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THE EUROPEAN COURT OF JUSTICE, MEMBER STATE AUTONOMY AND EUROPEAN UNION CITIZENSHIP: CONJUNCTIONS AND DISJUNCTIONS[1]

Dora Kostakopoulou

1. INTRODUCTION

Scholarship on the role of the European Court of Justice in shaping the polycentric European governance and the law and politics of 'sovereign' national authorities contains plenty of discords. Yet its role as a driving force of European integration is probably beyond dispute. Not only jurists but also political scientists have acknowledged its authoritative reasoning on issues of integration and principle, notwithstanding the existence of concerns about growing judicial power and the perennial disagreement over whether judicial processes are less legitimate than democratic ones.[2] Certainly, if the meaning of the latter is confined to majoritarian processes, then the assumption of a quasi-legislative role by courts, that is, their ability to bypass political and legislative processes, appears to be problematic. But since democratic systems are built upon majoritarian electoral processes as well as reflective values and rights, which place constraints on governments' powers, the judicial protection and advancement of these values and rights are normatively and empirically justified. Courts function as 'fora of principle'[3] and

1 The phrase is borrowed from Octavio Paz's collection of essays, entitled *Conjunctions and Disjunctions*, Arcade Publishing, New York, 1991. The 2007 edition has been published by Little, Brown and Company.

2 See, for instance, H. Rasmussen, *On Law and Policy in the European Court of Justice*, Martinus Nijhoff, The Hague, 1986; U. Everling, 'The ECJ as a Decision-making Authority', (1994) 82 *Michigan Law Review* 1294; J.H.H. Weiler and N.J.S. Lockhart, '"Taking Rights Seriously" Seriously: the European Court of Justice and its Fundamental Rights Jurisprudence', (1995) 32 *CMLR (Common Market Law Review)* 51; T. Tridimas, 'The European Court of Justice and Judicial Activism', (1997) 22 *ELR (European Law Review)* 199; K. Alter, 'the European Union's Legal System and Domestic Policy', (2000) 54 *International Organisation* 489; et al.

3 R. Dworkin, 'The Forum of Principle', in *A Matter of Principle*, Harvard University Press, Cambridge, MA, 1985, p 91; *Taking Rights Seriously*, Harvard University Press, Cambridge, MA, 1977.

have been recognised as reliable agents for securing equitable settlements within and above the nation-state.

Seen from the perspective of achieving rights-enhancing and fairer settlements, ensuring non-discrimination and promoting human welfare, the role of the courts, be they national constitutional courts or the ECJ, is commendable. Seen from the (narrower) perspective of the actually existing world of majoritarian democracy, which entails the promotion of 'the right' and 'the good' through the exercise of governmental power, any institution which might call into question the 'undisputed' sovereign authority of the state, is bound to be seen as having an adverse effect on democratic decision-making. To some extent, this debate reveals contrasting conceptions of democracy held by political and legal scholars and the frequent identification of rulers with the people (the ruled). But it may also be seen to reflect contrasting perspectives depending on the question of 'who is looking at the ECJ'; that is, national executives or the members of their publics. At the heart of this question thus essentially lie different beliefs in how far and in what ways governance should be responsive to the governed, should pro-actively address their needs and enhance their welfare.

In this chapter, I seek to address the debate between judicial activism at the EU level and Member State autonomy by comparing and contrasting two dimensions of the same institution; namely, the judicialised material scope (section 2) and the non-judicialised personal scope of European Union citizenship (section 3). The latter institution was established by the Treaty on European Union in 1993 and its material scope has developed significantly owing to the European Court of Justice's interventions as well as the entry into force of Directive 2004/38 (the so called 'Citizenship Directive') on 1 May 2006.[4] To an extent, the maturation of European citizenship could be seen as a manifestation of 'governing with judges'.[5] But while the material scope of Union citizenship has been characterised by incremental, principled and transformative institutional change, its personal scope, that is, the question of who is entitled to be a member of the European citizenry, has by and large evaded a similar process of critical reflection and adaptation to changing conditions. In the subsequent discussion, I reflect on the consequences of governing with or without judges and the Member States' relative autonomy and argue that the political consequences as far as the rights of citizens and residents, substantive commitments to non-discrimination and equal treatment and the vision of an inclusive European public are concerned are too important to be left to self-regulation.

4 European Parliament and Council Directive 2004/38/EC, OJ 2004 L 157/77. The transposition of the Directive has not been effective according to the European Commission's 5th Report on EU Citizenship, COM (2008) 85 final, page 5.

