

**The Role of the European Court of Justice in Shaping European Union
Citizenship**

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Abstract

This thesis aims to examine the role of the European Court of Justice in shaping the concept of Union citizenship. Through analysing some of the most important court decisions from recent years I aim to uncover the changes that occurred in the jurisdiction of the Court concerning EU citizenship. Scholars argue that the ECJ sends a controversial message and is unclear about the meaning of the evasive concept of the 'essence of the rights'. However, in recent years the ECJ addressed some of these fundamental questions concerning EU citizenship. This thesis aims to study these decisions in order to get a better understanding of how the Court shapes the concept of Union citizenship through its jurisdiction.

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Introduction

The aim of my thesis is to analyse recent case law of the Court of Justice of the European Union (ECJ) concerning citizenship to see how the court interprets the meaning of EU citizenship through its decisions. Scholars argue that the ECJ sends a controversial message and is unclear about the meaning of the evasive concept of the ‘essence of the rights.’¹ However, in the last two years, the case law has steadily moved towards easing such tensions through addressing arguably the most fundamental questions. Through analysing some of the most relevant court decisions from recent years I will examine how the court tries to shape and interpret the meaning of EU citizenship. I investigate the nexus of ECJ court decisions, and scholarly debate in terms of EU citizenship to analyse the Court’s role in constructing Union citizenship by its jurisdiction.

The concept of European Union Citizenship was introduced by the Maastricht Treaty and has been a highly discussed issue in the academia and on the policy level. The first part of my analysis starts with a historical overview of the development on the creation of European citizenship and the debates concerning it to observe how it differs from the traditional understanding of citizenship. The concept has often been criticized for being purely symbolic and reduced to rights without identity and access without belonging.²

Several authors, such as Bauböck³, Soysal⁴ or Shaw⁵ point out the importance EU citizenship as it broke the link between citizenship and national territory and introduced a multilevel

¹ Kochenov, D.: The Right to Have What Rights? EU Citizenship in Need of Clarification. *European Law Journal*. Vol. 19 Issue. 2013.

² Maas, W.: Unrespected, unequal, hollow? Contingent citizenship and reversible rights in the European Union *Columbia Journal of European Law* 2009. p. 265-280

³ Bauböck, R.: Why European Citizenship? Normative Approaches to Supranational Union. *Theoretical Inquiries in Law*. Vol. 8, No. 2. July 2007.

⁴ Soysal, Y. *Limits of Citizenship*. Chicago: University of Chicago Press 1994.

citizenship structure. European citizenship is one of the most elaborate forms of post-national membership where the legal and normative basis of the concept lies in the wider community but the actual implementation is assigned to Member States.

With this in mind, I will argue that the ECJ played a significant role in shaping this concept and explored it by moving from the traditional approach that is nested in Member State citizenship to a broader approach remote from the practices of the single market. Judges of the Court claim political neutrality; however, the ECJ's decisions often have a strong political connotation. The role and importance of the European Court of Justice in the integration process is often overlooked and not emphasized enough even though its role is acknowledged by several scholars.⁶ It has a significant impact on finding the limits of European citizenship and as Shaw argues in recent years the Court has moved towards reconstructing EU citizenship in a way that it constrains the scope and boundaries of national citizenship.

The second part of my thesis examines the ECJ's role as an actor in the integration process. The significant influence of the Court's decisions on the evolution of the integration can be derived from several milestone decisions such as *Costa v. ENEL* establishing the supremacy of EU law, *Van Gend en Loos* establishing the principle of direct effect or *Cassis de Dijon* creating the principle of mutual recognition. This chapter aims to prove that even though the Court's role on the integration process have often been overlooked it indeed plays a crucial role in terms of strengthening the status of EU law.

⁵ Shaw, J.: *The Transformation of Citizenship in the European Union*. Cambridge: Cambridge University Press. 2007 or Jo Shaw: *EU Citizenship and the Edges of Europe*, University of Edinburgh School of Law, CITSEE Working Paper 2012/19

⁶ Shaw, J.: *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, University of Edinburgh School of Law Working Paper 2010/14

In order to examine the Court's role in the integration process and to analyse how the case law can influence the policy making process I intend to contrast neofunctionalism and intergovernmentalism as a theoretical background for my research in order to better comprehend the process of legal integration. Neofunctionalism emphasizes the importance of spillover effects in the process of integration where integration in one sector ideally leads to a spillover effect and strengthen the integration among other sectors. While intergovernmentalism emphasizes the importance of member states and national governments arguing that they are the ones deciding on the speed and level of integration process and rejects the idea of spillover effect.

For the purpose of my analysis I chose four cases to examine the Court's interpretation of the meaning of European citizenship. The first one is the Rottmann decision which represents a new development and an unexpected step from the ECJ in terms of interpreting EU citizenship⁷ and by treating it in a relatively autonomous way from national citizenship. The importance of the case stems from the fact that "national laws on citizenship must have due 'regard to Community law' and that Union citizenship is destined to be fundamental status of Europeans"⁸ This decision started a new era in terms of EU citizenship legislation and raised several questions concerning the future of Union citizenship that needed further clarification. For instance under what circumstances do national citizenship fall under the scope of EU law.

Just one year later, the Rottman ruling was followed by an other significant decision, the Zambrano ruling that extended the reach of EU law to internal situations when dealing with

⁷ Shaw, J.: *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* EUDO Observatory on Citizenship,

⁸ Davies, G.: *The Entirely Conventional Supremacy of Union Citizenship and Rights in Jo Shaw: EU Citizenship and the Edges of Europe*, University of Edinburgh School of Law, CITSEE Working Paper 2012/19

the situation of family members of EU citizens.⁹ In this case the Court ruled that national measures cannot deprive Union citizens from the enjoyment of the substance of the rights by virtue of their status as citizens of the EU, respective of the previous exercise by these citizens of their right of free movement. This decision not just extended the reach of EU law to internal situations but also eliminated free movement as a criteria to trigger EU law. However, this led to further discussions on the meaning of Union citizenship. The most important question that needs to be answered is what the Court means by the ‘substance of rights’.

The McCarthy decision followed the Zambrano ruling only a few months later and also raised question about the relationship between EU citizenship, free movement, residence and family reunification. This decision sought clarification on the genuine enjoyment of rights attached to Union citizenship however, limited the scope of the Zambrano ruling.

Finally, the Dereci case attempts to clarify the scope of and application of ‘genuine enjoyment of rights’ in terms of right of residence for third country nationals who are family members of EU citizens. In this decision, the court remains unclear about the concept of essence of the rights that are linked to Union citizenship¹⁰ and also do not specify the infringement of what rights triggers the automatic application of EU law. So far the Court takes different approaches which are often not consistent. Furthermore, these different directions are often vague and leave to much space for interpretation on the national level that can lead to further problems in the future.

⁹ Wiesbrock, A.: *The Zambrano Case: Relying on Union Citizenship Rights in Internal Situations* EUDO Observatory on Citizenship
Available at: <http://eudo-citizenship.eu/citizenship-news/449-the-zambrano-case-relying-on-union-citizenship-rights-in-internal-situations>

¹⁰ *ibid*

Chapter 1: EU Citizenship and European Identity

The concept of European Union Citizenship was introduced by the Maastricht Treaty in 1992. According to Article 8 of the Treaty every person holding the nationality of a Member State shall be a citizen of the Union with certain rights and duties attached. Most importantly citizens have the right to move freely and reside within the territory of the Member States. Citizens residing in a Member State other than their nationality are entitled to vote and to stand as a candidate at the municipal elections in the member state in which they reside and can participate in the European Parliamentary elections with the same conditions. Furthermore, in a third country EU citizens are entitled to diplomatic protection by the diplomatic or consular authorities of any Member State if the Member State of which he is a national is not represented.

The concept of European citizenship has been a highly discussed issue ever since. Scholars and policy makers shaped and re-framed its meaning over time as the concept developed. In the first part of my analysis I will discuss the most relevant theoretical approaches to EU citizenship to see how the concept has been understood in the academia and how scholars see the evolution and future of EU citizenship. My general aim is to examine why and how EU citizenship has been used as a tool for strengthening integration within the European Union; what are the shortcomings of the concept and how scholars and policy makers see the role of EU citizenship in the future.

According to Jo Shaw¹¹, citizenship has always been used as a tool to express notions of identity and to describe certain collective attributes. She argues that the aim of the policy makers with introducing the EU citizenship in the Maastricht Treaty was a top-down concern to facilitate and strengthen the creation of a European identity. She argues that as much as EU

¹¹Shaw, J.: *The Transformation of Citizenship in the European Union*. Cambridge: Cambridge University Press. 2007. p. 37.

citizenship is nested within the wider framework of globalisation and Europeanisation, formally it is still dependent on Member States as it is shaped by their nationality laws and Member States are free to determine who their nationals are.¹²

A clearly problematic concept here is the status of third-country nationals and immigrants in the Union context in which case we see a collective embrace of repressive measures towards outsiders.¹³ The EU has a strong emphasize on free movement and has encouraged mobility among its citizens however, when it comes to migrants' rights as citizens the picture is less promising. This is an issue that challenges the future of European citizenship and have been highly discussed among scholars and policy makers.

