¹²⁴ Case C-148/02 Garcia Avello, 2003.

¹²⁵ Case C-127/08 Metock and Others, 2009.

as an exercise in window dressing. Especially because the following questions in light of fundamental rights protection were often raised: Why would the famous adagio „*civis europeus sum*” only apply to certain categories of Union citizens? Why should the common fundamental values laid down in the Charter only apply when Union citizens can prove an actual or potential cross-border link or when their citizenship status as such is at stake? Could the nationality of the Member State automatically open the gates to the application of the Charter on the basis of the EU citizenship provisions?¹²⁶

The answers to these questions will be presented in the following part of this chapter. The description of the new CJEU jurisdiction test, is going to show the changing nature of the strictly limited reach of the EU law. As we will see in the following part, according to the recent CJEU jurisprudence the cross-border element is no longer required in order to be able to claim EU citizenship rights violations before the Court, because the Court states that the interference to *the substance of the EU citizenship rights* itself is sufficient reason to hear a suit. However the Court stays precautionous and does not define the exact meaning of *the substance of EU citizenship rights*, apparently leaving this task open for future interpretation. These novelties are very significant in light of the fundamental rights protection, because in the future a bundle of new fundamental rights could fit in this unspecified concept of *the substance of the EU citizenship rights*, thus „bypassing” the restricted application of EU fundamental rights. Because the Charter of Fundamental Rights of European Union is not only, but merely one of the sources clarifying the substance of EU human rights.

3.4. The EU citizenship and the fundamental rights protection in the case law of the CJEU (*Rottman, Zambrano, McCarthy, Dereci*)

According to Eleanor Spaventa, *in a Union built on the principle of equality, there should be no space for an Orwellian approach whereby some citizens are more*

¹²⁶ Adam, S. and Elsuwege, P., Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on Dereci, p. 186, in *European Law Review*, Vol. 37, 2012.

equal than others.¹²⁷ But the very idea of the EU citizenship sat uncomfortably with a priori differentiation between citizens based on the sole ground that a border has been crossed.¹²⁸ Nonetheless the recent CJEU case law practice shows that the Court has firmly emancipated the status of EU citizenship from the „cross-border” requirement and has inaugurated a new area for the protection of rights linked to the essence of the EU citizenship provision.¹²⁹ The new approach of the Court is focused solely on the intensity of the Member States’ interference with the right enjoyed by Europeans in their *capacities as EU citizens* and is blind to the „cross-border” requirement of the traditional vision.¹³⁰ In order to show the changes this chapter will examine recent judgments of the CJEU, which deals with the scope of application of the EU citizenship provisions and the application of the EU citizenship rights in purely internal situations. These examples were chosen to show how the changing CJEU case law affects or could affect in the future the scope of the fundamental rights protection in the EU.

Despite the fact that all these judgments did not apply the fundamental rights and did not make any reference to the Charter, the cases are worth paying attention because the “genuine enjoyment of the substance of citizenship rights” has emerged as a new legal category that is capable of providing a uniform and general protection and entails the affirmation of a core rights of a supranational nature. Moreover this development raise a question as to what will be the relationship between EU citizenship and EU fundamental rights in the future.¹³¹

Before starting the analysis of the mentioned cases it is worth to remember the opinion of the AG Jacobs in *Konstantinidis*. In its opinion AG Jacobs stated that an EU citizen is ‘entitled to assume that, wherever he goes to earn his living in the European Community (Union now), he will be treated in accordance with a common code of fundamental values <...> . In other words, he is entitled to say ‘*civis europeus sum*’ and to invoke

¹²⁷ Spaventa, Eleanor, Seeing the Woods despite the Trees? On the scope of Union Citizenship and its Constitutional effects, p. 45, in *Common Market Law review*, No. 45, 2008.

¹²⁸ *idem* p. 44.

¹²⁹ Hailbronner, Michaela and Iglesias Sánchez, Sara, The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status, p. 498, in *Vienna Journal on International Constitutional Law*, Vol. 5, 2011.

¹³⁰ Kochenov, Dimitry, A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe, p. 106, in *Columbia Journal of European Law*, Vol. 18, 2011.

¹³¹ Hailbronner, Michaela and Iglesias Sánchez, Sara, p. 498, 2011.

that status in order to oppose any violation of his fundamental rights'.¹³² From the recent decisions in *Rottmann*, *Ruiz Zanzbrano*, *McCarthy*, it is obvious that the '*civis europeus sum*' prophesy coined by AG Jacobs twenty years ago is gradually being fulfilled.¹³³

The following issues will be emphasized while analyzing the recent case law of CJEU: what is the *substance of the rights* conferred by virtue status of Union citizenship? And how the new *substance of rights* doctrine affected or would affect the *ratione materiae* of EU law? And where, if at all, the fundamental rights come into play?

In 2010 *Rottmann* case¹³⁴ the Court, for the first time explicitly moved away from the dogma that a cross-border element is required to trigger the application of EU law, building upon the well-known postulate that "citizenship of the Union is intended to be a fundamental status of nationals of Member States" and without focusing on any transitional links.¹³⁵ It is important to emphasize that failing to bring this case within the ambit of EU law would have amounted to the CJEU recognizing that Member States are absolutely free to interfere with the scope of EU citizenship by applying their nationality rules.¹³⁶ But the Court accepted the case partly following the opinion of the AG Maduro, who stated that the status of EU citizenship is *a self-standing one and thus EU citizenship is a legal and political concept independent of that of nationality*.¹³⁷ In its judgment the Court emphasized that the withdrawal of Member State nationality, possibly causing the person concerned to lose his status and rights as a Union citizen, fell "by reason of its nature and its consequences"¹³⁸ within the ambit of EU law.¹³⁹

¹³² Opinion of Advocate General Jacobs, Case C-168/91, *Christos Konstantinidis v. Stadt Altensteig—Standesamt and Landratsamt Calw—Ordnungsdienst*, para. 46, 1993.

¹³³ Kochenov, Dimitry, *A real European citizenship: A new Jurisdiction test: A novel chapter in the development of the Union in Europe*, 2011, p. 106.

¹³⁴ Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, Judgment of the Court of Justice (Grand Chamber), 2010.

¹³⁵ Stanislas Adam and Peter Van Elsuwege, p. 176, 2012.

¹³⁶ Kochenov, Dimitry, *A real European citizenship: A new Jurisdiction test: A novel chapter in the development of the Union in Europe*, 2011, p. 75.

¹³⁷ Opinion of Advocate General Poiares Maduro, Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, 2010, E.C.R. I-01449, para. 23.

¹³⁸ C-135/08 *Janko Rottmann v. Freistaat Bayern*, 2010.

¹³⁹ Wiesbrock, Anja, *Disentangling the "Union Citizenship Puzzle"?: The McCarthy Case*, p. 866, in *European Law Review*, Issue 6, December 2011.

Therefore, this decision shows that the CJEU by stressing the risk to the status of the EU citizenship and to the rights attached to this status, has found its way to avoid the cross-border logic. As states Jo Shaw, the Court's judgment in *Rottmann* suggests that we may soon need a new way of thinking about the reach and effects of Union citizenship vis-à-vis national law <...> depending both upon how the Court applies the principles it appears to have announced in *Rottmann* in the future and upon how national courts take up the challenge which they have been given in this case.¹⁴⁰ As Jo Shaw noticed, the *Rottmann* is arguably a logical conclusion of a line of a case law in which the Court has counteracted ever more remote links with the putative exercise of free movement rights as justifying scrutiny and control of national laws and policies. But the Court still left open the question as to precisely what the content of citizenship at the Union level may be, mostly because the questions about the solidarity remained so contested, such that many judgments did not find acceptance at national level.¹⁴¹

Despite all these worries related to the solidarity and the reaction coming from the national courts in *Ruiz Zambrano* (2011)¹⁴², the Court followed the same path, but went even further in pursuing its work of extension of the scope *ratione materiae* of EU citizenship.¹⁴³ In its judgment the Court concluded that “Article 20 TFEU precludes national measures which have the *effect of the genuine enjoyment of the substance of the rights* conferred by virtue of that status”¹⁴⁴, irrespectively of the cross-border element.¹⁴⁵ In regard to this interpretation of Article 20, the Court held that the Article entails an obligation on the Member State of residence and nationality of a minor and dependent Union citizen to grant the child's parents a right to residence and a work permit, because the denial of these rights would have consequences of the child, who is

¹⁴⁰ Shaw, Jo, Citizenship: Contrasting Dynamics, p. 594, De Burca, Grainne, *The Evolution of EU Human Rights Law*, Oxford: Oxford University Press Inc. 2011.

¹⁴¹ *idem* p. 596.

¹⁴² C-34/09, *Ruiz Zambrano v Office national de l'emploi*, 2011.

¹⁴³ In order to fall within the scope of primary or secondary EU legislation and for the CJEU be able to exercise its jurisdiction, the claimant must satisfy conditions of *ratione personae* and *ratione materiae*. *Ratione personae* identifies those to which the EU legislation applies and *ratione materiae* relates to the situations to which the legislation applies. Spaventa, Eleanor, 2008, p. 14.