5 The term is borrowed from A. Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, Oxford, 2000.

2. EUROPEAN UNION CITIZENSHIP AS AN EXPERIMENTAL INSTITUTION

The adoption of the Directive *on the Right of Citizens and their Family Members to move and reside freely within the territory of the Member States*[6] remedied the sector-by-sector and fragmented approach to free movement rights by incorporating and revising the existing Directives and amending Council Regulation 1612/68.[7] It built on, and further extended, the rights-based approach characterising the rights of free movement since the 1960s and made Union citizenship a genuine mode of associated living by establishing an unconditional right of permanent residence for Union citizens and their families[8] who have resided in the host MS for a continuous period of five years. Permanent residence brings along a formal expectation for the elimination of the barrier of nationality; Union citizens are entitled to full equal treatment in the areas covered by the Treaty in the Member State of their residence. Below the apex of permanent residence there exist two other types of residence rights; namely, free circulation during short periods of residence not exceeding three months and longer periods of residence exceeding three months. The former type of residence rights enables Union citizens to exercise their rights without any conditions or any formalities other than the requirement to hold a valid identity card or passport, but does not carry an entitlement to social assistance for non-active economic actors. In *Oulane* the Court reiterated that a MS may not refuse to recognize a person's right of residence because she did not present one of these documents and that any document that could prove that the person concerned is a Community national would suffice.[9] This is not to say that third country nationals who are family members of Union citizens do not continue to encounter problems with respect to the authorization of their entry and the issue of residence cards in practice. Periods of residence exceeding three months, on the other hand, entail a right of residence for Union citizens and their family members provided that they are active contributors to the commonwealth or self-sufficient: they are workers or self-employed persons in the host MS; or have sufficient resources and comprehensive sickness insurance cover, if they are non-active economic actors; or they are students enrolled at a private or public establishment, have comprehensive sickness insurance cover and are self-sufficient in order to avoid becoming a burden on the social assistance

6 Directive 2004/38/EC, OJ 2004 L 158/77.

7 Articles 10 and 11 of Council Reg. 1612/68 were repealed with effect from 30 April 2006.

8 The definition of a 'family member' includes a registered partner if the legislation of the host MS treats registered partnership as equivalent to marriage.

9 ECJ 17 February 2005, Case C-215/03, *Oulane* [2005] ECR I-1215. In addition, in *Commission* v *the Netherlands* the Court ruled that national provisions which required non-active and retired persons to have adequate personal resources sufficient for at least a year's stay in the host MS contravened Community law (i.e., Dir 38/360 and Directives 90/364 and 90/365); Case C-398/06, Judgment of the Court of 10 April 2008.

system of the host MS.[10] The Directive also makes reference to the possibility to extend the period of time during which Union citizens and their family members may reside in the territory of the host MS without any conditions.[11] The rights of family members have also been reinforced by extending family reunification to registered partners and by giving spouses and partners who are non-EU nationals independent rights of residence in the event of divorce, annulment of marriage or termination of the registered partnership. In addition, by incorporating the Court's reasoning in *Grzelczyk*,[12] the Directive states that as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host MS they should not be expelled.[13]

On reflection, the provisions of the Directive reveal three important trends which correspond to the increasing political importance of European integration. Firstly, they attest to a reconfiguration of community membership in ways that attribute greater importance to the observable fact of residence than the habits of loyalty and ideology associated with nationality. The right to permanent residence is an offshoot of connexive citizenship, that is, the real links and genuine connections that a Union citizen develops in a MS other than that of its origin, rather than being the by-product of one's naturalization in the host MS.[14] As recital 17 in the preamble to the Citizenship Directive states: 'enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host MS would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion which is one of the fundamental objective of the Union'. Union citizenship thus gradually changes our understanding of community membership and fosters more inclusive forms of political association. In sum, the new Directive creates the institutional preconditions for a notion of citizenship that is more inclusive than nationality-based models of citizenship.[15] Secondly, Union citizenship has become a fundamental status of nationals of EU member states thereby endowing them with an increasing range of rights which are exercised not within the domain of a given national polity but within the wider context of a wide Europolity. In this way, the political and social constructivist aspects of European integration are realized; the so called 'market Europe'

10 Article 7 of Council Directive 2004/38.

11 Ibid, Chapter VII, Article 39.

12 Dir. 2004/38, note 26 above, Article 14.

13 Article 14(1) of Directive 2004/38.

14 D. Kostakopoulou, 'European Citizenship and Immigration After Amsterdam: Openings, Silences, Paradoxes', (1998) 24:4 *Journal of Ethnic and Migration Studies* 639-656; *The Future Governance of Citizenship*, Cambridge University Press, Cambridge, 2008.

15 However, egalitarian processes co-exist with the practice of exclusion of long-term resident third country nationals from the personal scope of Union citizenship. In addition, transitional arrangements with respect to the nationals of eight Central and Eastern European states which joined the EU on the 1 May 2004 and 1 of January 2007 have resulted in a hierarchical European citizenry.

is transformed into a peoples' Europe or a European society.[16] As Advocate General Maduro has stated, 'when the Court describes Union citizenship as 'the fundamental status' of nationals it is not making a political statement; it refers to Union citizenship as a legal concept that goes hand in hand with specific rights for Union citizens'.[17] And further, 'Citizenship of the Union must encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bonds of the national community, but also within the wider context of the society of peoples of the Union'.[18]

It follows from both the preceding considerations that Union citizenship is not a simple, and weaker, corollary to national citizenship. True, the EU may lack the traditional state paraphernalia, but, as we shall see below, its supranational character rules out national sovereignty claims over the grant of migration rights to EU nationals and their family members, residence rights for them and their children enrolled at educational establishments[19] and regulatory autonomy in the granting of welfare assistance and the payment of war related pensions and allowances. And this, quite unavoidably, gives rise to reactions and criticisms. It has been argued, for example, that the Citizenship Directive weakens state autonomy in matters of passport controls, extends the definition of the EU citizen's family, threatens to increase social and financial burdens in the MS and prevents national executives from implementing proposals for the automatic expulsion of 'foreign criminals' who are sex offenders or are given custodial sentences.[20]

In assessing the merits of national anxieties about, and criticisms against, the scope and the pace of creating 'an ever closer Union among the peoples' of Europe' either by legislative fiat or judicial activism, it seems to me a prior reflection on both the appropriateness and legitimacy of the yardstick to be used is necessary. Although ideology, pragmatism, normative concerns or simply convenience, which is often manifested in a belief in the fixity of the status quo, all can impact

16 Compare the Opinion of Advocate General Jacobs in Case C-168/91 *Konstadinidis v Stadt Altensteig* [1993] ECR I-1191 and his reference to 'civis europeum'.