In his article "*Why European Citizenship? Normative Approaches to Supranational Union*"¹⁴ Bauböck examines European Union citizenship from different perspectives such as democratic representation on supranational level, internal freedom of movement and regional limits to external geographic extension to analyse what are the possible development paths for EU citizenship. The statist approach aims at transforming the EU into a federal state in which national citizenship would not play a role. The goal of the unionist approach is to strengthen EU citizenship through member state nationality. Finally, the third one the pluralist approach specifies citizenship norms for each level and balances them with each other on the basis of the current state of federal integration. He argues that for a long time citizenship has been dominated by the nation-state paradigm and multiple membership and vertical dimension of the concept was not widespread. However, the EU challenged this concept with the introduction of a vertically nested membership among states.¹⁵

¹² *ibid* p. 42.

¹³ *ibid* p. 39.

¹⁴ Bauböck, R.: *Why European Citizenship? Normative Approaches to Supranational Union. Theoretical Inquiries in Law*. Vol. 8, No. 2. July 2007.

¹⁵ *ibid* p. 454.

He points out that the normative approach in scholarly literature aims at analysing “how liberal democracies ought to respond to claims of distinct membership that do not fit into a nation-state framework.”¹⁶ However, this approach is still in need of clarification and in practice the EU needs to specify the exact rules determining the acquisition and loss of EU citizenship as a legal status. Furthermore, it has to be clear what rights and obligations are attached to the concept and how they relate to citizenship at state and sub-state level.

According to Bauböck, the different ways we look at the European integration determines our understanding of the concept of European citizenship. For the purpose of his analysis he uses three different categories for citizens: first country nationals (FCN) are the ones who have the citizenship of a Member State and reside in that country; second country nationals (SCN) are those who have citizenship in one of the Member States and therefore have EU citizenship but reside in an other Member State; finally, third country nationals (TCN) are those people who reside in one of the Member States but have the nationality of a non-EU country and therefore are not eligible for EU citizenship.

The first, statist approach regards the EU as a federal state in-the-making¹⁷ therefore opts for a citizenship model that would reflect the principles of federal democracies. However, this approach is rather farfetched from the actual path that the EU follows and the idea is rather utopistic. This case would establish the primacy of Union citizenship¹⁸ and regulate citizenship rights of EU citizens even in their country of nationality. In terms of third country nationals this approach would transfer legislation from member states to EU level. The problem of multiple memberships in this case can be solved by making the acquisition and loss of citizenship an automatic consequence of shifting residence. This solution would eliminate vertical membership and voting rights would be allocated based on the country of

¹⁶ *ibid* p. 455.

¹⁷ *ibid* p. 466.

¹⁸ *ibid* p.470.

residence.¹⁹ The statist approach is however, not likely to be realized and is only used in the article to contrast the other two approaches.

The second approach Bauböck proposes is the unionist approach which aims to strengthen EU citizenship but does not want to integrate member state citizenship into it. It focuses more on emancipating it and making it more inclusive for EU residents and has more supporters mostly from civil society organisations and pro-immigrant groups but remains rather marginal on the political agenda.²⁰ A unionist approach would accept privileging EU citizens as it promotes mobility between member states and would put third country national in a more favourable position. In terms of voting rights third country nationals would be able to vote at local elections through direct access to EU citizenship and regarding European Parliamentary elections a single vote in country of residence would be allowed for citizens.²¹ This concept is the most favourable for third country nationals but has limited impact on actual policy making.

Finally, the third, pluralist approach tries to balance Union citizenship and member state citizenship by applying general norms of democratic legitimacy at both levels and balances where they conflict each other.²² It aims to promote a more consistent conception of multi-level membership. In terms of voting rights we get a rather complicated picture in which citizens can vote either in country of residence or country of nationality at EP elections. At national elections dual vote for dual nationals is allowed and local vote is possible for all residents independent of their nationality.²³

Even though this concept covers several possibilities and development paths for future improvement it still leaves several questions unanswered, especially in terms of inequalities

¹⁹ *ibid* p. 480.

²⁰ *ibid* p. 467.

²¹ *ibid* p. 480.

²² *ibid* p. 467.

²³ *ibid* p.480.

between the three citizenship statuses in Europe. There is a disproportion already among first and second country nationals but what is even more striking is the status of third country nationals.

This problem has been addressed by several scholars who analyse what are the possibilities for extending citizenship-related rights to third country nationals. Kochenov²⁴ examines the relevant development of ECJ case law and argues that until very recently in cases related to EU citizenship had to fall within the scope of „cross-border situation” but this is not the case anymore. There is a new approach in which the Member State’s interference with the citizens’ rights triggers the application of EU law and not the borders. As a consequence of the new case law regarding citizenship by the ECJ a new legal paradigm has emerged that amounts to a tectonic shift in the border dividing the material scopes of the EU and the Member States’ legal orders, with clear implications for the status of EU citizenship and the sovereignty of the Member States.

This shift in the approach towards European citizenship also fits into the broader discussion on citizenship and membership. As Soysal also points out²⁵ the concept of citizenship has gone through a reconfiguration in the postwar era. Rights that used to belong to nationals of a country have been extended to foreign country population and a new form of post-national membership emerged. She argues that in contrast to the traditional model where there was a clear convergence between membership and boundaries, in the case of post-national membership boundaries became fluid. Therefore, this concept also implies multiplicity of membership rather than a single status. This concept derives its legitimacy from changes in the transnational order in the postwar period. The source of legitimacy shifted to the global level even though nation states are still the ones responsible for upholding the new rules and

²⁴ Kochenov, D.: A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe. *Columbia Journal of European Law*, Vol. 18, No. 1, pp. 56-109, 2011

²⁵ Soysal, Y.: *Limits of Citizenship*. Chicago: University of Chicago Press 1994.

principles. Changes also occurred in the basis of membership as in the case of national citizenship the basis was shared nationhood and national rights while in the case of postnational membership the focus is on universal personhood and human rights.

Soysal points out that the problem with the concept of postnational membership is that a shift occurred in the basis of legitimation of membership however, there is no scheme to implement and organize this new structure. Therefore, the responsibility of implementing individual rights and universal personhood still lies at the nation states.

The emergence of EU citizenship regime fits perfectly into the framework of postnational membership. As Soysal argues²⁶ with introducing EU citizenship EC member states broke the link between citizenship and national territory and introduced a multilevel citizenship structure. European citizenship is one of the most elaborate form of postnational membership where the legal and normative basis of the concept lies in the wider community but the actual implementation is assigned to member states. She points out that as much as the concept is one of the most sophisticated forms of postnational membership it still has several shortcomings and the situation of third country national is the most problematic. The instruments and guidelines addressing the rights of refugees and migrants shape the dynamics of the discourse and construct category for migrants in the policy debate that can form a basis for the claims of migrants. However, it is still not clear how they fit into this new concept of postnational membership within the EU.

Sassen also comes to similar conclusions as Soysal and argues that a transformation occurred under the impact of globalization that brought tension between citizenship as a formal legal status and as a normative concept.²⁷ In this process the international human rights regime played an important role and strengthened the concept of postnational membership. However,

²⁶ *ibid* p.

²⁷ Sassen, S.: *Towards Post-National and Denationalized Citizenship*. In: Isin, E. F. and Turner, Brian (eds.): *Handbook of Citizenship Studies*. Sage: London. 2002. p. 280.

her argument is distinct from Soysal's argument in certain ways. Sassen points out that Soysal captures the emergence of postnational membership within the EU as located outside of the nation state. On the other hand she uses the term denationalizing for this process and argues that the national itself has changed as a result of the pressure of globalization and strengthened claim making from international actors.²⁸

Kochenov argues that the question what we need to ask is what rights are included in the concept of EU citizenship as the developments in the case law send contradictory signals to what is meant by the essence of rights.²⁹ He argues that automatically acquiring jurisdiction in cases where the rights of EU citizens are infringed is an innovation introduced in the Zambrano ruling that moved EU citizenship closer to a citizenship in the Arendtian sense.³⁰ The Court claiming jurisdiction in citizenship cases based on the substance of rights is an important milestone. However, the ECJ fails to clarify what is exactly meant by these rights. This clarification would be fundamentally important to specify what the substance of rights actually includes. Therefore, Kochenov points out that answering the question 'the right to have what rights' would be crucially important for the future of EU citizenship.

What can be observed is that citizenship can be addressed in different ways and can be seen as a legal status, as a set of rights, and as a political activity. The emergence of the international human rights regime also played an important role in shaping the understanding of postnational membership. However, if we talk about the pure legal status of citizenship, the status of aliens still has not changed even if their civil, political and social rights increased.³¹ The European Union offers a great opportunity to observe the dynamics of postnational membership in practice. An increasingly important question that several scholars seek an

²⁸ *ibid* p. 288.