¹⁴⁴ C-34/09, *Ruiz Zambrano v Office national de l'emploi*, 2011. Hailbronner, Michaela and Iglesias Sánchez, Sara, The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status, p. 499, in *Vienna Journal on International Constitutional Law*, Vol. 5, 2011.

¹⁴⁵ Stanislas Adam and Peter Van Elsuwege, , 2012, p. 177.

EU citizen, to leave the territory of the Union, therefore being unable to exercise the *substance of its rights as a Union citizen*.¹⁴⁶ The statement that the Court in *Ruiz Zambrano* went further in extending the scope *ratione materiae* of EU citizenship, is supported by the facts that unlike in *Rottmann*, where both the status of EU citizenship and the rights attached to this status were at stake, which allowed the case to fall within the scope of EU law, in *Ruiz Zambrano* the status of EU citizenship itself was not at stake. The case was decided solely on the illegality of depriving an EU citizen of the “of the genuine enjoyment of the substance of the rights”¹⁴⁷ conferred by the citizenship of the Union. This judgment shows that the Court has established a new test of jurisdiction, which undermines the previous approach, which required actual or hypothetical cross-border situation, and now focuses on the intensity of the Member States’ interference with the rights of EU citizens in triggering the application of EU law.¹⁴⁸ That means the extension of *ratione materiae* of EU citizenship also to the situations that have no cross-border element.

These two cases show that this novel approach towards EU citizenship extends the range of situations that can be considered as „non-internal”. Nevertheless these two *Rottmann* and *Ruiz Zambrano* judgments could still be interpreted as an extension of the “future movement” case law (because the loss of citizenship in *Rottmann* would prevent him from moving in the future and because in *Ruiz Zambrano* the child EU citizen could not exercise his right to move without his parents) and nevertheless it could still be argued that they are not intended to extend the scope of *ratione materiae* of the Treaty also to internal situations which have no link with Community (now Union) law.

The *McCarthy*¹⁴⁹ case however proves that in the cases where either EU citizenship or the core rights associated with citizenship are at stake, EU law can be applied in order to protect EU citizens, regardless of the cross-border test. The Court by considering the applicability of Art. 21 TFEU alluded to *Ruiz Zambrano*, stressing that the failure to make use of free movement rights in itself does not automatically mean that a situation is purely internal. The Court states that the fact that Mrs. McCarthy has

¹⁴⁶ Wiesbrock, Anja, 2011, p. 863.

¹⁴⁷ Case C-34/09, *Ruiz Zambrano v. Office national de l’emploi*, para. 40, 2011.

¹⁴⁸ Kochenov, Dimitry, 2011, p. 84.

¹⁴⁹ C-434/09, *McCarthy v. Sec’y of State for the Home Dep’t.*, 2011.

not made use of her free movement rights does not mean that her situation must be considered purely internal.¹⁵⁰ Being the fundamental status, Union citizenship equally precludes national measures, *which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status.*¹⁵¹ This judgment shows the overall change in approach towards invoking citizenship rights, which is no longer necessarily linked to cross-border situation. By its cross-border argument also made in the same case, the CJEU merely wanted to clarify, in case the infringement of EU citizens' rights is not intense enough, that citizens still fall within the scope of EU law when a cross-border element is present.¹⁵²

Nevertheless the latest CJEU judgment in the line of its new jurisdiction test *Dereci* is worth particular attention because it clarifies the implications of its judgments in *Ruiz Zambrano* and *McCarthy* for the application of EU citizenship rights in purely internal situation. The way out of the "purely internal situation" test and the focus instead on the intensity of a Member State's interference with the rights of EU citizens, including the protection of the genuine enjoyment of the substance of rights of EU citizens is further clarified in this case. According to some authors, the Court in *Dereci* narrows down the potential of its reasoning in *Ruiz Zambrano* and preserves the Member States' regulatory autonomy and core responsibilities for the protection of fundamental rights outside the scope of EU law.¹⁵³ But the thesis argues that the Courts' judgment in *Dereci*, which despite some limitations favors further application of „purely internal situation" test, shows that the Court is developing something new, something better suited for the fundamental status of EU citizenship.

¹⁵⁰ *idem* para. 46.

¹⁵¹ *idem* para. 47.

¹⁵² C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, para. 56: „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'.

¹⁵³ Stanislas Adam and Peter Van Elsuwege, 2012, p. 176; Van den Brink, M.J., *EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?*, p. 279, in *Legal Issues of Economic Integration*, Issue 2, 2012.

The CJEU in its *Dereci* judgment¹⁵⁴ made references to the *Ruiz Zambrano* and stated, that the refusal of residence to the two Columbian parents would lead to a situation where their children, who are EU citizens, would have to leave the territory of the Union in order to accompany their parents. This situation will hinder the possibility to exercise the substance of the rights conferred on them by virtue of their status as citizens of EU.¹⁵⁵ However in *Dereci* the Court narrowed down the interpretation of *Zambrano* emphasizing that *the 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.*¹⁵⁶ The high threshold – the situations in which the EU citizen is forced to leave the EU territory – set by the CJEU in order to fulfill the criteria of the deprivation of *the genuine enjoyment of the substance of the rights* – is the warning sign, which notes that the impact of EU citizenship on EU fundamental rights could remain limited if the Court will further follow this interpretation in its future case law.

This contradictory recent case law of CJEU, because of the latest judgment in *Dereci*, which limits the substance of EU citizenship rights doctrine to cases in which an EU citizen is forced to leave EU territory, raises more question than answers. The CJEU decision to limit the substance of rights doctrine to merely protect EU citizens from expulsion from EU territory is in conflict with the decision in *Zambrano* and *McCarthy* and more importantly in conflict with the relation between EU fundamental rights and EU citizenship.¹⁵⁷

First of all from *Zambrano* and *McCarthy* it is clear that the Court did not exclude any area from the *substance of rights* doctrine. Both cases only consider the expulsion of a Union citizen from EU territory to be an example of the deprivation of an EU citizen's substance of rights¹⁵⁸ and not, as the CJEU in *Dereci* decided¹⁵⁹, the only

¹⁵⁴ *Dereci* C-256/11, November 15, 2011.

¹⁵⁵ *idem*, para. 65.

¹⁵⁶ *idem*, para. 66.

¹⁵⁷ Van den Brink, M.J., 2012, p. 283.

¹⁵⁸ C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi, para, 42–44; Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department, para 49–53.

¹⁵⁹ C-256/11, Murat Dereci and Others v. Bundesministerium für Inneres, para. 66.

instance in which the genuine enjoyment of the substance of the rights is denied.¹⁶⁰ Secondly, the separation of EU citizenship from the wider bundle of fundamental rights is illogical because these two concepts are strongly connected to each other.¹⁶¹ Since in general one of the main objectives of establishing the status of citizenship is the protection of (fundamental) rights against abridgement by the state, recognizing fundamental rights as EU citizenship rights would certainly give more meaning to EU citizenship.¹⁶²

To sum up, the analysis of all four cases shows, that by extending the scope *ratione materiae* of EU citizenship to a wider range of situations, including purely internal ones, the Courts' position still lacks clarity what is *the substance of the Union citizenship rights*, which allowed the Court to modify the internal situation rule. In the case of *Rottmann* the EU citizenship as such and all the rights coming from it were at stake, in *Ruiz Zambrano* and *McCarthy* the right to residence in EU, which is not the self-standing right was the essential question the Court was called upon to decide. But none in these cases the Court went into the *substance of the rights*, because of the fact that an argument could very well be made that the substance of citizenship rights also include, in the cases as *Ruiz Zambrano* and *McCarthy*, next to residence in the Union, also fundamental rights, as the right to family reunion.¹⁶³ This could be explained by the tension between the EU citizenship rights, which core protection is activated, notwithstanding cross-border connection or whatever other link to EU law instruments and the strictly delimited scope of application of Union fundamental rights. Taking into the consideration the restrictions of the applicability of the Charter of Fundamental rights (Article 51 of the Charter), to make it applicable in the two latest cases would have signaled any internal situation having an impact on the *genuine enjoyment of the substance of Union citizenship* and it would have pointed at EU citizenship as a concept

¹⁶⁰ Van den Brink, M.J., 2012, p. 282.

¹⁶¹ Council Decision 2007/252/EC of 19 Apr. 2007 establishing for the period 2007–2013 the specific programme 'Fundamental rights and citizenship' as part of the General Programme 'Fundamental Rights and Justice', which has as its objective the promotion of 'the development of a European society based on respect for fundamental rights'.

¹⁶² Van den Brink, M.J., 2012, p. 281.

¹⁶³ Wiesbrock, Anja, 2011, p. 869.