17 See the AG's Opinion 3 April 2008, in C-524/06, *H. Huber v Bundesrepublic Deutschland* [2008] ECR I-9705.

18 See point 23 of AG Maduro's Opinion 28 February 2008, Case C-499/06, *Nerkowska* [2008] ECR I-3993; see also the Opinion of AG Trstenjak 28 June 2007, Joined Cases C-396/05, C-419/05 and C-450/05, *Habelt and Others* [2007] ECR I-11895), para 82 to 84.

19 See ECJ 23 February 2010, Case C-310/08, *London Borrow of Harrow* v *Nimco Hassan Ibrahim and Secretary of State for the Home Department*, nyr, Opinion of AG Mazak delivered on 20 October 2009, Case C-480/08, *Maria Teixeira* v *London Borough of Lambeth and Secretary of State for the Home Department*, Opinion of Advocate General Kokott delivered on 20 October 2009, nyr.

20 It thus comes as no surprise that its transposition and correct implementation have been problematic. In June 2007 fifteen infringement procedures were open, four of which have been referred to the European Court of Justice and in December 2008 the Commission announced that only Cyprus, Greece, Finland, Portugal, Malta, Luxembourg and Spain had adopted more than 85% of provisions of the Directive; European Commission, 5th Report on Citizenship of the Union (1 May 2004-30 June 2007) COM(2008) 85 Final, page 5. Following this report, the Commission has recently had to adopt guidelines to ensure its transposition; COM(2009) 313.

on the choice of the yardstick, in my opinion what justifies and legitimates institutional structures at all levels, functions and policies are their capacity to recognize and fulfil human needs by removing barriers, be they unacceptable inequalities, unfair applications of rules of collective action, prejudice or simply wasteful struggles. J. Dewey has brilliantly outlined such a human needs-based yardstick in another context and with respect to another political organisation, namely, the state: he observed that 'a measure of the goodness of the state is the degree in which it relieves individuals from the waste of negative struggles and needless conflict and confers upon them positive assurance and reinforcement in what he undertakes'.[21] Such a yardstick stands in sharp contrast to both the deification of state power and the belief that the commands of sovereign authorities deserve unqualified respect by the European judges as well as the false identification of the interests of national executives with the interests of the citizens they claim to represent. It is on the account of its consequences on individuals and their life chances that the judicialisation of European Union citizenship will be approached and judged in this chapter.

2.1. STATUS

It is beyond doubt that the ECJ has contributed decisively to the developments of Article 18(1) EC which were in turn enshrined in the Citizenship Directive. Following an initial period of judicial minimalism (1993-1997)[22] and governmental reactions against the Court's influential integrationist approach which were manifested in concrete proposals to limit its power prior to the 1996 Intergovernmental conference, the Court enhanced the normative and political weight of Union citizenship by stating that 'it is destined to be the fundamental status of nationals of the Member States'.[23] As the Court put it, it enables 'those who find themselves in the same situation [as nationals of the host Member State] to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for', thereby echoing and reinforcing Advocate General Leger's statement in *Boukhalfa*, 'taken to its ultimate conclusion, the concept should lead to Citizens of the Union being treated absolutely equally, irrespective of nationality. Such equal treatment should be manifested in the same way as among nationals of one and the same Member State'. [24]

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21 J. Dewey, *The Public and Its Problems*, H. Holt, New York, 1927, reprinted by Swallow Press and Ohaio University Press, 1991, p 72.

22 D. Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change', (2005) 65:2 *Modern Law Review* 233-267, 244-245.

23 ECJ 20 September 2001, Case C-184/99, *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 31.

24 ECJ 30 April 1996, Case C-214/94, *Boukhalfa v Federal Republic of Germany* [1996] ECR I-2253; [1996] 3 *CMLR* 22 delivered on 14 November 1995.

A few years later, the Court stated that Article 18(1) EC creates a directly effective right (*Baumbast*)[25] despite the express reference to the 'limitations and conditions laid down in this Treaty and by the measures adopted to give it effect' in Article 18(1) EC. According to the Court, 'the application of the limitations and conditions acknowledged in Article 18(1) EC in respect of that right of residence is subject to judicial review. Consequently, any limitations and conditions imposed on that right do not prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which the national courts must protect'. Although this ruling led certain commentators to argue that the ECJ illegitimately rewrites the rules laid down in secondary Community law with the aid of Union citizenship and the principle of proportionality,[26] it, nevertheless, was the case that the attribution of direct effect to Article 18(1) EC (now Article 21(1) TFEU) had an empowering effect on individuals and a 'path dependent' effect on its subsequent jurisprudence.