²⁹ Kochenov, D.: The Right to Have What Rights? EU Citizenship in Need of Clarification. *European Law Journal*. Vol. 19 Issue. 2013.

³⁰ *ibid* p. 507.

³¹ Lister, M. and Pia, E.: *Citizenship in Contemporary Europe*. Edinburgh University Press: Edinburgh, 2008. p. 63.

answer to is how European citizenship plays a role in strengthening integration. Furthermore, and other important aspect is that these dynamics are not only limited to the relationship between first and second country nationals but third country nationals also play a crucial role.

Scholars have different approaches and methods to elaborate on the concept of European citizenship and how it fits into the broader debate on citizenship and postnational membership. Besides the scholarly debate it is also important to look at the development of European citizenship on the policy level to see what how the concept developed and what were the main milestones in the evolution of EU citizenship.

Chapter 2: Historical Development of Union Citizenship

When signing the European Coal and Steel Community Treaty there was no direct assertion to citizenship and individual rights. It was clear that the concept went beyond the classic international organizations however, laws for member state citizens were not part of the picture yet and also there was no common European identity for citizens from different member states.

The Treaty of Rome³² moved a bit beyond this concept towards strengthening integration. According to the preamble of the Treaty the member states are “determined to lay the foundations of an ever closer union among the peoples of Europe, resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe, affirming as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples [...]”³³

What we can observe looking at the preamble of the Rome Treaty is that the citizens of Europe were directly mentioned and not only in relation to economic development and performance but more in relation to integration. This still did not directly target individuals but created a link between the people and the integration.³⁴ However, most of these rights were linked to the principles of free movement and individuals were included in relation to the free movement of workers. The notion of citizenship was not incorporated in the early stages of integration and the only link between individuals and the community was in the framework of market integration.

³² Treaty of Rome 1957

Available at: http://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf

³³ *ibid*

³⁴ Espen D. and H. Olsen: *Transnational Citizenship in the European Union – Past, Present and Future*. London. 2012. p.20.

The question of citizenship, individual rights and common European identity became part of the political agenda more explicitly in the 1970's. The first important step in this process was the Copenhagen Summit in 1973 where the foreign ministers of the member states published a document on the concept of European Identity.³⁵ The declaration mostly focuses on external relations and foreign policy and defines the community in relations to other external entities. There is less emphasis on the relation between the community and the individuals however, the declaration also mentions that the member states aim to “build a society which measures up to the needs of the individual, [...] are determined to defend the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights. All of these are fundamental elements of the European Identity.”³⁶

These elements mentioned in the declaration are relatively vague but still imply that these are the most crucial issue for individuals who are linked to the community even if at this point only through citizenship in one of the member states.³⁷

The next important milestone in the creation of European Citizenship was the Tindemans Report³⁸ that looked more closely into the relationship between individuals and the community. One of the most crucial elements in the report is “the protection of rights of Europeans, where this can no longer be guaranteed solely by individual States.”³⁹ Unfortunately, this had no significant impact on policy making and its importance remained overlooked.

³⁵ Declaration on the European Identity EC 12-1973.

³⁶ *ibid*

³⁷ Espen D. and H. Olsen: *Transnational Citizenship in the European Union – Past, Present and Future*. London. 2012. p.34.

³⁸ Available at: http://aei.pitt.edu/942/1/political_tindemans_report.pdf

³⁹ *ibid*

In the 1980's the idea of European identity and citizenship was more addressed at the policy level in the EC. The Draft Treaty Establishing the European Union was passed in 1984 and it directly stated that further efforts at harmonisation and integration of laws are needed in order to reinforce and strengthen European identity.⁴⁰ What is important to mention here is that this concept mostly focused on political conception of citizenship and on the notions of universal human rights.

The upcoming years were marked by diverse attempts to develop the concept of European identity. The Single European Act was a key point in this process as it addressed the problem both from policy and identity perspectives.⁴¹ The strengthening of free movement with the Schengen agreement lead to a broader concept and understanding of European citizenship which now moved from an economic and market based approach to a more personhood based approach.

Finally, the fundamentals of Union Citizenship were laid down in the Maastricht Treaty that aimed “to establish a citizenship common to nationals” of the Member States. This moved citizenship beyond the nation states and the concept was based more on potential transnational acts rather than belonging to a specified community or nationality.⁴² The Maastricht Treaty granted EU citizenship to every person holding the nationality of a Member states and granted the following rights:⁴³

- Right to move and reside freely within the territory of the Member States
- Right to vote in the European Parliamentary elections

⁴⁰ Espen D. and H. Olsen: *Transnational Citizenship in the European Union – Past, Present and Future*. London. 2012. p. 59.

⁴¹ *ibid* p. 71.

⁴² *ibid* p. 96.

⁴³ Treaty on the European Union, OJ C 191, 29 July 1992.

Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1992:191:FULL&from=EN>

- Right to vote and stand as a candidate in the municipal elections in the Member State that s/he resides with the same conditions as the nationals of the given state
- Right to protection by the diplomatic or consular authorities of any Member State
- Every citizen shall have the right to petition to the European Parliament
- Every citizen may apply to the Ombudsman

Although the Maastricht Treaty was undeniably an important milestone in the creation of European citizenship and identity it still has several shortcomings which are mostly visible through the case law of the European Court of Justice and through the diverse legislation of the Member States. One of the main difficulties that the Treaty fails to address properly is how EU citizens can exercise their rights. This meant the creation of legal ties instead of the creation of belonging and identity.⁴⁴

The debate following the Maastricht Treaty focused mostly on the issues of exclusion and inclusion where one possible solution would have been the introduction of place-oriented citizenship. This idea was brought into the debate by the European Parliament⁴⁵ however, the debate did not remain on the political agenda.

The Amsterdam Treaty did not reflect on the demands mentioned above and did not strengthen the residency criteria. On the contrary, the nationality component was reinforced once again stating that “the Union shall respect the national identities of its Member States.”⁴⁶ The institutional settings for EU citizenship remained almost the same while at the same time the EU made several efforts to bring citizens closer to the Union. The European Parliament

⁴⁴ Wiener, A.: From Special to Specialized Rights: The Politics of Citizenship and Identity in the European Union. In: Hanagan M. & Tilly C., eds. *Extending Citizenship, Reconfiguring States* p. 195- 227.

⁴⁵ *ibid*

⁴⁶ Treaty of Amsterdam 2 October 1997. Article 1.

Available at: <http://www.eurotreaties.com/amsterdamtreaty.pdf>

initiated campaigns such as “Citizens First”⁴⁷ in order to create a direct bond between citizens and the Union. The main problem was however, that in certain situations rights from EU citizenship could not be invoked in domestic situations.

What can be observed is that by creating EU citizenship the Union moved beyond the traditional understanding of citizenship and created new boundaries by introducing a transnational form of membership. However, this attempt purely focused on the legal aspects of the question and there was little debate on the identity aspects of the question that later became extremely important. While citizenship so far was embedded in the nation state and its institutions the introduction of EU citizenship pushed this concept to its limits by introducing a new form of nested membership. Yet this citizenship was based on citizens’ involvement in economic and political participation. Thus as much as the creation of EU citizenship was a major step forwards in terms of creating identity and post-national membership there is little improvement on how to access and enjoy these rights.

⁴⁷ Wiener A.: From Special to Specialized Rights: The Politics of Citizenship and Identity in the European Union. In: Hanagan M. & Tilly C., eds. *Extending Citizenship, Reconfiguring States* p. 195- 227.

Chapter 3: European Court of Justice

This part of my thesis intends to examine the role of the European Court of Justice (ECJ) as an actor in the integration process. My main goal is to look at how the ECJ's judicial activism shaped policy making. First to understand this it is important to look at how the evolution of ECJ case law played a crucial role in the integration process. Therefore, I intend to review theoretical and empirical studies addressing this question.

3.1. Introduction to the Court of Justice of the European Union

The European Court of Justice was established in 1952 under the European Steel and Coal Community Treaty with the mission to ensure that the law is observed in the interpretation and application of the Treaties. Its main roles are the following:⁴⁸

- reviewing the legality of the acts of the institutions of the European Union
- ensuring that the Member States comply with obligations under the Treaties, and
- interpreting European Union law at the request of the national courts and tribunals

The Court consists of 28 judges, one per each Member State and is assisted by 8 Advocate-Generals who are all appointed for a six-year term. The ECJ consist of three courts: the Court of Justice, the General Court and the European Union Civil Service Tribunal. As it is laid down in Article 5 (2) of the Treaty on European Union (TEU) the Court “may act only within the limits of the competence conferred upon it by the Member States in the Treaties.”