“likely to pull the Charter in the direction of an ever-expanding field of application”.¹⁶⁴ In order to avoid the conflicting situation, because of the restrictions linked to the EU fundamental rights application in internal matters, the Court in *Dereci* decided to limit the *substance of rights* doctrine to merely protect EU citizens from expulsion from EU territory in order to prevent the Charter from extending or changing the field of application of Union law or the competence of the EU.¹⁶⁵

However the described CJEU case law at least shows that the Court is overcoming the need for a cross-boundary element in the EU citizenship cases. The abandonment of the cross-border servitude of European citizenship is confirmed by the definition of an unwritten core of fundamental protection to be safeguarded universally against the Union and the States. The central development in the recent CJEU rests in the delimitation of an essential core of protection, non-expressly worded in the Treaty, which is independent from the trans–frontier conception of free-movement.¹⁶⁶ Even though the Court avoids elaborating explicitly on the “substance” of citizenship rights and remains in silence on the issue of fundamental rights, the Court endows a growing conceptual and material independence to the status of the EU citizenship as a truly fundamental status which provides for an autonomous and different content, suitable to provide a broader protection and to overcome the limitations of fundamental rights.¹⁶⁷ This new realm of protection offers ultimate safeguards of membership through the imposition of limitation on state discretion in nationality matters. As long as the notion of interference with genuine enjoyment of the *substance of the rights* attaching to the status of EU citizens is not defined unduly restrictively, it has a potential of extending the scope of EU law to a broader range of situations.¹⁶⁸ Noticing that the Charter is not only one, but merely one of the sources clarifying the substance and scope of EU human rights.¹⁶⁹ And the modified internal situation rule – the changes addressed to the *ratione materiae* opens the gate to the further evolvement of the fundamental rights protection.

¹⁶⁴ Hailbronner, Michaela and Iglesias Sánchez, Sara, 2011, p. 530.

¹⁶⁵ Van den Brink, M.J., 2012, p. 283.

¹⁶⁶ Hailbronner, Michaela and Iglesias Sánchez, Sara, 2011, p. 510.

¹⁶⁷ *idem*

¹⁶⁸ Wiesbrock, Anja, 2011, p. 867.

¹⁶⁹ Uitz, Renata, Rescue package for Fundamental Rights: Comment, 2012, available at:

<http://verfassungsblog.de/rescue-package-fundamentafl-rights-political-judicial-enforcement/>

The possible further steps in regard to the EU citizenship provision and its relation to fundamental rights will be described in the following part. Keeping in mind that EU fundamental rights protection is limited in scope the following chapter will analyze the proposal recently introduced by the German researchers, which holds that in order to warrant full enjoyment of the EU citizenship status, it is necessary to fill the gap of unwritten fundamental rights protection in EU citizenship law (Article 20 TFEU) with the fundamental rights protection which is stipulated by Article 2 TEU.

4. The possible future role of the Court of Justice of European Union in Protection of Fundamental Rights

Taking into account the above present recent CJEU case law practice and a new legal category of the *genuine enjoyment of the substance of EU citizenship rights* that has emerged with it, in this part of the thesis the jurisprudence of the CJEU will be taken one step further and by referring to the prominent sources the possible content of the “substance” of the EU citizenship will be presented, as well as its possible application in the case of Hungary.

Presuming that the times when the CJEU has only been willing to apply fundamental rights to Member States when implementing EU law or to national measures that fall within the scope of Union law is history, the question, which will be answered in this chapter is related to the possibility to implement a new CJEU jurisdiction test in the case of Hungary. We ask what kind of situation could fall within the new CJEU jurisdiction test, when it could be argued that the application of the national legislation may undermine the effective use of the EU citizens rights protected under EU law? When the Hungarians’ legislation interference with the rights of EU citizens and hinders the genuine enjoyment of the substance of rights of EU citizens to the extent that the case could come before the CJEU? But first of all it is important to define what kind of rights should be included in the substance of EU citizenship?

4.1. The substance of EU citizenship rights: Article 2 TEU

From the recent CJEU case law¹⁷⁰ emerges that the Court no longer views EU citizenship just as transitional citizenship, basically facilitating its holder to move freely while not being discriminated against, but it starts to introduce to the substance of EU citizenship a traditional-domestic dimension, what means the rising possibility for EU to protect its citizens against excesses even of their Member States of origin which

¹⁷⁰ C-135/08 Janko Rottmann v. Freistaat Bayern, C-34/09, Ruiz Zambrano v Office national de l’emploi, C-434/09, Shirley McCarthy v. Secretary of State for the Home Department, C-256/11, Murat Dereçi and Others v. Bundesministerium für Inneres.

would deprive that status of practical meaning.¹⁷¹ The *Heidelberg proposal*¹⁷² suggests to fill the substance of EU citizenship with the Article 2 TEU which declares respect for human rights to be a foundational value of the EU common to the Member States and not with the EU fundamental rights provisions. Because Article 2 TEU does not lift the limitation of Article 51(1) of the Charter, according to that the Member States are only obliged to respect EU fundamental rights when they are implementing the EU law. From this follows that the Charter is functioning as the foundation of judicial enforcement of fundamental rights and Article 2 TEU is basis of political decision making under Article 7 TEU. But Article 7 TEU as a political process has no limiting effects *vis-à-vis* the judicial safeguarding of the human rights of EU citizens, which – if they are systematically breached and EU citizens status is deprived from its practical meaning - must not be subject of the vagaries of political institutions.¹⁷³ Therefore the attempt of *Heidelberg proposal* is to eliminate previous objection by referring to the fact that the values in Article 2 TEU are no longer removed from the jurisdiction of CJEU and therefore gives the mandate to the Court to ensure that the human rights are respected.¹⁷⁴

The Court in its case law¹⁷⁵ has clearly demonstrated that it does not regard the Charter as the only source of fundamental rights and not as insurmountable limiting factor of its own fundamental rights jurisdiction. The Charter is not only, but merely

¹⁷¹ Bogdandy, Armin, Reverse Solange – Protecting the essence of fundamental rights against EU Member States in *Common Market Law Review*, Vol. 49, 2012.

¹⁷² The research team from Heidelberg's Max Planck Institute led by Armin von Bogdandy proposed, in an opinion for the German Foreign Office, the reverse application of the Solange doctrine *vis-à-vis* member states (also called Heidelberg proposal). Accordingly, EU citizens cannot appeal to fundamental EU rights, as long as there is a presumption that the substantive content of such fundamental rights, as guaranteed under Art. 2 TEU, is ensured in the relevant member state. This presumption can be refuted, however, and in such a situation the “core” of EU citizenship applicable to domestic matters under recent ECJ jurisprudence would have been established. Bogdandy, Armin, Reverse Solange – Protecting the essence of fundamental rights against EU Member States, in *Common Market Law Review*, 2012.

¹⁷³ Franzius, Claudio, Hungary and the EU: Ways out of the Crisis, 2012, p. 5, available at: <http://www.boell.de/worldwide/europenorthamerica/europe-north-america-claudio-franzius-hungary-and-the-eu-14682.html>.

¹⁷⁴ Sonnevend, Pal, Rescue package for Fundamental Rights: Comment, 2012, available at: <http://verfassungsblog.de/rescue-package-fundamentafl-rights-political-judicial-enforcement/>.

¹⁷⁵ In Ruiz Zambrano (C-34/09) Court talked about the right not to be forced to leave the territory of Union, in Case C-300/04 Eman and Sevinger [2006] ECR I-8055 about the principle of equality and etc.

one of the sources clarifying the substance and scope of EU human rights.¹⁷⁶ As the analysis of the recent EU citizenship case law showed, the Court has never turned to the Charter on the scope of its jurisdiction, because of the limitation to apply the Charter based rights in internal matters. Therefore, the Article 2 TEU which sets just the general definition of human rights as a source of unwritten rights leaves room for interpretation of the spirit of the law. In other words, the proposal holds that in order to warrant full enjoyment of the “virtue of their status as citizens” which was for the first time emphasized by the CJEU in its *Ruiz Zambrano* ruling, it is necessary to fill the gap of unwritten fundamental rights protection in EU citizenship law with the fundamental rights protection which is stipulated by Article 2 TEU.¹⁷⁷

In order to agree or disagree with this approach the essence of human rights provision (Article 2 TEU) must be clarified, because at present time it lacks content. The essence of human rights provision is going to be analyzed firstly through the prospective of *Heidelberg proposal*, secondly through the theological approach.

4.1.1. The content of Article 2 TEU as the essence of fundamental rights

According to the *Heidelberg proposal* Article 2 TEU aims at safeguarding *essentials*. Taking into consideration that the specific mode of fundamental rights protection is conditioned by the different legal, political and cultural characteristics of each Member States, the values protected by Article 2 TEU are said to be *common to the Member States*. Therefore according to the proposal, the best way to find such a common denominator is to cling to the concept of *essence of fundamental rights*. Without claiming that there is a fixed or valid essence of rights, the *European essence* however, according to the proposal could be approached inductively by analyzing the jurisprudence of Europe’s highest courts with regard to certain infringements upon certain rights that cannot be justified.¹⁷⁸

¹⁷⁶ Uitz, Renata, Rescue package for Fundamental Rights: Comment, 2012, available at: <http://verfassungsblog.de/rescue-package-fundamentafl-rights-political-judicial-enforcement/>.

¹⁷⁷ Wiener, Antje, Rescue package for Fundamental Rights: Comment, 2012, available at: <http://verfassungsblog.de/rescue-package-fundamentafl-rights-political-judicial-enforcement/>.