In the years that followed, the Court proceeded to weaken the link between economic self-sufficiency and the exercise of free movement rights. The right to move and reside freely within the territory of the Member States thus became a fundamental right that all Union citizens should enjoy irrespective of their economic status. This was achieved by combining Article 18 EC with Article 12 EC, the non-discrimination clause, a combination that enabled Union citizens lawfully resident in the territory of a MS to rely on Article 12 in all situations that fell within the scope (*rationae materiae*) of Community law. Accordingly, in *Bidar*[27] the Court departed from earlier case law which excluded students from the grant social assistance, by ruling that, as Union citizens, students who have demonstrated 'a certain degree of integration into the society of the host state' can claim maintenance grants.[28] But the Member States are also entitled to ensure that 'the grant of assistance does not become an unreasonable burden'. Even though the requirement of demonstrating 'a certain degree of integration' was not sufficiently clear, the Court had, nevertheless, indicated that a reasonable period of lawful residence[29] and the ensuing immersion in a web of interactions in the host state[30] generates an entitlement to non-discrimination and equal treatment in the social field. The Court thus ruled in *Trojani* that a lawfully resident non active economic actor is entitled to a social assistance benefit on

25 ECJ 17 September 2002, Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

26 M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', (2006) 31 *ELR* 613; E. Spaventa, 'Seeing the Wood despite the Trees?', (2008) 13 *CMLR* 29.

27 ECJ 15 March 2005, Case C-209/03, *Bidar v London Borough of Ealing* [2005] ECR I-2119.

28 In Bidar's case, a subsidised student loan.

29 Ibid. See also ECJ 7 September 2004, Case C-456/02, *Trojani v CPAS* [2004] ECR I-7573, para 43. The ECJ refers to 'lawful residence in the host MS for a certain time or the possession of a residence permit'.

30 Bidar had completed his secondary education in the UK.

the basis of Article 12 EC,[31] whereas in *Collins*, the absence of a genuine link between a jobseeker and the employment market of the host state invalidates an entitlement to a jobseeker's allowance.[32] In both cases, however, the principle of proportionality must be respected and the application of a residence requirement is open to judicial review. In the two tide-over allowance cases, namely *D'Hoop and Ioannidis*, the Court held that the place of completion of one's secondary education did not reflect the real and effective degree of connection between the individual concerned and the employment market of the MS. D'Hoop, a Belgian national and graduate who had obtained her baccalaureate in France, was denied the benefit which would give her access to special employment programmes by the MS of her origin. The Court in this case highlighted that Union citizenship forms the basis of rights to equal treatment irrespective of nationality[33] and noted that it would contravene EC law if a citizen received in her own Member State treatment less favourable than that she would otherwise enjoy had she not availed herself of the right to free movement. In *Ioannidis*, on the other hand, Belgium did not grant the tideover allowance to a Greek national resident in Belgium who had completed his secondary education in Greece, but who could be an active participant in the Belgian employment market.[34]

Although in the Court's 'real link' jurisprudence many detected a conscious attempt by the ECJ to create a form of transnational solidarity by undermining the exclusivity of national welfare systems,[35] O'Brien has convincingly argued that the 'real link implies a right to be assessed, but no more'.[36] General provisions and blanket exclusions of economically inactive (– not yet active) persons form access to social benefits such as those that pertained under *Lebon,* that is, equal access to employment and not with respect to social and tax advantages under Article 7(2) of Council Regulation 1612/68, were no longer consonant with the constitutionalisation of Union citizenship and its growing importance as

31 See fn 29 above.

32 ECJ 23 March 2004, Case C-138/02, *Brian Francis Collins* [2004] ECR I-2703. Similarly, the taking up of residence abroad is not a satisfactory indicator of a loss of connection with one's home Member State which is demonstrating its solidarity with the applicant by granting a civilian war benefit to him/her; ECJ 26 October 2006, Case C-192/05, *K. Tas-Hagen and R.A. Tas* [2006] ECR I-10451.

33 ECJ 11 July 2002, Case C-224/98, *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191.

34 Compare also ECJ 15 September 2005, Case C-258/04, *Ioannidis* [2005] ECR I-8275. Ioannidis was denied a tideover allowance on the grounds that he had completed his secondary education in another Member State.

35 A. Somek, 'Solidarity Decomposed: Being and Time in European Citizenship', (2008) 32 *ELR* 787; H. Verschueren, 'European (internal) migration law as an instrument for defining the boundaries of national citizenship systems', (2007) 9:3, *European Journal of Migration Law* 307-346; O. Golynker, 'Jobseekers' rights in the European Union: challenges of changing the paradigm of solidarity', (2005) 30:1 *ELR* 111-122.

36 C. O'Brien, 'Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity', (2008) 33:5 *ELR* p 643-665.

well as with growing citizen mobility.[37] Instead, a case-by-case approach and personalized assessments of the extent and weight of the connections that non –, or not yet –, active economic actors have established with the host MS either through residence or study or employment[38] or both appear to furnish a better ground for determining the boundaries of full community belonging.[39]

Although the Member States have complained against what they see as the gradual erosion of their national welfare schemes and the reduction of executive discretion in decisions on the award of social welfare assistance, it may be noted that the Court's reasoning is both reasonable and consonant with the fundamental status of Union citizenship.[40] Union citizenship in the new millennium could no longer be a privilege of 'the few' 'favoured EU nationals', that is, of active economic actors; instead, it had to obtain a more universal application in line with the concept of citizenship itself. Otherwise put, the promise of equal treatment irrespective of nationality,[41] which underpins Union citizenship, could not continue to be grounded in inequality in economic status; the latter had to be made less consequential. At the same time, however, pragmatic considerations about disparities in welfare across the EU dictated that the distinction between economically active and non-active economically Union citizens and the concomitant differential residency and welfare rights could not be completely

37 N. Reich, 'The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union', (2005) 11 *ELJ* 675-698; F. Jacobs, 'Citizenship of the EU-A Legal Analysis', (2007) 13:5 *ELJ* 591.