The Court's jurisdiction includes several components. One of the most important is to decide whether or not a state has failed to fulfil obligations under the Treaty. These actions may be brought by the Commission or by member states. The Maastricht Treaty was the first time when the EU gave the power to the Court to impose penalties on Member States if they fail to

⁴⁸ European Court of Justice website

Available at: http://curia.europa.eu/jcms/jcms/Jo2_6999/ Retrieved 15 May 2014

fulfil obligations. The second type of judicial competence is application for annulment. This includes the review of legality and legislative acts, of acts of the Council, of the Commission, and of the European Central Bank. Furthermore, it intends to review legality of acts of bodies, offices or agencies of the EU that intend to produce legal effects *vis-à-vis* third parties. The judicial review of acts of the European Council and the agencies was only introduced in the Lisbon Treaty but is considered to be an important milestone in the extension of the Court's power which is also considered to be a significant step in the constitutionalisation of the EU.⁴⁹

An important rule of that the Court has to fulfil is an advisory role. Cases can be referred to the ECJ for preliminary ruling in which case the Court gives interpretation on points of the EU law to enable national courts to make a ruling. Finally, "in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".⁵⁰

Table 1.⁵¹

	2009	2010	2011	2012	2013
References for a preliminary ruling	302	385	423	404	450
Direct actions	143	136	81	73	72
Appeals	105	97	162	136	161
Appeals concerning interim measures	2	6	13	3	5
Request for an opinion	1			1	2
Special forms of procedures	9	7	9	15	9
Total	562	631	688	632	699

⁴⁹ Nugent, N.: *The Government and Politics of the European Union* 7th Edition 2010. Chapter 12 p.207-225.

⁵⁰ Article 340 Treaty on the Functioning of the European Union

⁵¹ Based on: European Court of Justice – Annual Report 2013.

Available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-03/en_version_provisoire_web.pdf
Retrieved: 15 May 2014.

3.2. Impact and Influence of the Court

To further analyse how the jurisdiction of the European Court of Justice influenced the debate on EU citizenship and triggered responses from policy makers it is crucial to look at the evolution of its case law. The ECJ made several milestone decisions that strengthened the status of EU law. One of the most important landmark decisions of the 1960s and 1970s is *Costa v. ENEL* (Case 6-64) in which established the supremacy of EU law over the laws of its Member States. Similar to this in 1963 in *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26-62) the ECJ established that the Treaty of Establishing the European Economic Community is capable of creating legal provisions that can be enforced before the national courts of the Member States thus establishing the principle of direct effect.

EU policies have been strengthened through Court judgments not just closely related to internal market and labour but also in the field of social security. Furthermore, the Court played an important role in pushing Member States towards the harmonisation of EU law. One example for this process is the *Barber v. Guardian Exchange Assurance Group* (Case 262-88) which was referred to the Court by the UK Appeal Court for preliminary ruling. In this case the ECJ ruled that pensions must comply with Article 119 of the EEC Treaty.⁵²

One of the most important decisions in terms of examining the Court's influence on policy making is the ECJ's *Cassis de Dijon* (Case 120-78)⁵³ ruling in 1978 that established the mutual recognition of goods among Member States. I use Alter's approach⁵⁴ to examine how this court decision had an impact on policy making processes and how it further influenced the strengthening of the Court's role in shaping EU policies. Scholars often disagree on the impact of ECJ court decision on policy making. The Court has made some far-reaching

⁵² Nugent, N.: *The Government and Politics of the European Union* 7th Edition 2010. Chapter 12 p. 224.

⁵³ ECJ Case 120/78 ReweZentral AG v. Bundesmonopolverwaltung für Branntwein Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61978CJ0120:EN:PDF>

⁵⁴ Alter, K.: *Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision. The European Court's Political Power: Selected Essays*. Oxford. 2012.

decision in recent years and had gradually broadened its jurisprudence. Still it remains unclear how much it influences the integration process. Alter starts off with analysing the *Cassis de Dijon* decision to see how it fits into the broader picture of integration process.

This case was referred to the Court by the German national court for preliminary ruling. German law requires spirits to have a minimum of 25% alcohol level to be marked and sold as such. Thus the French alcoholic beverage ‘Cassis de Dijon’ with an alcohol percentage of 15-25% could not be sold as a spirit. Germany based its argument on the grounds of health and consumer protection as they believed a lower alcohol percentage can induce a tolerance towards alcohol more easily. In its verdict the Court rejected the German argument and applied the legal principle of proportionality. The ECJ ruled that lowering the level of alcohol does not mean lowering the standards. As part of the ruling the Court stated that:

“There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member States.”⁵⁵

This ruling had significant political consequences. The European Commission almost immediately reacted to the decision as it gave a background for developing a new approach to the harmonization of the internal market and furthering European integration.⁵⁶ These guidelines laid down the principle of mutual recognition and were directed towards strengthening cooperation among Member States. This was the first time that an ECJ decision directly triggered the policy making process.⁵⁷ This also opened up the floor for further discussions on the role of the Court of Justice in the integration process. The purpose of analyzing this case was to give an example how ECJ decisions are influencing policy debate and shed a light on the role of the ECJ in the integration process.

⁵⁵ Case 120/70 Decision of the Court

Available at: http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/mutrec/cassisdijon_en.pdf

⁵⁶ Alter, K.: Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision. *The European Court's Political Power: Selected Essays*. Oxford. 2012.

⁵⁷ *ibid.* p.

3.3. Court of Justice as a Political Actor

The Court influence on policy making processes did not end with the internal market. The ECJ remained an important actor in shaping the integration even though its role and impact of its decision remains a highly discussed question among scholars. This chapter is devoted to summarize the main ideas and debates among scholars on how the European Court of Justice plays a role in the European Union and how it triggers policy making processes.

The first question that needs to be answered whether or not the ECJ can be considered as a political actor at all. Judges of the Court often claim that it cannot be seen as such as it is a “passive institution” in a sense that its decisions depend on the cases brought to them. In that sense they claim political neutrality. However, it is clearly undeniable that the Court’s decisions often have strong political connotations. Over the past few decades Court decisions had a spillover effect to non-market policy domains such as social security, education or immigration. One other remarkable development is the reduced scholarly support of EU law-making.⁵⁸ Thus the ECJ has often been criticized for being uneven and unpredictable as we can also observe in the recent *Zambrano*⁵⁹ or *Mangold v. Küçükdeveci* cases.

Dawson⁶⁰ bases his argument on three main pillars. First of all he looks at the imbalances within the EU in terms of legislative competences and jurisdiction. According to Dawson⁶¹ the first factor that can lead to imbalances between EU law and policies is the EU’s discrepancy between competences to legislate and the jurisdiction of its legal order. This discrepancy is linked to the supremacy principle and a confliction Member States’ legislation. Therefore, the dialogue already begins at a national level between the courts and the

⁵⁸ Dawson, M. and E. Muir: The European Court of Justice as a Political Actor. In: *Judicial Activism at the European Court of Justice*. 2013. p.2.

⁵⁹ Case C-34/09 Gerard Ruiz Zambrano v. Office national de l’emploi. 8 March 2011.

⁶⁰ M. Dawson and E. Muir: The European Court of Justice as a Political Actor. In: *Judicial Activism at the European Court of Justice*. 2013.

⁶¹ *ibid* p. 14.

legislators. Furthermore, when EU legislation does respond to the Court's jurisprudence it often leads to contradictory outcomes⁶² and further problems in terms of interpretation.

The second argument examines how the Court's failure to properly explain its decisions inhibits it from actively engage in the policy making process. The problem of inadequate reasoning makes it difficult for the Court to engage in a dialogue with the political institutions of the EU.⁶³ This however, prevents the Court from actively participating in the policy-making process as it distances itself from the other political actors within the EU. This can lead to several problems and definitely makes it difficult for the Court to actively engage and play an influential role in the policy-making process. It also makes it more difficult for other actors and political institutions to respond to Court decisions. Dawson⁶⁴ also points out that the media attention that the Court decisions receive remains relatively low.

Finally, Dawson looks at the imbalances in the law-politics nexus and other asymmetries within the integration that can influence the Court's role as a political actor. One of the most striking examples of these imbalances are the conflicting social and economic goals. This imbalance can be observed in the Treaties and also infiltrates to the Court's jurisprudence. The ECJ has to face the challenge to balance market and non-market values and create a certain hierarchy.⁶⁵ Dawson argues that judicial activism arises not just because there is no simple and original meaning of the Treaties but also because these possible meanings can be fractured into several goals and objectives. Especially in the case of the EU where decision makers have to forge different national, political and cultural visions. Therefore, the ECJ plays an important role in shaping and guiding the policy making process.

⁶² *ibid* p. 16.

⁶³ *ibid* p. 19.

⁶⁴ *ibid.* p20.

⁶⁵ *ibid* p.26.