¹⁷⁸ Bogdandy, Armin, 2012, p. 510.

In the proposal the three patterns derived from the ECHR case law are pointed out that could help to identify in concrete situation whether Article 2 TEU is infringed. Firstly, the Article 2 TEU would be infringed by the interference of the state which would “destroy” a certain right or strip it of any content. Secondly, the reduced margin of appreciation of the Member State shows, that the essence of the right is at stake. Finally, the Courts strict unwillingness to enter into a balancing test and strong protection of certain rights, shows that any restriction would be understood as interference to the essence of certain right.¹⁷⁹

The thesis argues that it is not enough just to define the situations in order to identify wherever Article 2 TEU is infringed. The concrete list of the rights is necessary in order to guarantee legal certainty and predictability of EU law. And the concrete list of the rights that should fall under the Article 2 TEU needs to be sharpened by those rights that reflects the spirit of the Article 2 TEU best.

As already noted, the EU enlargement towards Eastern and Central European countries influenced the constitutional developments in the EU even beyond the issue of merely institutional reform. The political conditions for membership set at the Copenhagen summit¹⁸⁰ and the importance of these values in the accession negotiations helped to stimulate the sensitivity for democracy and basic values within the EU and its constitutional order itself, which influenced the agenda at Amsterdam Intergovernmental Conference (IGC).¹⁸¹ Fundamental rights and democracy were main themes at the IGC 1996 and that resulted the fact that fundamental values clause was inserted into Article 6 TEU (now Article 2 TEU), which obliges the EU to respect principles common to all member states. i.e. of liberty, democracy, respect for human

¹⁷⁹ *idem*

¹⁸⁰ According to Accession criteria (Copenhagen criteria) To join the EU, a new Member State must meet three criteria. Political: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; Economic: existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union; Acceptance of the Community *acquis*: ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

¹⁸¹ Weiß, Wolfgang, *Eastern Enlargement and European Constitutionalisation*, Belfast: Queen's University, 2005, p. 2.

rights and the rule of law.¹⁸² These principles apply not only to the institutions of the Union but are binding in respect of the internal order of the Member State. The primary purpose of this article was to convey an emphatic message to the prospective Member States in Central and Eastern Europe about the seriousness of the Union's commitment to common constitutional principles.¹⁸³

Taking into consideration that human rights as one of the Copenhagen criteria later inserted into a present Article 2 TEU and now as well enjoying a status of EU value, was originally designed for the purpose of avoiding incorporation of some serious human rights problems existing in the post-communist states into the EU. This thesis argues that the content of human rights (Article 2 TEU) could be derived from the circumstances following the adoption of the Article.

4.1.2. The content of Article 2 TEU in the light of the grey shadow of communism hanging over it

With the end of the communist authoritarianism the post-communist countries, including Hungary, has gained the prospects to become an authentic 'people's democracy', and draw its legitimacy and its power from the rule of law, respect for human rights, functioning democratic mechanisms and accountability.¹⁸⁴ The communist state was labeled as 'power without politics' in the sense that in spite of the enormous ascendancy that the party-controlled state enjoyed, politics (as governance based on conciliation) were almost entirely absent from the decision-making process. In opposite, the post-communist state represented 'politics without power', which means that the primary source of the former were located beyond the domain of democratic control. During this period the strongest power remained to a large degree beyond the sphere of democratic institution.¹⁸⁵ The described situation in the post-communist countries shows the lack of civil and political rights. Because civil and political rights

¹⁸² *idem*. Nevertheless, the Treaty of Maastricht (1991) had already proclaimed respect to human rights in Art. F para. 2 TEU.

¹⁸³ Murswiek, Dietrich, The Stealthy Development of the Treaty on European Union into the Supreme European Constitution, p. 2, in *Neue Zeitschrift für Verwaltungsrecht*, No. 8, 2009.

¹⁸⁴ Zolkos, Magdalena, Bringing Human Rights in the Enlargement Politics? The EU as a Human Rights Promoter in the Central Eastern Europe, p. 3, *The annual meeting of the International Studies Association, Quebec, Canada*, 2004.

¹⁸⁵ *idem* p. 4.

are the rights that generally restricts the powers of the government in respect of actions affecting the individual and his autonomy(civil rights), and confer an opportunity upon people to contribute to the determination of laws and participate in government (political rights). In a communist countries the government could unrestricted affect the individuals and exclude them from the participation in government, because control was not in the hands of people, but in the hands of those who had power.

In light of the mentioned communist state characteristics, the main challenges which arose in EU was, how to address this specific post-communist human rights perspective in the EU's political conditionality towards the Central and Eastern European countries. The EU decided to tackle these challenges with its hegemonic role in the area of human rights. This post-communist EU human rights model especially challenged the state-centrist approach and placed emphasis mostly on the civil and political rights, because primarily these rights were limited in the communist countries.¹⁸⁶

Taking this background into consideration, the thesis states, that the substance of the human rights provision set in Article 2 TEU should entail those civil and political rights, which are considered to be an essential elements of democracy. In 2004, the UN General Assembly adopted a resolution that lays out the essential elements of democracy include respect for human rights and fundamental freedoms, especially emphasizing the following as essential rights for democracy: freedom of association and peaceful assembly and of expression and opinion; the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as a pluralistic system of political parties and organizations, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media.¹⁸⁷ The idea to interpret the content of Article 2 TEU as consisting of the those civil and political rights, which are considered to be an essential element of democracy does not come out of the blue. It became almost a

¹⁸⁶ *idem*

¹⁸⁷ The United Nations, General Assembly Resolution 59/201, 2004, at: <<http://www.undemocracy.com/A-RES-59-201.pdf>>.

mantra for the Court of Justice of European Union to look to legislative purpose in interpreting statutes.¹⁸⁸ The Court by using this method, sometimes called teleological approach or purposive approach, investigates the motivation for the legislation, including founding documents that set forth overarching legal goals, and resolves disputes in manner that will further those goals.¹⁸⁹ Such a reference to legislative goals of Article 2 TEU is easy to find. Coming back to what has been already mentioned, the origins of the Article 2 TEU can be drawn back to the adoption of Accession criteria (Copenhagen criteria) in 1993. At the time Copenhagen European Council settled among others a ‘political criteria’ for accession to the EU of new Eastern and Central European countries. These criteria included ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities’. In 1997 with the adoption of Amsterdam Treaty the same criteria corresponded to the principles set in Article 6 of the Treaty, with the exception of the protection of minorities.¹⁹⁰ Despite the criticism coming from some authors at the time¹⁹¹, that the Copenhagen Criteria are not coextensive with principles proclaimed in Article 6(1) of the Treaty, mostly because of the missing provision which refers to the protection of minorities, today its follower Article 2 TEU introduced with Lisbon Treaty, among other values also includes the rights of persons belonging to minorities. The complete list of the political requirements shifted from the Accession criteria to the Article 2 TEU, shows the roots of the present EU values.

Taking all this into consideration, the thesis states, that from the theological point of view human rights as a value set in Article 2 TEU aims at safeguarding those fundamental rights that are essential for democracy. The presumption is based on the circumstances which originally influenced the adoption of human rights principle in the Treaty: the forthcoming EU enlargement towards Central and Eastern Europe established the need for a common human rights standard setting, which primarily was

¹⁸⁸ McLeod, Ian, *Legal Method*, London: Palgrave Macmillan Limited, 2005, p. 248.

¹⁸⁹ Solan, Lawrence M., *Statutory Interpretation in the EU: The Augustinian Approach*. Brooklyn Law School, Legal Studies Paper No. 78, 2007, p. 6.

¹⁹⁰ The Treaty of Amsterdam, 1997, Article 7, access via:
<http://www.eurotreaties.com/amsterdamtreaty.pdf>.

¹⁹¹ Sadurski, Wojciech, *Charter and Enlargement*, p.343, in *European Law Journal*, Vol. 8, 2002.

supposed to eliminate the ill-suited records on civil and political rights in the former communist countries.

4.2. The situations when the Hungarians' legislation interference with the rights of EU citizens and hinders the genuine enjoyment of the substance of rights of EU citizenship: Article 2 TEU

This part of the thesis will analyze the situations when the Hungarian's legislation could be considered as hindering the genuine enjoyment of the rights which form the substance of EU citizenship, defining this substance with reference to the Article 2 TEU. The analysis will be based on the presumption that Article 2 TEU aims to safeguard those rights, which were set in the resolution adopted by the UN General Assembly in 2004 and which lays out the essential elements of democracy: freedom of association and peaceful assembly; freedom of expression and opinion; the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people (the right to vote and be elected), as well as a pluralistic system of political parties and organizations, the separation of powers, the independence of the judiciary and free, independent and pluralistic media.¹⁹² In light of the Hungary's controversial legal reform, all these rights will be discussed step by step manner.

The independent and pluralistic media and freedom of expression and opinion. The media often referred to as the fourth branch of government, has come in Hungary under scrutiny the first. With the introduction of a new media law, the Government created a new Media Council with the mandate to monitor and fine the media for not complying with standards of political "balance". The chief of Media Council was appointed by the government for a period of nine years.¹⁹³ In order to properly

¹⁹² The United Nations, General Assembly Resolution 59/201, 2004, at: <http://www.undemocracy.com/A-RES-59-201.pdf>.