38 It is true that the migration of the real link reasoning to the realm of frontier workers has resulted in a more 'messy' approach, since in *Hartmann* (ECJ 18 July 2007, Case C-212/05 *Hartmann* [2007] ECR I-6303) the Court ruled that a child-raising allowance which had been made conditional on residence in Germany by law, should not be denied to a frontier worker who continue to be employed in Germany while residing in a neighboring Member States, but Ms Geven was denied the same child raising allowance because her employment in Germany was only 'minor' (ECJ 18 July 2007, Case C-213/05, *Geven v Land Nordrhein-Westfalen* [2007] 3 *CMLR* 45). And in *Hendrix* (ECJ 11 September 2007, Case C-287/05 [2007] 3 *CMLR* 46) the Court ruled that a wage supplementing benefit should be paid to Dutch national who had changed his place of residence from the Netherlands to the Belgium but continued to work in his state or origin, the Netherlands.

39 However, this does not mean that the Court will not embark upon balancing exercises. In *De Cupyer*, for example, the Court upheld the proportionality of Dutch measures which conditioned an entitlement to unemployment allowance on actual residence in the Netherlands on the ground that the effective monitoring of the employment and family situation of unemployed persons could not have been achieved by less restrictive measures, such as the production of documents or certificates; ECJ 18 July 2006, Case C-406/04, *G. De Cuyper v. Office national de l-emploi* [2006] ECR I-6947). Compare also ECJ 15 July 2004, Case C-365/02, *Lindfors* [2004] ECR I-7183 and ECJ 12 July 2005, Case C-403/03, *Schempp v Finanzamt Munchen V* [2005] ECR I-6421.

40 P. van der Mei, *Free Movement of Persons within the European Community*, Hart Publishing, Oxford, 2003, pp 43 et seq. For a different view, see K. Hailbronner, 'Union Citizenship and Access to Benefits', 42 (2005) *CMLR* 1245.

41 For a recent manifestation of this, see ECJ 5 June 2008, Case C-164/07, *James Wood v Fonds de garantie des victims des actes de terrorisme et d'autres infractions* [2008] ECR I-4143. The Court ruled in this case that EC law precludes national legislation which excludes resident EU nationals from the grant of compensation from a Member State fund intended to help the victims of crime.

eliminated.[42] Residence and access the social assistance had to be relaxed, but could not be wholly disentangled, from economic activity. Accordingly, 'the requirement of exhibiting a certain degree of financial solidarity with nationals of other Member States' (*Grzelczyk*) does not extend to situations where a person becomes an unreasonable burden on the welfare system of the host MS. In addition, the Member States retain discretion in determining the latter as well as in making the assessment of the existence of a certain degree of integration conditional on the fulfilment of appropriate residence requirements. In *Forster* the ECJ ruled that it is legitimate for Member States to make the grant of maintenance grants to students who are nationals of other Member States conditional on their sufficient integration into the host society, which, in turn, may be deduced by a finding that the student has resided in the host Member State for a certain length of time, such as, for instance, for five years.[43] Although this ruling stood in sharp contrast to the Advocate General's Opinion and the momentum to enhance students' rights with respect to maintenance grants and assistance generated by the previous case law, it is, nevertheless, consonant with secondary law. Article 24 of Council Dir. 2004/38 explicitly states that prior to the acquisition of the right of permanent residence, the Member States are not 'obliged to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families'.

The validity of Article 24(2) of Dir. 2004/38 in light of Article 12 EC (now article 18 TFEU) read in conjunction with Article 39 EC (now Article 45 TFEU) was raised in preliminary reference proceedings in the joined cases of *Vatsouras* and *Koupatantze*.[44] Although both the Advocate General Colomer and the Court concluded that 'no factor capable of affecting the validity of Article 24(2) of Directive 2004/38 had been disclosed', the Court's ruling is, nevertheless, significant not only for confirming that excluding job-seekers from social assistance without a prior examination of the possible existence of a real link with the labour marker contravenes EU law, but also for clarifying that Article 24(2) of Dir. 2004/38 reflects the MS' competence to judge whether to a job-seeker is entitled to receive social assistance whilst (s)he is actively seeking for work and

42 For a defence of the opposite argument, see Ferdinand Wollenschlager, 'Union Citizenship, its Dynamics for Integration Beyond the Market', Paper Presented at the EUSA 11th Biennial International Conference, Los Angeles, USA, April 23-25 2009.

43 ECJ 18 November 2008, Case C-158/07, *Jacqueline Forster v Hoofddirectie van de Informatie Behher Groep* [2008] ECR I-8507; compare also Advocate General Mazak's Opinion delivered on 10 July 2008, points 142-144.