3.4. Neofunctionalism

In order to understand the European Court of Justice's role and impact in the integration process Burley and Mattli⁶⁶ use the neofunctionalist approach in order to better comprehend the process of legal integration. The authors argue that other legal approaches and political science theories all have some kind of shortcomings and inconsistencies and neofunctionalism is the theory that explains the ECJ's role in the most elaborate way. They base their argument on Ernst Haas model that looks at integration as a process in which:

“Political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possesses or demand jurisdiction over the pre-existing national states. The end result of a process of political integration is a new political community, superimposed over the pre-existing ones.”⁶⁷

Burley and Mattli explain their argument based on four main categories: actors, motives, process and context. In terms of actor the main emphasize is on the ECJ judges and the Advocate-General. They argue that the proliferation of community lawyers led to the development of specialized and highly independent body above community level.⁶⁸ However, an important set of actors are the community law professors who give an extensive commentary on Court decisions. Motives are also based on the previous category as Burley and Mattli points out actors on the supra- and subnational actors are driven by self-interest arguing that these individuals were given the chance to influence the integration process.

Furthermore, the neofunctionalist approach puts a significant emphasize on the process in terms of the different dynamics in the integration. Neofunctionalists differentiate three main

⁶⁶ Burley, A and Mattli, W.: Europe Before the Court: A Political Theory of Legal Integration. *International Organization* Vol.47/01. 1993.

⁶⁷ Haas, E.: International Integration: The European and the Universal Process. *International Organization* Vol.15.03. 1961. p.366.

⁶⁸ Burley, A. and Mattli, W.: Europe Before the Court: A Political Theory of Legal Integration. *International Organization* Vol.47/01. 1993 p. 59.

features in terms of the actual process of the integration.⁶⁹ Functional spillover emphasizes the logic of law arguing that the different sectors of the integration are so interdependent that once a measure is adopted in one sector it will automatically influence other sectors who will therefore adopt integrative measures to achieve the goal. The ECJ's role in creating coherent and authoritative body of community law⁷⁰ streams into other dimension of the integration. An example of this process can be observed for instance in *Van Gend en Loos v Nederlandse Administratie der Belastingen*⁷¹ or in *Costa v. Enel*⁷² which established the supremacy of EU law. The fact that the ECJ no longer has a dominantly economic character is also a manifestation of the functional spillover effect.

The political spillover effect explains why the Member States react positively to the Court's legal innovations. They argue that law shifts expectations and thus once a rule is established as law actors such as states, national courts and individuals are expected to behave in accordance to the rule.⁷³ Therefore, if the actors accept the Court's decision it becomes a precedent and from that point all the actors are required to act according to the rule. This later on influences the policy-making process as the actors such as national governments and national courts are obliged to follow them. This effect basically follows the functional spillover effect and involves changes in values and expectations of interest groups such as nation states and national courts.

Finally, the third element in this nexus is upgrading common interest. Burley and Mattli argue that for the neofunctionalists this is referred as a "swapping mechanism dependent on the services of an institutionalized autonomous mediator."⁷⁴ However, the ECJ in this sense

⁶⁹ *ibid* p. 65.

⁷⁰ *ibid* p.65.

⁷¹ C- 26/62

⁷² C- 6/64 Flaminio Costa v. E.N.E.L

⁷³ Burley, A: and Mattli, W.: Europe Before the Court: A Political Theory of Legal Integration. *International Organization* Vol.47/01. 1993. p. 67.

⁷⁴ *ibid* p.68.

cannot be considered as a mediator more of an arbiter. The neofunctionalist theory is exceptionally important in terms of this thesis as it creates theoretical background on which I intend to analyse the different Court decisions. This is especially helpful to further understand how the Court's decisions can influence and shape the policy making process.

3.5. Intergovernmentalism

In his book *'The Government and Politics of the European Union'* Nugent defined intergovernmentalism as follow:

“arrangements whereby nation states, in situations and conditions they can control, cooperate with one another on matters of common interest. The existence of control, which allows all participating states to decide the extent and nature of this cooperation means that national sovereignty is not directly undermined”⁷⁵

Moravcsik⁷⁶ criticizes the neofunctionalist approach mostly because it fails to develop different predictions about the possible development of the EU. He proposes a new theory that is according to him more in line with the recent developments in the integration process. The core of liberal intergovernmentalism is built on three main assumptions⁷⁷: rational state behaviour, a liberal theory of national preference formation and an intergovernmentalist analysis to interstate negotiations.

Garrett⁷⁸ builds on Moravcsik's theory and comes to the conclusion that the Court's rulings tend to be in line with the expectation of powerful Member States and it is used as a tool by these states to produce the necessary policy outcome. However, several authors such as Burley and Mattly or Alter challenge this conclusion arguing that it lacks empirical evidence to support his claim. They argue that indeed many of the landmark decision of the ECJ had a

⁷⁵ Nugent, N: *The Government and Politics of the European Union* 7th Edition 2010. Chapter 12 p.

⁷⁶ Moravcsik, A: Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach. *Journal of Common Market Studies*. Vol. 31. No. 4. 1993. p. 477.

⁷⁷ *ibid* p. 480.

⁷⁸ Garrett, G.: International Cooperation and Institutional Choice: The European Community's Internal Market. *International Organization*. Vol. 46. No. 2. 1992.

significant impact on the integration and policy-making process. Furthermore, that these rulings do not necessarily reflect the preferences of powerful Member States.

The aim of this chapter was to shed a light on the different approaches to examining the European Court of Justice's role in the integration process. The neofunctionalist approach helps us to better understand how the different dimensions in the policy-making process influence each other. The intergovernmentalist approach on the other hand builds on this but also points out the shortcomings of neofunctionalism. This gives the background for my analysis to examine and better understand how the Court decisions influence and shape the policy-making process.

Chapter 4: Case Law of the European Court of Justice

This chapter of my thesis aims to analyse the recent developments in ECJ rulings in terms of European Union citizenship. Union citizenship has been a highly discussed concept since it was established in the Maastricht Treaty and remained on the political agenda ever since. It is an essential component of integration however, the rights attached to it and how individuals can benefit from these rights often remains unanswered. This question became even more important in recent years as the number of third country nationals (TCN) residing in the territory of the Member States increased significantly. In recent years the European Court of Justice made several landmark decisions in terms of EU citizenship. This chapter examines a few of the most important court cases in recent years. The aim is to better understand how the ECJ interprets EU citizenship in its decisions.

4.1. Rottmann

The first court case I intend to analyse marks a new phase in the Court's legislation on EU citizenship. This landmark decision opens up the floor for further discussions on the interpretation of Union citizenship and the concept of the substance of rights. Furthermore, this is the first time that the Court treats EU citizenship in a relatively autonomous way from national citizenship.

Mr. Rottmann had Austrian nationality and was prosecuted for alleged fraud in his home country. Meanwhile he was living in Germany and sought German citizenship without disclosing to the authorities that he was the subject of criminal proceedings in Austria. After obtaining German citizenship he automatically lost his Austrian citizenship by operation of law. However, after Germany was informed that Mr. Rottmann obtained citizenship fraudulently it immediately revoked the naturalisation decision which did not entail automatic reacquisition of his Austrian citizenship. This action would have rendered Rottmann stateless.

The German Supreme Federal Administrative Court decided to seek and answer for the following questions from the Court:

“whether it is contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation and obtained by deception inasmuch as that withdrawal deprives the person concerned of the status of citizen of the Union and of the benefit of the rights attaching thereto by rendering him stateless, acquisition of that nationality having caused that person to lose the nationality of his Member State of origin”⁷⁹

However, before this it was assumed that only cases with cross-border element fell within the scope of EU law. Furthermore, citizenship was considered as an exclusively internal matter of the Member States.

In the decision the Court indicated that based on Article 3 of the European Convention on Nationality which was adopted by the Council of Europe, Member States have the right to define rules for acquisition and loss of citizenship however, this should be done with due regard to Community Law. The Court acknowledged that citizenship is a purely internal matter however, it came to the conclusion that other aspects also have to be taken into consideration.

“It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.”⁸⁰

⁷⁹ C- 135/08 Judgment of the Court 2. March 2010.

Available at:

http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=75336&occ=first&dir=&cid=1416955

⁸⁰ C- 135/08 Judgment of the Court 2. March 2010. §42.

The Advocate General came to the same conclusion as the Court however, using a different approach. He acknowledged the internal nature of citizenship but used the concept of freedom of movement⁸¹ as a basis for his argument. He points out that Mr. Rottmann had used his right to freedom of movement when he moved from Austria to Germany. Freedom of movement was established by Article 21 TFEU and is considered as one of the fundamental freedoms of the European Union. Therefore, Advocate General Maduro argues that by exercising this right the case cannot be considered as a purely internal matter of a Member State and argues that the case should be subject to Community Law.

As an outcome the Court ruled that Member States should apply the principle of proportionality. A proportionality test should be conducted by the national court to examine whether the deprivation from the offense is severe enough to justify the loss of European citizenship. The Court also made no comments about admissibility and rejected the contention that the case is an internal situation of the Member State as “in situations covered by European Union law, the national rules concerned must have due regard to the EU law”⁸²

This is one of the most ground breaking decisions in recent years in terms of Union citizenship. It also led to a debate among scholars and academics about the scope of EU citizenship. Davies⁸³ argues that the decision raises three main questions: “(1) What does it

⁸¹ Case- 135/08 Opinion of Advocate General Maduro §12.