¹⁹³ The Norwegian Helsinki Committee report, Democracy at stake in Hungary - The Orbán government's Constitutional revolution", 29 February 2012, available at <http://nhc.no/no/nyheter/Democracy+at+stake+in+Hungary+->

understand the relevance of a new Hungarian media law, the overall democratic and constitutional context of the country must be pointed out. Even before the new Fundamental Law entered into force (1 January 2012), the Venice Commission had raised the concerns about the constitutional setup of checks and balance across all major areas of the democratic playing field.¹⁹⁴ Taking into account that limitation that these changes place on the democratic system makes even more important the need to safeguard freedom of speech and freedom of communication in Hungary, it is obvious, that government introduced the new restricted media law in order to prevent any criticism on its legal reforms.

The newest Hungarian government attempts to restrict freedom of expression came in April 2012, when the Hungarian Minister of Justice and Public Administration, Mr. Tibor Navracsics submitted to Parliament a draft Parliamentary Resolution to not execute the judgment of the European Court of Human Rights (ECtHR) taken in the case of *Fratanolo v. Hungary*. The judgment, handed down by the ECtHR in November 2011, is the second such decision establishing that Hungary had violated the right to freedom of expression protected by the European Convention on Human Rights and Fundamental Freedoms by criminalizing the wearing of the red star in public. Under the minister's proposal, the penal provision should remain in effect and Hungary should not pay the just satisfaction awarded by the ECtHR.¹⁹⁵

The right to an independent judiciary. In March 2012 the Venice Commission issued an opinion regarding the new Hungarian cardinal laws on the court system and the judiciary, stating that *the reform as a whole threatens the independence of the judiciary*.¹⁹⁶ The main problem, according to Venice Commission, is the concentration of power in the hands of one person, i.e. the President of National Council of Judges.

[+The+Orb%C3%A1n+government%27s+Constitutional+revolution.9UFRHU18.ips](#) (last consulted 1 June 2012).

¹⁹⁴ The opinion of the Venice Commission on the Fundamental Law of Hungary adopted at its 87th Plenary Session (Venice, 17-18 June 2011).

¹⁹⁵ The Hungarian Civil Liberties Union, Hungarian Government and Parliament should respect European Court of Human Rights judgment, 2012, access via: <http://tasz.hu/en/news/hungarian-government-and-parliament-should-respect-european-court-human-rights-judgment>.

¹⁹⁶ The opinion of the Venice Commission on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts of Hungary, adopted by Venice Commission at its 90th Plenary Session, 2012, access via: [http://www.venice.coe.int/docs/2012/CDL-AD\(2012\)001-e.pdf](http://www.venice.coe.int/docs/2012/CDL-AD(2012)001-e.pdf).

Although States enjoy a large margin of appreciation in designing a system for the administration of justice, in no other member state of the Council of Europe are such a important powers, including the power to select judges and senior office holders, vested in one single person. The new Hungarian laws made the President the crucial decision maker of practically every aspect of the organization of the judicial system, without any accountability of its actions.¹⁹⁷

Despite the fact that the Hungarian Government has initiated an amendment of the two cardinal laws in question, these amendments do not eliminate the connectional problems of new regulation.¹⁹⁸ In the light of these events, the Hungarian NGOs stress that if the Hungarian Government does not fully comply with the requirements set out by the Venice Commission, there may be unpredictable consequences. According them any display of force by governments aimed at the judicial branch creates an environment in which both judges and parties seeking justice before courts may rightfully assume that judges are under political pressure.¹⁹⁹ This may put at stake a large list of human rights, because without an independent judiciary, it is impossible to imagine people having tangible human rights capable of being asserted against the state. Above all, judicial independence is itself a human right, insofar as it is the human right which presupposes *the unfettered enjoyment of all others*.²⁰⁰

Freedom of association. Besides widely discussed unjustified decision of the Budapest Police Chief, which has previously banned the Budapest Pride March²⁰¹, the right to association is restricted even more seriously, only in the less obvious and for a public not directly visible way.²⁰² Worth noting also is that freedom of expression is a necessary precondition for the promotion and protection of the freedom of assembly and association as well as the right to political participation. Therefore the governments

¹⁹⁷ *idem*, para. 118.

¹⁹⁸ The Hungarian Civil Liberties Union, Inadequate response to the Venice Commission's criticism, 2 May, 2012.

¹⁹⁹ *idem*

²⁰⁰ Warren, Marilyn, Does Judicial Independence Matter, in *Australian law Journal*, 2010.

²⁰¹ Human Rights Watch, Hungary: Revoke Denial of Pride March Route, 2012, access via: <http://www.hrw.org/news/2012/04/11/hungary-revoke-denial-pride-march-route>.

²⁰² For example with its overwhelming majority the Hungarian government has pushed through controversial changes to the country's labour code, impacting on collective bargaining and making the right to strike yet more restrictive. International Trade Union Confederation, *2012 Annual Survey of Violations of Trade Union Rights - Hungary*, 6 June 2012, available at: <http://www.unhcr.org/refworld/docid/4fd889482d.html> [accessed 6 July 2012].

attempt to exercise monopolistic control over the ideas and information disseminated by the media also hinders the freedom of association.

The right to vote and the right to stand for election. The system of the right to vote and the right to stand for election has been partly restructured by the Fundamental law and later further changed by the Law on the Election of Representatives to the Parliament. The new electoral law as envisaged by *Fidesz* was long in the making. The careful research of prior results was undoubtedly necessary to come up with a sure-fire plan that would favor the incumbent. The task was complicated by the reduced size of the parliament from 386 members to 199. A further complication that had to be taken into consideration is that instead of a two-step system with the requirement that at least 50% +1 of the voting age population cast votes, the new system is a simple one-step affair with no minimum requirement. Both in the old and in the new system there is an element of compensation, but in the past only the votes of the losers were compensated. Now by some strange logic the winner will also receive extra votes.²⁰³ This new electoral law makes what is the already third most disproportionate electoral system in Europe even more disproportionate. In the 2010 election, the current governing parties gained 68% of the mandates with only 53% of the popular vote. With the “winner compensation” feature and the corresponding increase in the share of mandate from individual districts, future elections will likely result in far more disproportionate outcome.²⁰⁴ From this it follows that the new laws are making it more difficult for new parties to gain influence in the future, thus interfering with the right to vote and the right to stand for election.

The separation of powers. Transparency and accountability in public administration. Violations of human rights by one part of the state must be corrected by another part, otherwise human rights remain words without reality. In the case of

²⁰³ Hungarian spectrum, The verdict: The new Hungarian electoral law is not democratic, 2011, access via: <http://esbalogh.typepad.com/hungarianspectrum/2011/11/the-verdict-the-new-hungarian-electoral-law-is-not-democratic.html>.

²⁰⁴ Halmai, G., Sclepele, K. L., Opinion on Hungary’s New Constitutional Order: Amicus Brief for Venice Commission on the Transitional Provisions of the fundamental Law and the Key Cardinal Laws, 2012, p. 47, available at <http://lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf>.

Hungary, the government led by the Prime Minister Orbán during the last two years has weakened institutional checks and balances and compromised the independence of central institution. The new laws allow the government to expand the number of judges in the Constitutional Court, to appoint new officials with *Fidesz* affiliation in central positions in various institutions and agencies and so reduce the independence of institutions.²⁰⁵ The first steps toward disturbing the system of checks and balance were made with the adoption of Fundamental Law. As states Venice Commission, the supreme law of the state is the sole product of the governing political party and has been adopted by governing majority without the support of any other political force.²⁰⁶ The limitation of powers of the Constitutional Court on taxation and budgetary matters and the prominent role given to the Budget Council in the adoption of the State budget, represent further sensitive issues that have raised concern in the light of their potential impact on the functioning of democracy.²⁰⁷ Further concerns were raised also about the administration of courts which became fully centralized; the new rule also allowed the dismissal of certain civil servants without justification, as a result of which thousands of civil servants were fired from public administration.²⁰⁸

In summarizing the research on the Hungary's legislation it is important to emphasize that when legislator wishes to reduce the level of the protection of rights, he has two choices: either he curtails the rights themselves or he weakens the institutional side of the enforcement of rights.²⁰⁹ In the new Hungarian legal order, both were done in regard to the for democracy essential civil and political rights. The restriction of civil and political rights that are supposed to protect individuals' freedom from unwarranted infringement by government and ensure one's ability to contribute to the laws and participate in government, shows the threat to democracy and the Hungarian

²⁰⁵ *idem*

²⁰⁶ Opinion on the New Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session, 17-18 June 2011, CDL-AD(2011)016, para. 144.

²⁰⁷ *idem* para. 146.

²⁰⁸ Fact sheets on some cardinal changes related to the Rule of Law in Hungary, Hungarian Helsinki Committee, 2012, access via: http://helsinki.hu/wp-content/uploads/Hungary_NGO_Fact_sheets_February2012.pdf.