44 ECJ 4 June 2009, Joined Cases C-22/08 and C-23/08, *Athanasios Vatsouras v Arbeitsgemeinshcaft (ARGE) Nurnberg 900 and Josif Koupatantze v Alrbeitsgemeinschaft (ARGE) Nurnberg 900* [2009] ECR I-4585.

has a genuine change of finding employment in the host MS, the exercise of which is subject to review by the Court of Justice.[45]

Vatsouras and Koupatantze were Greek nationals who following a short spell of employment in Germany (one year and two months respectively) became involuntarily unemployed and had to rely on social assistance whilst actively seeking employment. Although the applicants could well be seen to fall within the scope of Article 39 EC since they engaged in activities which were neither marginal or ancillary and they retained the status of worker owing their involuntary unemployment, the ambivalence of the referring court as to whether they had attained the status of a worker owing to their 'brief and minor employment', led the Court to address the question whether jobseekers who do not enjoy worker status are entitled to social assistance. Applying its case law,[46] the Court ruled that that 'in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 39(2) EC a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State' (para 37), provided that there is a real link between the jobseeker and the labour market of that MS. The existence of a real link can be inferred from the fact that a Union citizen has genuinely sought work in the territory of the MS for a reasonable period (para 39). Accordingly, the old maxim that non-active economic actors are entitled to equal treatment under Article 39(2) EC only with respect to access to employment and not with respect to enjoyment of social and tax advantages under Article 7(2) of Council Reg. 1612/68 had been firmly surpassed; job-seekers who have established a real link with the labour maker of the host MS could rely on Article 39(2) EC in order to receive a benefit of a financial nature intended to facilitate access to the labour market.

Interestingly, the Court then proceeded to state that that 'benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to labour market cannot be regarding as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38' (para 45). The removal of jobseekers' allowances and benefits from the realm of social assistance may be analytically controversial, but in practice it will provide important pointers for national legislators who might be inclined to exclude jobseekers seeking employment following previous spells of employment from the receipt of such allowances. But one cannot also disregard the fact that the inclusion of paragraph 45 in the Court's judgment could also lead to a number of

45 Advocate General Colomer states that it is unlikely that institutions which adopted Dir 2004/38 were unaware of the Collins judgement and its implications and notes that the Citizenship directive 'leaves each national legislature free to find the appropriate balance'; point 55 of the Opinion delivered on 12 March 2009.

46 ECJ 23 March 2004, Case C-138/02, *Collins* [2004] ECR I-2703, para 63, and ECJ 15 September 2005, Case C-258/04, *Ioannidis* [2005] ECR I-8275, para 22.

permutations. Conceivably, MS concerned about the state of their public finances might use para 45 to argue that jobseekers are not entitled to other type of social assistance benefits, such as, for example, housing benefit, which fall within the scope of Article 24(2) of the Directive 2004/38, despite the fact that the ECJ's case law has confirmed the application of Article 18 TFEU in combination with Article 21 TFEU in favour of claimants who have established a link with the host MS. Conversely, one could interpret para 45 in an expansive way by arguing that jobseekers' allowances (– not social assistance in general) could be granted to jobseekers entering another MS for the purpose of seeking employment in the first three months of their residence, provided that they have managed to establish a sort of link, even a loose one, with the labour market of the host MS due to job-searching for two months, visiting job centres and being invited for job interviews, or to past periods of residence there. Of course, such an argument would presuppose a more fundamental reorientation of the way in which jobseekers are perceived and a shift in the perception of migration as capital or a resource. For if job seekers are seen as not yet fully active economic actors, as the Advocate General Colomer has noted in his Opinion – and not as non-active economic actors and burdens, the grant of any form of assistance that helps them join the labour market and promotes their employability is both desirable and legitimate under Article 39(2) EC. It thus remain to be seen whether para 45 will trigger more expansive interpretations of Union citizenship and the formation of an ethos of European solidarity or will be used to legitimate attempts to place a lid on such expansive interpretations by placing all those benefits which are not designed to facilitate access to employment and integration into the labour market beyond jobseekers' reach irrespective of whether they can demonstrate the existence of a link with the host MS during the first three months of residence or for longer periods under Article 24(2) of Dir. 2004/38.

2.2. FAMILY REUNIFICATION

The ECJ has also been very influential in the domain of family migration. Although since the 1960s derivative free movement and residence rights were granted to the spouse and other family members of Community workers, the European Court of Justice has played a central role in establishing a fundamental right to family reunification in Union law. The Court has also extended the net of protection to third country national spouses of EU nationals, thereby lifting them out of the regulative confines of national, and often restrictive, migration regimes. Commencing with a consequentialist perspective which viewed family unification as an important aid to intra-Community mobility and necessary for 'the integration of the worker and his family into the host MS without any difference in treatment in relation to nationals of that state', the ECJ proceeded to pronounce respect for family light (Article 8 ECHR) an integral part of the

general principles of Community law.[47] In *Commission v Germany*, it ruled that a German provision which made the issuing of a residence permit for a family member of a Community worker conditional on the possession adequate accommodation for the whole duration of the family's stay in Germany contravened Article 10(2) of Council Regulation 1612/68, whereas in *Baumbast* and *Carpenter* it asserted the normative priority of the fundamental right of respect for family life enshrined in Article 8 of the ECHR over national migration laws.[48] More specifically, in *Carpenter* the Court inferred a right of residence for Mrs Carpenter, a national of the Philippine and spouse of a UK national who provided cross border services and who was threatened with deportation, from Mr Carpenter's status as service provider (Article 49 EC), thereby overriding restrictive national immigration rules.[49] It ruled that Mr Carpenter's right to provide and receive services in other Member States 'could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin relating to the entry and residence of his spouse',[50] and hence Article 49 interpreted 'in light of the principle of respect for family life, which is recognised by Community law',[51] precluded Mrs Carpenter's deportation.