⁸² Shaw, J.: Setting the scene: the *Rottmann* case introduced in: Jo Shaw: *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* EUDO Observatory on Citizenship
Available at: <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law>

⁸³ Davies, G.: The Entirely Conventional Supremacy of Union Citizenship and Rights in: Jo Shaw: *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* EUDO Observatory on Citizenship
Available at: <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law>

mean to say national citizenship fall within the scope of EU law? (2) Which aspects exactly fall within this scope? (3) What are the practical consequences?”⁸⁴

Davies argues that the Rottmann ruling is a very conventional application of EU law. Some scholars regard EU citizenship as subordinate or dependent on Member State citizenship. However, now it became clear that even though Member States are still the gatekeepers of Union citizenship, they must do so in compliance with EU law. Though another aspect of this question that needs to be answered is what features of national citizenship fall within the scope of EU law. Davies point out that only the deprivation from EU citizenship falls within the scope of EU law but not the denial of it. This raises more problems in terms of the future developments in terms of EU citizenship as according to Davies denial and deprivation should both fall under the scope of EU law and there is no reason to exclude just one or the other.⁸⁵

One other important aspect is the implications of the ruling and how much it matters for Member States. Generally speaking the Rottmann decision did not receive significant attention from Member States. Only a minority of Member States intervened,⁸⁶ but most of the countries took the view that in practice it will rarely apply to them. There was nothing in the Court’s decision that would imply the possibility of the Court’s future engagement with the structure of national citizenship law. Therefore, one can also assume that at this point there was little chance that this decision would influence the policy-making process concerning European Union citizenship in the long run.

⁸⁴ *ibid*

⁸⁵ *ibid*

⁸⁶ *ibid*

Nonetheless, the ruling cannot be seen as a clearly positive outcome. While Davies points out several positive features that can lead to further improvement on the policy level, Kochenov⁸⁷ clearly criticizes the ruling. His main argument is that the Court did not go far enough and did not introduce a minimum level of predictability within the context of interaction between EU law and national law. Furthermore, the decision failed to examine the facts in the larger perspective of European integration. Moreover, an important shortcoming is that the Court left the principle of proportionality to the national courts instead of shaping it at EU level.

Therefore, even though the Rottmann decision is considered groundbreaking in several aspects it still lacks important aspects that should have been addressed by the Court. For instance the creation of a logical and sustainable construct of interaction between EU citizenship and Member State nationalities. Furthermore, the ruling “failed to follow the Micheletti tradition of dismissing the rules of international law dangerous for the success of the European integration project.”⁸⁸ However, despite all these shortcomings that Kochenov lists in his article, the Rottmann decision is still considered one of the most important and groundbreaking decisions in terms of Union citizenship.

Another important aspect that needs to be emphasized is the clear distinction between third country nationals who never had EU citizenship and nationals of a Member State whose citizenship has been withdrawn. Similar to Davies, Golyner⁸⁹ also points out that this distinction between denial and deprivation can be highly problematic. She argues that the

⁸⁷ Kochenov, D.: Two Sovereign States vs. a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters in: Jo Shaw: *Has the European Court of Justice Challenged Member State Sovereignty in Nationality* EUDO Observatory on Citizenship

⁸⁸ Kochenov, D.: Two Sovereign States vs. a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters in: Jo Shaw: *Has the European Court of Justice Challenged Member State Sovereignty in Nationality* EUDO Observatory on Citizenship

⁸⁹ Golyner, O.: The Correlation Between the Status of Union Citizenship, the rights attached To It and Nationality in Rottmann. in: Jo Shaw: *Has the European Court of Justice Challenged Member State Sovereignty in Nationality*

Court has a very controversial approach towards the correlation between EU citizenship, the rights attached to it and nationality.⁹⁰

To sum up, the Rottmann ruling had several shortcomings and scholars often criticize it for many reasons such as the scope of application or the proportionality test. Nevertheless, when put in context this decision is clearly groundbreaking. It did not directly create a policy outcome but created a path for further development in terms of the Court's jurisprudence.

To examine more closely what this decision means in terms of interpreting Union citizenship I intend use Bauböck's approach that he suggests in his article "*Why European Citizenship? Normative Approach to Supranational Union.*" I will argue that with this decision the Court moved towards a direction that is closely linked to the pluralist approach that he suggest. In this case, even though the Court treated the concept of Union citizenship relatively autonomously, it still balanced it in a way that the proportionality check remained in the competence of the Member States. This promotes the idea of multi-level membership where general norms of democratic legitimacy can be observed on all levels.

With this ruling the Court tried gain more jurisdiction in cases that are linked to Union citizenship even when it is conflicting with national legislation. Bauböck argues that in the case of pluralist approach actors try to balance if there are conflicting interests. This can also be detected in the Rottmann case where the Court claimed jurisdiction in a case that was considered purely internal however, left the proportionality test in the competence of the Member States. For the purpose of this analysis it is an important milestone, as it also proves that the Court moves into a direction where it can claim jurisdiction in cases where the rights of Union citizens are threatened.

⁹⁰ ibid

4.2. Zambrano

Just one year later the Rottmann ruling was followed by another significant decision, the Zambrano⁹¹ ruling that extended the reach of EU law to internal situations when dealing with the situation of family members of EU citizens.⁹²

Mr. Zambrano is a Colombian national who left his country of origin with his family and sought asylum in Belgium. His claim was rejected and he was refused a residence permit. However, he and his wife took up full-time employment and during their stay in Belgium Mrs. Zambrano gave birth to two children who became Belgian nationals. The parents did not take any steps to have them recognized as Colombian nationals. Following the birth of his children Mr. Zambrano applied for a residence permit once again but his application was rejected. The court based its decision on the argument that Mr. Zambrano did not make any steps to have his children registered in his country of origin, but used their status as a basis to legalise his own residence.⁹³ Therefore, Mr. Zambrano was refused a residence and work permit. However, not granting residence permit to Mr Zambrano also meant that his minor children, who are EU citizens, would be deprived of the right to stay within the territory of the European Union.

The Tribunal du Travail de Bruxelles decided to refer the question to the ECJ for preliminary ruling, in particular concerning the possible application of the provisions of the Treaty relating to European citizenship to the situation of the Zambrano children.⁹⁴ The Court emphasized the fundamental status of Union citizenship and therefore concluded that:

⁹¹ Case C-34/09 Gerard Ruiz Zambrano v. Office national de l'emploi (ONEm) Judgment of the Court. 8 March 2011.

⁹² Wiesbrock, A.: *The Zambrano case: Relying on Union citizenship right sin internal situations* EUDO Observatory on Citizenship

⁹³ Case C-34/09. Judgment of the Court of 8 March 2011.

⁹⁴ *ibid*

“Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union [...] A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect”⁹⁵

National measures cannot deprive Union citizens of the enjoyment of the substance of the rights by virtue of their status as citizens of the EU, respective of the previous exercise by these citizens of their right of free movement.

This decision has several implications that challenge the concept of EU citizenship. The first and probably most important is that we can observe a clear disconnection of EU citizenship from free movement. In this case a shift occurred where citizenship is no longer dependent on mobility. This redefined the scope of application of EU law to purely internal situations and eliminating the cross-border element that was necessary to trigger EU law.

One of the most important implications of elimination the cross-border element is that this extends the reach of EU law to a large number of potential beneficiaries as the percentage of EU citizens who exercise their right to free movement is still marginal.⁹⁶ However, eliminating the free movement criteria raises further questions in terms of the legal theory of EU citizenship.

Azoulai⁹⁷ argues that the Zambrano decision is indeed a landmark decision as it marks the beginning of a shift in the understanding of EU citizenship which can later also influence the policy-making process. First and foremost, the fact that EU citizenship is no longer dependent

⁹⁵ *ibid*

⁹⁶ Wiesbrock, A.: *The Zambrano Case: Relying on Union Citizenship Rights in Internal Situations* EUDO Observatory on Citizenship
Available at: <http://eudo-citizenship.eu/citizenship-news/449-the-zambrano-case-relying-on-union-citizenship-rights-in-internal-situations>

⁹⁷ Azoulai, L.: *A Comment on the Ruiz Zambrano Judgment: A Genuine European Integration*. EUDO Citizenship Observatory
Available at: <http://eudo-citizenship.eu/search-results/457-a-comment-on-the-ruiz-zambrano-judgment-a-genuine-european-integration>

on mobility makes it more accessible for Member State citizens to enjoy their rights as Union citizens. Before this decision Union citizenship and free movement were bound together as also reflected in Directive 2004/38 which states that “Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence.”⁹⁸ The fact that the Court moved from away from this Directive and ruled that the sole presence⁹⁹ of Union citizens in a Member State even if that country is his/her country of origin is enough to trigger ‘European protection.’