²⁰⁹ Halmai, G., Sclepele, K. L., Opinion on Hungary's New Constitutional Order: Amicus Brief for Venice Commission on the Transitional Provisions of the fundamental Law and the Key Cardinal Laws, 2012, p. 48.

Government's attempt to move to authoritarianism. In light of this, the proposal to fill in the substance of EU citizenship with those rights that are essential for democracy (civil and political rights), seems the most effective measures which could stop internal fundamental rights violations and at the same time safeguard democracy. However, the future will show if the Court will follow the path it introduced in *Ruiz Zabrano* case and wider the scope of fundamental rights protection through the EU citizenship provision also to internal matters, or it will remain by its more restricted *Dereci* decision.

Conclusion

A case study on the Hungary's new legal reform that was introduced by the controversial government, showed the clear risk and in some cases (e.g. media law etc.) even internationally recognized breach of fundamental rights. The problem that arose in light of these events was – who are the relevant bodies that should bring about a change to this situation? Should the problems related to these fundamental rights violations be left to the Hungary and Hungarians, who elected their government democratically? Or should the changes and pressure come from external institutions?

Taking into account that Hungary is Member State of European Union and the Hungarians' are the EU citizens, the European Union was seen as the most powerful actor capable to protect the Hungarians from the threat to their fundamental rights.

The contemporary world champions the sovereignty of the human being. No organization, not least the EU, which as an organization is overwhelmingly linked to free trade, the single market and regulation, could reject or ignore the crucial role of human rights. In regard to the CJEU reasoning in *Van Gend en Loos* „the Community (Union now) constitutes a new legal order of international law for the benefit of which the State has limited its sovereign rights <...> and the subjects of which compromise not only Member States but also their nationals”.²¹⁰ However, the EU power in the field of EU fundamental rights is limited to the scope of EU law (Art. 51(1) CFR). This approach is in line with the EU principle, according to which the EU protects constitutional autonomy of its member states (Art. 4(2) TEU). Therefore, the only currently available EU measures in the matters of internal fundamental rights violations are of a political nature.

However, the shortcomings of the political measures did not bring about the expected outcome. The analysis of the Art. 7 mechanism of the Treaty on European Union showed that it has never been activated and the case study of Hungary once again proved this harmful practice. The started infringement procedure set up in Article 258 TFEU despite the clear relation between the violation of EU law and fundamental

²¹⁰ C - 26/62 Van Gend en Loos, 1963, CJEU, p. 12, access via internet: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962CJ0026:EN:PDF>.

rights, was not as beneficial for fundamental rights protection as once thought. The political EU attempt to react to the fundamental crisis in Hungary proved to be ineffective, mostly because of the EU Member State's unwillingness to cause risk reminiscent of passing UN Security Council resolutions, which could be understood as a collective action against Hungary.

Despite the general approach that political problems require political solutions, the case study of Hungary showed, that political measures are not always capable of preventing and protecting human rights violations from occurring. Human rights violations in one EU Member State do not just have a negative impact on people who are EU citizens, but also poses a serious threat to the democracy. As a result a new legal mechanism designed to protect human rights was proposed in this thesis. The need for the new legal mechanism is based on the fact that the EU draws part of its legitimacy from its member states. It is dependent on intact democracies in its Member States, and if the EU wants to be democratic it cannot ignore the serious human rights violations taking place in one of its Member States which poses the threat to the democratic system of government.²¹¹

The source of inspiration, which gave the guidelines on how to construct the arguments in order to develop a new mechanism was a „Reverse Solange” proposal (also called *Heidelberg proposal*) of Armin von Bogdandy and his research team.

The recent CJEU case law showed that the EU citizenship concept broadens the strictly limited reach of the law of the European Union, which only applied to the situations falling within its scope. Until fairly recently in the cases of EU citizens, in order to fall within the scope of EU law, a so called „cross-border test” was required. This test required that cases had a Union dimension and were not confined to one of the Member States. However, the latest CJEU case law changed this jurisdiction test applied by the Court. Under the new approach it is the intensity of the Member States' interference with the rights of EU citizens, and not the cross-border situation, which trigger the application of EU law.²¹²

²¹¹ Franzius, Claudio, Hungary and the EU: Ways out of the Crisis, 2012.

²¹² Kochenov, Dimitry, 2011, p. 87.

The discussed case law of the CJEU has shown the changing doctrinal nature of the Court in regard to the EU citizenship concept. The *Rottmann* case, which was the first move away from the cross-border dogma, shows, that even the right to grant or withdraw citizenship, which was the major expression of a Member State sovereignty, is historical and is not controlled by the Court. The following case law (*Ruiz Zambrano, McCarthy*) has shown that the Court is moving further by touching other issue of the substance of EU citizenship. This shows the growth of the Court's consciousness in matters connecting the protection of fundamental rights to EU citizenship concept. The notion of EU citizenship may thus assist judicial protection of fundamental rights by means of enlargement of CJEU jurisdiction and its approach to sources of judicial protection.

This new development of CJEU case law opens new opportunities for a wide range of fundamental rights protections. It is important to consider how this concept of EU citizenship could be relevant for the vast majority of citizens of the Member States who are 'static' and who do not take advantage – other than temporary travel – of their free movement rights.²¹³ If the Union is to have a citizenship which extends a meaningful experience of membership to all residents of its territory, then this must have a content which includes a wide bundle of fundamental rights. Noting that full account of citizenship must be dynamic, not static, the potential development of the human rights policy within the EU citizenship content is reasonable. What citizenship means, which aspects it emphasizes, and how it is institutionalized, have always been dependent on time and place.²¹⁴ Therefore, the allowance for change and flexibility is particularly important when it comes to assessing the current legal crisis in Hungary. The inclusion of fundamental rights in the substance of the EU citizenship would have an advantage for EU citizens and also for the EU integration process, because without sufficient safeguarding of human rights in member states, democracy in the EU is at risk. Empowering citizens to present their concerns as European concerns before the institutions of their home countries would be an important step, making political

²¹³ Shaw, Jo, *Citizenship: Contrasting Dynamics*, p. 595, De Burca, Grainne, *The Evolution of EU Human Rights Law*, Oxford: Oxford University Press Inc. 2011.

²¹⁴ Heater, Derek, *Citizenship: The Civic Ideal in World History, Politics and Education*, Manchester: Manchester University Press, 2004.

solutions possible, with the Union obliged to uphold human rights, democracy and rule of law.

However the significant changes to human rights protection in the EU which followed the adoption of the Treaty of Lisbon and the case law of CJEU does not deny the primarily economic nature of EU. This approach is obvious from cases such as *Viking* and *Laval*²¹⁵. In addition to the economic nature of EU, opposition coming from some of its Member States²¹⁶ is an obstacle for further expansion of EU competence in fundamental rights area. It is also obvious from the recent EUCJ case of *Dereci*, where the Court stepped back from the *Ruiz Zambrano* decision, and puts limits on the ‘genuine enjoyment of the substance of the EU citizenship’ test.

Therefore, as states Sionaidh Douglas-Scott, it is likely that the CJEU will continue to determine issues of fundamental rights on a case by case basis, with a particular focus on the proportionality of any infringement of rights, rather than with an eye to the development of a coherent substantive fundamental rights law.²¹⁷

²¹⁵ C-438/05 International Transport Workers’ Federation and Finnish Seamen's Union v Viking Line, 2007; C-341/05 Laval v Svenska Byggnadsarbetareförbundet, 2007.

²¹⁶ Protocol 30 is an additional protocol to the Lisbon Treaty, giving Poland and the UK an opt-out not to fully apply the European Human Rights Charter if it would contradict to their national legislation. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:en:HTML>>.

²¹⁷ Douglas-Scott, Sionaidh, The European Union and Human Rights after the Treaty of Lisbon, p. 682, in *Human Rights law Review*, 2011.

Bibliography

Books and articles

Adam, S. and Elsuwege, P., Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on Dereci, in *European Law Review*, Vol. 37, 2012.

Bogdandy, A., Reverse Solange – Protecting the essence of fundamental rights against EU Member States in *Common Market Law Review*, Vol. 49, 2012.

Cappelletti, M., *The Judicial Process in Comparative Perspective*, New York : Clarendon Press, 1989.

Carrera, S. and Atger, Anaïs Faure, *L’Affaire des Roms: A Challenge to the EU’s Area of Freedom, Security and Justice*, Brussels: Centre for European Policy Studies, 2010.

Conway, G., *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge: Cambridge University Press, 2012.

De Búrca, G., The Drafting of the EU Charter of Fundamental Rights, in *European Law Review*, 2001.

De Burca, Grainne, *The Evolution of EU Law*, Oxford: Oxford University Press, 2011.

De Burca, Grainne, The Evolution of EU Human Rights Law, Paul Craig and Grainne de Burca, *The Evolution of EU Law*, 2011.

De Búrca, Grainne, Report on the Further Development of Citizenship in the European Union, in *Zeitschrift für Schweizerisches Recht*, No. 39, 2001.

De Burca, Grainne, The Road Not Taken: The EU as a Global Human Rights Actor in *American Journal of International Law*, Vol. 105, 2011.