On 25 July 2002 when the legality of Belgium's restrictive measures on the movement and residence of third country national spouses of Union nationals was challenged by the Movement Against Racism, Anti-Semitism and Xenophobia ASBL (Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL, (MRAX)) the Court drew on *Carpenter* and emphasized that third country national spouses' residence rights do not derive from states' authorisation of their entry.[52] Instead, they are grounded in their family ties with Union citizens. Accordingly, MS should not send back to the border third country national spouses of EU nationals who do not possess the necessary entry documents (an identity document or visa) or deny them a residence permit or order their expulsion order on the grounds that they were 'illegal' entrants or residents. Nor should it impose additions conditions on the exercise of the rights of entry and residence of non-EU national family members of Union citizens which flow from

47 ECJ 18 May 1989, Case 249/86, *Commission v Germany* (Re Housing of Migrant Workers) [1989] ECR 1263, paras 10, 11.

48 ECJ 17 September 2002, Case C-413/99, *Baumbast, R v Secretary of State for the Home Department* [2002] ECR I-7091.

49 ECJ 11 July 2002, Case C-60/00, *M. Carpenter* [2002] ECR I-6279. I have discussed this more extensively in 'Ideas, Norms and European Citizenship: Explaining Institutional Change', (2005) 68:2 *Modern Law Review* 233-267, pp 54-55. See also G. Barret, 'Family Matters: European Community Law and Third Country Family Members', (2003) 40 *CMLR* 369-421, 406.

50 Ibid at para 39.

51 On this, see the provisions of the Council Regulations and directives on the free movement of employed and self-employed persons as well as Article 8 ECHR.

52 ECJ 25 July 2002, Case C-459/99, *MRAX* [2002] ECR I-6591.

their family links.[53] The Court's ruling in *MRAX* led the Commission to amend Article 9 of the Draft Citizenship Directive by including the provision that 'family members may not be refused a residence card solely on the grounds that they have no visa or that their visa has expired prior to the submission of the application for a residence card.[54]

The Court reiterated the importance that Community law attributes to respect for family life in *Akrich*,[55] but it, nevertheless, gave the impression that Article 10 of Council Reg 1612/68 could only be invoked if the third country national spouse of an EU national seeking to move to a MS was lawfully resident in another MS.[56] The UK had resisted Mr Akrich's invocation of Community law in order secure residence rights in the UK following the return of his spouse, a UK national, to the country of origin, on the grounds of his past record as an undocumented migrant who had been deported twice to Algeria. Drawing in this ruling, the UK Home Office distinguished between the intra-Community movement of lawfully resident family members of Community nationals, which allegedly fell within the ambit of Community law, and the entry of such persons from outside the Community which was seen to fall within the sovereign prerogative of the UK. Accordingly, it was officially stated that national migration rules should apply to the latter case and that third country nationals 'who are illegally in the UK and marry British citizens should not be able to abuse EC law to remain here'.[57] The *Immigration (European Community Area) Regulations 2006* thus stated that third country national dependent relatives or members of a household of a Community national seeking to exercise rights of free movement in the UK must have previous lawful residence in another MS in order to be eligible for a resident permit. Denmark, Finland and Ireland also required prior lawful residence in another MS.[58]

In *Jia* the Court revisited, and distinguished, the factual underpinnings of *Akrich*, and ruled that Community law does not require prior lawful residence in a member state for the grant of a permanent residence permit to a family member

53 In *Commission v Spain*, the grant of a residence permit to a non-EU national family members of a UK national was conditional upon applying and obtaining a residence visa prior at the Spanish consulate in their last country of domicile. The Court ruled that Spanish law violated Directives 68/360, 90/365 and 73/147; C-157/03 [2005] ECR I-2911.

54 Article 9(2a) of the Draft Directive, COM (2003) 199 final, 15.4.2003.

55 ECJ 23 September 2003, Case C-109/01, *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607.

56 At para 61. However, the Court also ruled that in genuine marriages the intentions of the parties in making use of the rights conferred by Community law is not relevant to an assessment of their legal situation by the competent migration authorities.

57 See the reply of Baroness Scotland of Asthal to the question by Lord Tebbit on 17 November 2003, HL Deb 17 November 2003 Vol 654 cc 252-3WA.