This step has several implications in terms of broadening the scope of application of EU law regarding Union citizenship and the rights attached to it. This means that the Court first needs to protect the status itself and then the rights attached to it such as the fundamental rights protected under the Charter of Fundamental Rights of the European Union.¹⁰⁰ This moves beyond the traditional understanding of Union citizenship and the combination of citizenship rights and fundamental rights has a far-reaching effect in terms of broadening the scope of Union citizenship.

As a consequence of this decision Azoulai¹⁰¹ points out three main dimensions that need to be further examined in terms of policy-making. First of all the classification and re-classification especially in terms of third-country nationals. There are a growing number of immigrants residing in the territory of the Member State. In the case of Zambrano the transformation of his status started from illegal immigrant to a ‘quasi European citizen,’ legally residing and

⁹⁸ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004.

Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>

⁹⁹ Azoulai, L.: *A Comment on the Ruiz Zambrano Judgment: A Genuine European Integration*. EUDO Citizenship Observatory

Available at: <http://eudo-citizenship.eu/search-results/457-a-comment-on-the-ruiz-zambrano-judgment-a-genuine-european-integration>

¹⁰⁰ Charter of Fundamental Rights of the European Union 2000/C 364/01

Available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

¹⁰¹ Azoulai, L.: *A Comment on the Ruiz Zambrano Judgment: A Genuine European Integration*. EUDO Citizenship Observatory

Available at: <http://eudo-citizenship.eu/search-results/457-a-comment-on-the-ruiz-zambrano-judgment-a-genuine-european-integration>

working in the territory of a Member State. This can be a promising start in terms of re-classification of migrants and third country nationals in order to grant them more rights and make it more accessible for them to enjoy these rights. Nevertheless, as we can observe in the previous Rottmann ruling there is still a clear distinction between the denial and the deprivation of Union citizenship. As long as this difference remains TCN's still find themselves in a legal limbo.

The second question concerns the exportability of this decision. In this case the dependents are children whose best interest is to live with their parents. The question is whether or not this decision can be expanded to other types of situations, for instance adults who have family members residing in the territory of one of the Member States.

Finally, this decision also stretches the boundaries of Union citizenship which is in a traditional understanding linked to Member State nationality. With this decision, however, the Court takes a step ahead and grants to a third country national rights that are similar to those enjoyed by the citizens of the European Union. This uncovers a potential new path in the development of Union citizenship. A possible new dimension for the EU is to develop connection with individuals not linked to Member States and therefore develop a new notion of membership.

For the purpose of this analysis this case has significant importance. In contrast to the previous decision, this ruling takes an important step forward in the development of Union citizenship. I will argue that this case moves the Court's interpretation of EU citizenship closer to Bauböck's unionist approach. This approach aims to strengthen a concept of Union citizenship that is not directly linked to Member State citizenship but legal residence. The Zambrano ruling points towards this direction as it claims jurisdiction in a situation that was before considered purely international.

The importance of this decision stems from the fact that through residence and work permit a third country national can enjoy rights similar to the ones of the nationals of the given country and this was triggered through the direct application of EU law. In this case Mr. Zambrano is not a national of any Member State but is able to access these rights through his children who are Union citizens but never exercised their right to free movement. Therefore, the Zambrano decision is in line with Bauböck's unionist approach that also favours third country nationals and points to a direction where EU citizenship is more linked to residency rather than Member State nationality. This also points to the direction that the Court tries to broaden the understanding and meaning of Union citizenship, that is not nested in Member State nationality, in order to make it more accessible for third country nationals legally residing in the territory of the European Union.

4.3. McCarthy

The McCarthy decision followed the Zambrano ruling only a few months later and also raised questions about the relationship between EU citizenship, free movement and residence, family reunification. Mrs. McCarthy is a national of the United Kingdom and also the Republic of Ireland and was residing in the UK without ever having exercised her right to move freely within the territory of other Member States. After her marriage to a Jamaican national she applied for an Irish passport and then requested a residence permit from the British authorities.¹⁰² Her husband also applied for a residence permit as a spouse of a Union citizen.

However, her application was refused and the Court argued that Mrs. McCarthy cannot base her spouse's residence on Union law as she never exercised her right to free movement and has never been in a position of employment or self-employment.¹⁰³ Finally, the Supreme

¹⁰² Case Summary: C-434/09 McCarthy v Secretary of State for the Home Department. European Migration Network

Available at: http://emn.ie/cat_search_detail.jsp?clog=6&itemID=336&item_name=

¹⁰³ Coutts, S.: Comment on McCarthy v Secretary of State for the Home Department. EUDO Citizenship Observatory

Court of the United Kingdom referred the question to the European Court of Justice for preliminary ruling and asked whether Mrs. McCarthy can invoke the rules of EU law designed to facilitate the movement of persons within the territory of the Member States.¹⁰⁴

The ECJ came to similar conclusion as the Supreme Court of the United Kingdom and ruled that Directive 2004/38/EC¹⁰⁵ is not applicable in this case.

“Hence, in circumstances such as those of the main proceedings, in so far as the Union citizen concerned has never exercised his right of free movement and has always resided in a Member State of which he is a national, that citizen is not covered by the concept of ‘beneficiary’ for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him.”¹⁰⁶

As a national Mrs. McCarthy’s right to residence cannot be questioned however, she cannot rely on this right to secure residence permit for his third country national husband. The fact that Mrs. McCarthy applied for Irish citizenship and later for residence permit in the UK as an Irish national was still not sufficient to grant residence permit for her spouse. The Directive concerns the situation of nationals who reside in the territory of an other Member State though as Mrs. McCarthy is also a national of the UK this part of the Directive was inapplicable to her situation. Furthermore, the Court ruled that Article 21 TFEU is also not applicable in this case. The fact that Mrs McCarthy did not exercise her right to free movement does not necessarily means that she cannot rely on her status as EU citizen. The Court argues that:

“no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of

Available at: <http://eudo-citizenship.eu/citizenship-news/475-case-c-434-09-shirley-mccarthy-v-secretary-of-state-for-the-home-department>

¹⁰⁴ Court of Justice of the European Union: Press Release No. 43/11. 5 May 2011.

¹⁰⁵ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004.

Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>

¹⁰⁶ Case C-434/09 Judgment of the Court. 5 May 2011.

the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU. Indeed, the failure by the authorities of the United Kingdom to take into account the Irish nationality of Mrs McCarthy for the purposes of granting her a right of residence in the United Kingdom in no way affects her in her right to move and reside freely within the territory of the Member States, or any other right conferred on her by virtue of her status as a Union citizen “¹⁰⁷

According to this denying residence permit to her third country national husband would not deprive Mrs. McCarthy from enjoying the substance of the rights associated with EU citizenship.

The decision follows the steps of the Zambrano ruling while limiting its application. The purely internal rule was abolished but remained even if in a modified form. The Court also clarified that the mere fact of dual nationality does not bring the situation under the scope of EU law.¹⁰⁸

In terms of fundamental rights Advocate General Kokott argued that this issue is not “a question of EU law, but only a question of the United Kingdom’s obligation under the ECHR, the assessment of which falls exclusively within the jurisdiction of the national courts and, as the case may be, the European Court of Human Rights.”¹⁰⁹ This is clearly a step back from the Zambrano judgment where the Advocate General advised the Court to extend the scope of EU fundamental rights protection in a way that “provided that the EU had competence

¹⁰⁷ *ibid*

¹⁰⁸ Coutts, S.: *Case C-434/09: Shirley McCarthy v. Secretary of State for the Home Department*. EUDO Observatory on Citizenship 10 May 2011.

¹⁰⁹ *Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department*. Opinion of Advocate General Kokott §60

Available at:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5190012ba0045401da8c1bf487c634943.e34KaxiLc3qMb40Rch0SaxuNbvhv0?text=&docid=83573&pageIndex=0&doclang=en&mode=lst&dir=&oc c=first&part=1&cid=270549>

(whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU even if such competence has not yet been exercised.”¹¹⁰

Nevertheless this does not necessarily imply that that Union citizens who do not exercise their right to free movement, cannot derive any rights from their EU citizenship status under primary EU law.¹¹¹ According to the Court denying residence for her husband did not deprive Mrs McCarthy from exercising her right to free movement and also did not deprive her from the genuine enjoyment of the rights attached to Union citizenship.

This case differs from the Zambrano decision also in a sense that in the previous case a Union citizen faced the threat of leaving the territory of the EU. While in this case the Court argued that this is not applicable and Mrs McCarthy can still fully enjoy her rights as an EU citizen without facing any deprivation.

Furthermore, Van Elsuwege also argues¹¹² that the threshold for applying EU law in purely internal situations is rather high as it is only applicable in cases where the genuine enjoyment of these rights is at stake. However, as the ruling in the McCarthy case also proves the right of family reunification is still not a strong enough reason. This is a major step back from the Zambrano decision. In that case the ECJ moved a big step ahead however, several aspects needed further clarification but it definitely was a promising beginning for a debate on the future of EU citizenship. Nevertheless the McCarthy decision clarified the purely internal ruled but also limited its application.