De Vries, Sybe, The protection of fundamental rights within Europe’s internal market after Lisbon –An endeavour for more harmony, Sybe A. de Vries, Xavier Groussot, Gunnar Thor Petursson, *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice As ‘Tightrope’ Walker*, Utrecht: Eleven International Publishing, 2012.

De Waele, Henri, EU Citizenship: Revisiting its Meaning, Place, Potential, p. 335, in *European Journal of Migration and Law*, No. 12, 2010.

Dogan, Yasar, The fundamental rights jurisprudence of the European Court of Justice: Protection for Human Rights within the European Union legal order, p. 57, in *Ankara Law Review*, Vol. 6, No. 1, 2009.

Douglas-Scott, Sionaidh, The European Union and Human Rights after the Treaty of Lisbon, p. 682, in *Human Rights Law Review*, 2011.

Dworkin, R, *Taking Rights Seriously*, London: Duckworth, 1978.

Groussot, Xavier, The Reach of EU Fundamental Rights on Member States Action after Lisbon, 2012.

Hailbronner, Michaela and Iglesias Sánchez, Sara, The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status, p. 498, in *Vienna Journal on International Constitutional Law*, Vol. 5, 2011.

Heater, Derek, *Citizenship: The Civic Ideal in World History, Politics and Education*, Manchester: Manchester University Press, 2004.

Kochenov, Dimitry, A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe in *Columbia Journal of European Law*, Vol. 18, 2011.

Kochenov, Dimitry, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', p. 209, in *Columbia Journal of European Law* No. 15, 2009.

Kostakopoulou, Dora Ideas, Norms and European Citizenship: Explaining Institutional Change, p. 233, in *Modern Law Review*, Vol. 68(2), 2005.

Maduro, Miguel Poiares, *We The Court - The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing, 1998.

Mancini F., The Making of a Constitution for Europe, p. 596, in *Common Market Law Review*, vol. 26, 1989.

McLeod, Ian, *Legal Method*, London: Palgrave Macmillan Limited, 2005.

Murswiek, Dietrich, The Stealthy Development of the Treaty on European Union into the Supreme European Constitution, p. 2, in *Neue Zeitschrift für Verwaltungsrecht*, No. 8, 2009.

Neuwahl and Wheatley, The EU and Democracy-Lawful and Legitimate Intervention in the Domestic Affairs of States, p. 232 in Arnall and Wincott, *Accountability and Legitimacy in the European Union*, Oxford: Oxford University Press, 2002.

O’Keeffe, D. and A. Bavasso. Fundamental Rights and the European Union, p. 254, edited by M. La Torre. In *European citizenship : An Institutional Challenge*, The Hague: Kluwer Law International, 1998.

O’Leary S., Putting flesh on the bones of European Union Citizenship, in *European Law Review*, 1999.

Pérez, Aida Torres, *Conflicts of Rights in the European Union*, Oxford: Oxford Scholarship Online, 2009.

Plattner, Marc F, Populism, Pluralism and Liberal Democracy, in *Journal of Democracy*, Volume 21, January 2010.

Risso, Linda, *The "Forgotten" European Political Community, 1952-54*, Cambridge: Cambridge University Press, 2004.

Rosas A. and Armati L. EU Constitutional law. An introduction, p. 143 in *Journal of Common Market Studies*, Vol. 50, 2012.

Sadurski, Wojciech, Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider, p. 2, in *Sydney Law School Research Paper*, No. 10/01, 2012 available at, <<http://ssrn.com/abstract=1531393>>.

Sadurski, Wojciech, Charter and Enlargement, p.343, in *European Law Journal*, Vol. 8, 2002.

Shaw, Jo, Citizenship: Contrasting Dynamics, p. 594, De Burca, Grainne, *The Evolution of EU Human Rights Law*, Oxford: Oxford University Press Inc. 2011.

Spaventa, Eleanor, Seeing the Woods despite the Trees? On the scope of Union Citizenship and its Constitutional effects, p. 45, in *Common Market Law review*, No. 45, 2008.

Steunenberg Bernard, Is big brother watching? Commission oversight of the national implementation of EU directives, p. 361 in *European Union Politics*, Vol. 11, 2010.

Van den Brink, M.J., EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?, p. 279, in *Legal Issues of Economic Integration*, Issue 2, 2012.

Warren, Marilyn, Does Judicial Independence Matter, in *Australian law Journal*, 2010.

Weiler, J.H.H, *The Constitution of Europe, 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, Cambridge: Cambridge University press, 1999.

Weiler J. and Haltern U., 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in Slaughter, *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context*, Oxford: Hart Publishing, 1998.

Weiß, Wolfgang, *Eastern Enlargement and European Constitutionalisation*, Belfast: Queen's University, 2005.

Wiesbrock, Anja, Disentangling the "Union Citizenship Puzzle"? The *McCarthy* Case, in *European Law Review*, Issue 6, December 2011.

Williams, Andrew, Respecting Fundamental Rights in New Union: A Review, Catherine Barnard, *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*, Oxford: Oxford University Press, 2007.

Case law and opinions (sorted by the first part of the case number)

C - 4/73 Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities, 1974, at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61973J0004&lg=en, (last consulted at 3 July 2012).

C-5/88 Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft. Judgment of the Court of 13 July 1989, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61988J0005:EN:HTM>.

C-6/64 Flaminio Costa v. E.N.E.L. Judgement of the Court of 15 July 1964, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964J0006:en:HTML>, (last consulted at 3 July 2012).

C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

C-26/62 NV Algemene Transport - en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration. Judgement of the Court of 5 February 1963, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0026:EN:HTML>, (last consulted at 3 July 2012).

C-29/69, *Erich Stauder v City of Ulm – Sozialamt*, 1969, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61969CJ0029:EN:HTML>, (last consulted at 3 July 2012).

C-34/09, *Ruiz Zambrano v Office national de l’emploi*, 2011, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0034:EN:HTML>.

Opinion of Advocate General Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi*, 2011, para. 84.

C-60/00 *Mary Carpenter v. Secretary of State for the Home Department*, Judgment of the Court of 11 July 2002, at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62000J0060.

C-69/90, *Francovich and Others v Italy*, 1991, at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61990J0006&lg=en.

C-109/01 *Secretary of State for the Home Department v Akrich*, 2004, Judgment of the Court of 23 September 2003, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001J0109:EN:HTML>.

C-135/08 *Janko Rottmann v. Freistaat Bayern*, Judgment of the Court of Justice (Grand Chamber), 2010, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0135:EN:NOT>.

Opinion of Advocate General Poiares Maduro, Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, 2010, E.C.R. I-01449, para 23.

Case C-148/02 *Garcia Avello*, 2003, ECR I-11613, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0148:EN:HTML>.

C-168/91, *Christos Konstantinidis v. Stadt Altensteig—Standesamt and Landratsamt Calw—Ordnungsat*, Opinion of Advocate General Jacobs, para. 46, 1993.

C-184/99, *Grzelczyk*, 2001, ECR I-6193, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999J0184:EN:HTML>.

C-224/98 *D’Hoop*, 2002, ECR I-6191, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0224:EN:HTML>.

C-256/11, *Murat Dereçi and Others v. Bundesministerium für Inneres*, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0256:EN:NOT>.

C-260/89 Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others. Judgment of the Court of 18 June 1991, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989J0260:EN:HTML>.

C-413/99 Baumbast and R., 2002, ECR I-7091, at <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61999J0413>.

C-434/09, Shirley McCarthy v. Secretary of State for the Home Department, at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0434:EN:HTML>>.

C- 465/00 Rechnungshof v. Österreichischer Rundfunk and Others. Judgment of the Court 20 May 2003, at http://www.sonntag.cc/teaching/Security_and_Privacy_SS11/2_Legal_day/Cases/ORF/OJ.html.

C-482/01 and C-493/01 Orfanopoulos and Oliveri, 2004, ECR I-5257, at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CJ0482:EN:PDF>>.

The Hungarian Constitutional Court decision on the media laws, No. 165/2011. (XII. 20.)

Treaties, constitutions and official documents

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2008/C115/01), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:en:HTML>.

European Council in Copenhagen, Accession criteria, 1993, available at:<http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/93/3&format=HTML&aged=1&language=EN&guiLanguage=en>;

Jakubowicz, K., *Analysis and assessment of a package Hungarian legislation and draft legislation on media and telecommunications*, Office of the OSCE Representative on Freedom of the Media, September 2010, available at <<http://www.osce.org/fom/71218>>.

Reding Viviane, Vice-President of the European Commission, EU Justice Commissioner Observations on the EU Charter of Fundamental Rights and the future of the European Union XXV Congress of FIDE (Fédération Internationale pour le Droit Européen) Tallinn, 31 May 2012.

The European Commission, Communication from the Commission to the Council and the European Parliament of 15 October 2003 on Article 7 of the Treaty on European Union: Respect for and promotion of values on which the Union is based, available at: http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/133500_en.htm.

The European Parliament resolution on the recent political developments in Hungary (2012/2511(RSP)).

The opinion of the Venice Commission on the Act on the Elections of Members of Parliament of Hungary adopted by the Council for Democratic Elections at its 41st meeting (Venice, 14 June 2012) CDL-AD(2012)012.