¹¹⁰ Case C- 34/09 Gerard Ruiz Zambrano v. Office national de l’emploi (ONEM). Opinion of Advocate General Sharpston §163.

Available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=82590&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=270937>

¹¹¹ Van Elsuwege, P.: Court of Justice of the European Union European Union Citizenship and the Purely Internal Rule Revisited Decision of 5 May 2011, Case Shirley McCarthy v. Secretary of the State for the Home Department. *European Constitutional Law Review*. June 2011. p.311.

¹¹² *ibid* p. 314.

Another unresolved issue that needs further clarification is the problem of reverse discrimination.¹¹³ In this case citizens of the European Union who do not exercise their right to free movement and the non-application of EU law in purely internal situations can lead to reverse discrimination where they are treated less favourably than nationals of other Member States or migrants.¹¹⁴ If static EU citizens cannot find a link to a cross-border element or to the genuine enjoyment of the rights attached to EU citizenship, they often face stricter regulations for instance in terms of family reunification. This raises several problematic questions that need to be address later as the Court fails to explain them in detail. One of the most essential questions is for example whether or not denying residence for a third country national spouse constitutes an infringement to the right to family life.

The previous two decisions both pointed to a direction where it seemed the Court took an active role in broadening the scope of Union citizenship to make it more accessible for third country nationals and move it closer to citizenship in a post-national sense. Nevertheless, several scholars argued that these steps need further clarification as the Court is not clear about certain concepts such as the genuine enjoyment of rights. As I examined in the first chapter of my thesis, Soysal also points out the importance of universal personhood and human rights in the context of post-national membership. This can be linked to the first two cases however, in this case the Court made an attempt to clarify some of the issues that remained unclear after Rottmann and Zambrano. Unfortunately, the Court gave little consideration to the fundamental rights aspect in this case. It forms part of the argument, however, the Court leave the responsibility in Member State competence. This decision does not follow the path laid down in Rottman and Dereci to a direction that according to Soysal would strengthen post-national membership.

¹¹³ *ibid* p. 320.

¹¹⁴ *ibid.* p. 320.

4.4. Dereci

The Dereci case attempts to clarify the scope and application of ‘genuine enjoyment of rights’ in terms of right to residence for third country nationals who are family members of EU citizens. The case is a joint case of five applicants each of them third country nationals who wish to obtain residence permit in Austria with their Austrian family members where none of these family members exercised their right to free movement within the EU. The applications were rejected by the Bundesministerium für Inneres before it was referred to the ECJ.

The significance of this case stems from that fact that the Court made a clear step in order to clarify what it means to be deprived from the genuine enjoyment of the rights which is according to the ECJ is “the denial 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.”¹¹⁵ On the other hand, the Court did not extend the application of EU law in terms of the Charter of Fundamental Rights of the European Union.

In this case the Court ruled the following:

“European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, when that third country national wishes to reside with a member of his family who is a citizen of the Union residing in that Member State, of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which it is a matter for the national court to verify.”¹¹⁶

¹¹⁵ Case C-256/11 Murat Dereci and Others v Bundesministerium für Inneres. Judgment of the Court 15 November 2011. §3.

¹¹⁶ Case C-256/11 Murat Dereci and Others v Bundesministerium für Inneres. Judgment of the Court 15 November 2011.

Adam and Van Elsuwege argue that this decision leads to a dual jurisdiction test¹¹⁷ to examine whether or not a situation that considered purely internal falls within the scope of EU law or not. The first jurisdiction test examines if the national measure is likely to restrict the rights granted by Union citizenship such as the right to free movement. The second one looks at whether or not the national measure would undermine the genuine enjoyment of the rights granted by EU citizenship. An important question that rises from the Dereci decision is how dependency plays a role in this ruling compared to the Zambrano case. In Dereci the Court makes a link between dependency and being able to live independently in the territory of one of the Member States.¹¹⁸ However, the Court rejects where, opposite to the Zambrano case, the third country national is dependent on his/her family member who is an EU citizen even if in this case it would mean that the EU citizen in question has to leave the territory of the Union.

Kochenov argues¹¹⁹ the recent developments in the case law of the ECJ, especially the McCarthy and Dereci decisions, raise several questions that need to be clarified. He points out that the Court remains unclear about the concept of essence of the rights that are linked to Union citizenship¹²⁰ and also do not specify the infringement of what rights triggers the automatic application of EU law. So far the Court takes different approaches which are often not consistent. Furthermore, these different directions are often vague and leave to much space for interpretation on the national level that can lead to further problems in the future.

This decision follows the path of the McCarthy decision and takes a step back from the improvements in Rottmann and Zambrano. Implementing Bauböck's theory for the last two cases what can be

¹¹⁷ Adam, S. and Van Elsuwege, P.: Citizenship Rights and the Federal Balance Between the European Union and Its Member States: Comment on Dereci." *European Law Review* 37.2 (2012): 176–190.

¹¹⁸ *ibid* p. 181.

¹¹⁹ Kochenov, D.: The Right to Have What Rights? EU Citizenship in Need of Clarification. *European Law Journal*. Vol. 19 Issue. 2013

¹²⁰ *ibid* p.

observed is that there is a contradiction between the status of first (FCN) and second country nationals (SCN) in terms of accessing Union citizenship rights.

FCNs are also referred to as static EU citizens who did not exercise their right to free movement. However, even though the Zambrano ruling put limitations on the free movement criteria and claimed jurisdiction in cases that were considered purely international before the last two decisions limited this scope. Therefore, FCNs still have limited options to access their rights compared to those who are nationals of a Member State but reside in the territory of the Union. Second country nationals exercised their rights to free movement that can trigger EU law thus fall under the jurisdiction of EU law more easily. The Zambrano ruling pointed to a direction where the Court could have eased such contradiction by emancipation EU citizenship and putting less emphasize on the cross-border element. This would move the Court's intensions more in line with Bauböck's unionist approach. However, the Dereci ruling puts strong limitations on this innovation.

Conclusion

European Union citizenship is one of the most emerging issues in contemporary debates concerning the future development of the integration. The concept challenged the traditional understanding of citizenship linked to nation states and created a new form of belonging nested in a post-national form of membership. Thus it is also an emerging topic for academic discussion.

Several scholars, such as Bauböck, Shaw or Soysal pointed out the importance of Union citizenship as it broke the link between national territory and citizenship by introducing a multilevel citizenship structure. However, the concept has often been criticized for being vague and purely symbolic. My thesis aimed at analysing the ECJ's role in constructing Union citizenship by its jurisdiction.

I examined the development of the European Court of Justice's case law concerning EU citizenship. As examined in chapter 3 the ECJ is a significant actor in strengthening EU law and facilitating the integration process. However, until recently the Court did not engage with citizenship cases directly. What can be observed that in recent years the Court claimed jurisdiction in cases which were previously considered purely internal. Engaging more in cases related to Union citizenship means the Court had a more significant influence on shaping the concept of EU citizenship.

Shaw argued that the main importance of citizenship stems from the fact that it facilitates identity and describes certain collective attitudes. Based on the Court decisions what my analysis aimed to uncover is who is included in this collective identity in the interpretation of the ECJ. To answer this question I analysed four court cases from recent years in order to better comprehend the concept of Union citizenship through the lenses of the ECJ.

The first two decisions, Rottmann and Zambrano, were truly groundbreaking as they challenged the traditional concept of citizenship by claiming jurisdiction in cases that previously fall under Member State competences. The importance of these cases stems from the fact that they broadened the scope of application of EU law regarding Union citizenship and made it more accessible also for third country nationals. Protection of EU citizens now entails the protection of rights attached to it such as fundamental rights protected under the Charter of Fundamental Rights of the European Union.

As an outcome of these rulings the Court took a step towards an EU citizenship that is detached from Member State nationality and stands on its own. This is in line with Bauböck's unionist approach towards integration. In this case the emphasis is on emancipating Union citizenship based on residence without integrating Member State citizenship. This is also considered to be the most favourable solution for third country nationals legally residing on the territory of the Union.

After a promising start, the Court took a step back with the Dereci and McCarthy decisions. Despite their innovative nature, Rottmann and Zambrano have been criticized for leaving several questions unanswered. The ECJ tried to address these questions in Dereci and McCarthy however, put a limit on their application. The most alarming dilemma that needed to be answered is what the Court means by the "genuine enjoyment of rights" and in which cases can this trigger the application of EU law. The ruling in these cases is less favourable and less inclusive for third country nationals. Furthermore, it also creates tension between first and second country nationals as the cross-border element is still not completely eliminated in terms of Union citizenship. This distinction between FCNs and SCNs is alarming and needs further clarification. Despite these shortcomings the Court played a significant role in recent years in developing the concept of Union citizenship to a direction that is more inclusive and less attached to Member State nationality.

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