The opinion of the Venice Commission on the new Constitution of Hungary, adopted by the Venice Commission at its 87th plenary session (Venice, 17-18 June 2011; CDL-AD(2011)016).

The opinion of the Venice Commission on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts of Hungary, adopted by Venice Commission at its 90th Plenary Session, 2011.

The opinion of the Venice Commission on the Act on the Rights of Nationalities of Hungary adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012) CDL-AD(2012)011.

The opinion of the Venice Commission on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary at its 91st Plenary Session (Venice, 16-17 March, 2012) CDL-AD(2012)008.

The report on European Parliament session, Strasbourg 6-9 June 2011, available at <http://www.europarl.europa.eu/news/en/pressroom/content/20110516NEW19404/html/Newsletter-6-9-June-2011-Strasbourg-plenary-session>.

The report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *2011 Report on the Application of the EU Charter of Fundamental Rights*. 2012, COM(2012)169.

The United Nations, General Assembly Resolution 59/201, 2004, available at: <http://www.undemocracy.com/A-RES-59-201.pdf>.

Treaty of Lisbon, : "Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union". Official Journal of the European

Union, C 83/1, 30 March 2010, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>.

Internet sources

Bitó, Laszlo, The voice of liberal democracy needs to be preserved in Hungary, at <http://www.opendemocracy.net/lászló-bitó/voice-of-liberal-democracy-needs-to-be-preserved-in-hungary> (last consulted at 3 July 2012).

Colneric, Ninon, Protection of Fundamental Rights through the Court of Justice of European Communities, Working paper, 2003, p.1, available at: <http://denning.law.ox.ac.uk/iecl/pdfs/working2colneric.pdf>.

EU Parliament places Hungary under scrutiny, 2012, available at <http://www.euractiv.com/central-europe/eu-parliament-places-hungary-scr-news-510938>.

Franzius, Claudio, Hungary and the EU: Ways out of the Crisis, 2012, p. 5, available at: <http://www.boell.de/worldwide/europenorthamerica/europe-north-america-claudio-franzius-hungary-and-the-eu-14682.html>.

Halmi, G., Scleppele, K. L., Opinion on Hungary's New Constitutional Order: Amicus Brief for Venice Commission on the Transitional Provisions of the fundamental Law and the Key Cardinal Laws, 2012, available at <http://lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf>.

Human Rights Watch, Hungary: Media Freedom Under Threat, EU Action Needed to Halt Slide on Rights, 2012, available at <http://www.hrw.org/news/2012/02/16/hungary-media-freedom-under-threat>.

Human Rights Watch, Hungary: Revoke Denial of Pride March Route, 2012, access via: <http://www.hrw.org/news/2012/04/11/hungary-revoke-denial-pride-march-route>.

Hungarian spectrum, The verdict: The new Hungarian electoral law is not democratic, 2011, access via: <http://esbalogh.typepad.com/hungarianspectrum/2011/11/the-verdict-the-new-hungarian-electoral-law-is-not-democratic.html>.

Hungary and the European Rule of Law, at <http://www.euractiv.com/future-eu/hungary-european-rule-law-analysis-513032> (last consulted at 20 June 2012).

Krugman, Paul, Depression and Democracy, *The New York Times*, 11 December 2011. Access via internet: http://www.nytimes.com/2011/12/12/opinion/krugman-depression-and-democracy.html?_r=1.

Kumm, Mattias, Rescue package for Fundamental Rights: Comment, at: <http://verfassungsblog.de/rescue-package-fundamental-rights-comments-mattias-kumm/> (last consulted at 21 June 2012).

Nielsen, Nikolaj, Kroes threatens nuclear option against Hungary, 2012, available at: <http://euobserver.com/9/115209>.

Pillar, Paul, Hungary and the Reversibility of Liberal Democracy, available at: <http://nationalinterest.org/blog/paul-pillar/hungary-the-reversibility-liberal-democracy-6392> (last consulted at 3 July 2012).

Sonnevend, Pal, Rescue package for Fundamental Rights: Comment, 2012, available at: <http://verfassungsblog.de/rescue-package-fundamentafl-rights-political-judicial-enforcement/>.

Taylor, Simon, Orban accuses EU of colonialism, EuropeanVoice.com, 2012. Available at: <http://www.europeanvoice.com/article/2012/march/orban-accuses-eu-of-colonialism/73903.aspx>.

The European Commission, European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary', 2012, press release, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24>.

The European Commission, Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary, 25/04/2012, press release, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/395&type=HTML>.

The European Union, The Evolution of Fundamental Rights Charter and Case Law, Director General for Internal Policies, Policy Department C: Citizens' rights and constitutional Affairs, by the requested of the European Parliament's Committee on Constitutional Affairs, Brussels, Index PE 432.755, 2011, available at: <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>.

The Greens/European Free Alliance in the European Parliament, Hungary- fundamental rights, press release, 2012 April 25, available at: <http://www.greens-efa.eu/hungary-fundamental-rights-7024.html>.

The Hungarian Civil Liberties Union, Hungarian Government and Parliament should respect European Court of Human Rights judgment, 2012, available at: <http://tasz.hu/en/news/hungarian-government-and-parliament-should-respect-european-court-human-rights-judgment>.

The Hungarian Civil Liberties Union, Inadequate response to the Venice Commission's criticism, 2 May, 2012, available at: <http://tasz.hu/en/political-freedoms/inadequate-response-venice-commissions-criticism>.

The Norwegian Helsinki Committee report , Democracy at stake in Hungary - The Orbán government's Constitutional revolution”, 29 February 2012, available at <http://nhc.no/no/nyheter/Democracy+at+stake+in+Hungary+-+The+Orb%C3%A1n+government%27s+Constitutional+revolution.9UFRHU18.ips> (last consulted 1 June 2012).

Uitz, Renata, Rescue package for Fundamental Rights: Comment, 2012, available at: <http://verfassungsblog.de/rescue-package-fundamentafl-rights-political-judicial-enforcement/>.

Verhofstadt, Guy, Hungary: Commission infringements don't go far enough - article 7 TEU should be applied, press release, available at: <http://www.alde.eu/press/press-and-release-news/press-release/article/hungary-commission-infringements-dont-go-far-enough-article-7-teu-should-be-applied-37822/>.

Wiener, Antje, Rescue package for Fundamental Rights: Comment, 2012, available at: <http://verfassungsblog.de/rescue-package-fundamentafl-rights-political-judicial-enforcement/>.

Other sources

Basselink, Leonard, The Protection of Fundamental Rights post-Lisbon, The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights and National constitution in *FIDE (Fédération Internationale pour le Droit Européen) Conference*, 2012.

Ahtisaari, M., Frowein, J. and Oreja, M. (2000) 'Report by Martti Ahtisaari, Jochen Frowein, Marcelino Oreja', Paris, 8 September 2000, available at: <http://www.mpil.de/shared/data/pdf/report.pdf>.

Mayer, Franz C.: Competences – Reloaded? The Vertical Division of Powers in the EU after the New European Constitution, Walter Hallstein-Institut für Europäisches Verfassungsrecht, Paper 19/04 (2004), available at: <http://www.whi-berlin.de/reloaded.htm>.

Solan, Lawrence M., Statutory Interpretation in the EU: The Augustinian Approach. Brooklyn Law School, Legal Studies Paper No. 78, 2007.

Zolkos, Magdalena, Bringing Human Rights in the Enlargement Politics? The EU as a Human Rights Promoter in the Central Eastern Europe, *The annual meeting of the International Studies Association, Quebec, Canada, 2004.*

Declaration against plagiarism¹

To be signed and placed at the beginning of the thesis

Name of the student: *Rudo Nadroucete*

Second semester host university: *Utrecht University*

Name of the supervisor: *Drjo Plehr*

Title of the E.MA thesis: *The European Union
as a 'Human Rights Organisation'*

Academic year: *2011/2012*

I certify that the attached is all my own work.

*I understand that I may be penalised if I use the words of others without
acknowledgement.*

[Handwritten Signature]
.....
(Signature)

¹ Art. 5.1.i of the E.MA Rules of Assessment: The thesis shall consist of an academic piece of work, written individually and independently by the student. It shall be different from work previously undertaken by the student outside the framework of the E.MA Programme, e.g. in another Master's programme. It shall be written in English. The student may write the thesis in French upon prior approval of the E.MA director of the second semester University. [...]

Statement on the use of the E.MA thesis for library purposes¹

Name of the student: *Ruda Petrovate*

Second semester host university: *Utrecht University*

Name of the supervisor: *Pinja Kibir*

Title of the E.MA thesis: *The European Union
as a 'Human Rights Organisation'*

Academic year: *2011/2012*

I hereby allow²

- Publication of the entire thesis on the web
- Publication only of the abstract and table of content of the thesis on the web

Use of the thesis in the library for the purposes of:

- Consultation only
- Photocopying
- Loan
- Digital format (pdf) delivery (only for other Masterini)

[Handwritten Signature]
.....
(Signature)

¹ As decided by the E.MA Executive Committee on 22-23 April 2005.

² Tick only the options you allow.