58 But following the Court's ruling in *Metock and Others*, which is discussed below, national regulations had to be amended, notwithstanding delays and legal challenges in some MS. See, for example, *R. on the application of Yaw Owusu v Secretary of State for the Home Department* (21 January 2009) [2009] EWHC 593 (Admin).

of a Community national who has exercised her right to free movement.[59] Mrs Jia, a Chinese national and the dependent relative (mother in law) of a German national living in Sweden, entered Sweden on a 90 day visit visa and before the visa's expiry she applied for permanent residence there. Her application was refused by the Swedish authorities, and on a preliminary reference from the Swedish Aliens Board, the ECJ held that there was no requirement for Mrs Jia to have resided in another MS before making the application and that the switch of status from visitor to resident did not pose any problems for Community law. Finally, in Metock and Others,[60] the ECJ outlawed national legislation making the right of residence of family members subject to prior lawful residence in another MS. It also stated that Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is a spouse of a Union citizen residing in a MS whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespectively of when and where their marriage took place (whether the marriage took place before or after the citizen's exercise of his/her right to free movement) and of how the national of a non-member country entered the host MS (regularly or irregularly). Although the ruling is consistent with the ECJ's case law prior to *Akrich* and the secondary legislation adopted in the 1960s and 1970s, it was, nevertheless, viewed by Ireland and Denmark as an illegitimate judicial interference with national policies designed to combat undocumented migration and 'marriages of convenience'. The Danish Government pledged to seek amendment of the Citizenship Directive sidestepping the fact that Article 35 of the Citizenship Directive addresses 'the case of abuse of rights or fraud, such as marriages of convenience'. According to Article 35, the MS are free to refuse, terminate or withdraw any Directive right in such a case, provided that such decisions are proportionate and meet the procedural safeguards provided for in Articles 30 and 32 of Directive 2004/38. What they are not free to do, however, is to subjugate Union rules to their domestic political requirements and restrictive migration policies.[61]

The Court continued to strengthen the rights of third country national members of the Union citizens following their return in the country of origin. In *Eind*, it

59 ECJ 9 January 2007, Case C-1/05, *Jia v Migrationsverket* [2007] ECR I-1. See also the Commission's 5th Report on Citizenship of the Union, 15.2.2008, which mention's the need to interpret the right to free movement in the light of fundamental rights and in particular the right to respect for family life and the principle of proportionality.

60 ECJ 25 July 2008, Case C-127/08, *Metock* [2008] ECR I-6241.

61 The Court's decision in *Metock* has also important implications for the recently introduced 'integration abroad' requirements in the Netherlands, France and Germany. By requiring that third country national spouses of EU nationals seeking reunification must have adequate knowledge of the national language and society and its values and pass tests in the countries of origin in order to be granted a visa, MS have infringed the Citizenship Directive (2004/38), in so far as they make the family reunion dependent on their migration regulations and not on the existence of conjugal ties with EU citizens.

ruled that the Surinamese daughter of a Dutch national, who lived with him in the UK while he was working there, was entitled to reside in the Netherlands when her father returned there even though he did not exercise any effective and genuine economic activities.[62] The fact that the daughter did not have a right to reside in the Netherlands before residing in the UK under Dutch law was seen to have no bearing on the recognition of a right of entry and residence as a family member of a Community worker.[63] According to the Court, to assert otherwise would be tantamount to denying that the rights of residence of family members of Community nationals derive from Community law.

2.3. NON-DISCRIMINATORY RESTRICTIONS

The evolution of Union citizenship has brought also another dynamic; namely, the prohibition of measures which might be unfavourable to persons moving between Member States, thereby making a decision to remain at home more attractive or penalizing those who have exercised their European Union law rights. In *Pusa* Advocate General Jacobs stated that, far from being limited to a prohibition of direct or indirect discrimination, Article 18 EC applied to non-discriminatory restrictions, including unjustified burdens.[64] Non-discriminatory restrictions involve measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty and can only be justified if they are based on overriding considerations of public interest and are proportionate to the legitimate aim of the national decisions.[65] In *Tas-Hagen* the Court utilised the non-discrimination model by stating that Dutch legislation on *benefits for civilian war victims 1940-1945* which required that beneficiaries were resident in the Netherlands at the time of the submission of their application was 'liable to dissuade Netherlands nationals' from exercising their rights under Article 18(1) EC and 'constituted a restriction'.[66] Indeed, 'the opportunities offered by the Treaty in relation to freedom of movement cannot be fully effective if a national of a Member State can be deterred from availing himself of them by obstacles raised to his residence in the host Member State by legislation of his State of origin penalising the fact that he has used them'.[67] And although the restriction can be justified on the ground that the obligation of solidarity could only apply to civilian war victims who had links with the population of the Netherlands during and after the

62 ECJ 11 December 2007, Case C-291/05, *Eind* [2007] ECR I-10719, para 45.

63 Ibid, para 42.

64 ECJ 29 April 2004, Case C-224/02, *Heikki Antero Pusa v. Osuuspankkien Keskinainen Vakuutusythio* [2004] ECR I-5763.

65 See ECJ 18 July 2006, Case C-406/04, G. *De Cuyper v. Office national de l-emploi* [2006] ECR I-6947.

66 ECJ 26 October 2006, Case C-192/05, *K. Tas-Hagen, R. A. Tas v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451, para. 32.

67 Ibid, para 30.

war, residence abroad was not a sufficient indicator of a person's disconnection from the Member State granting the benefit. The requirement of residence in the Netherlands therefore did not meet the test of proportionality.

A similar conclusion with respect to residence requirements enshrined in national legislation regulating the award of disability pensions to victims of war was reached in *Nerkowska* and *Zablocka-Weyhermuller*.[68] In the former case a disability pension compensating for the suffering endured by Ms Nerkowska, a Polish national, following her deportation to Siberia, was suspended because she changed her place of residence from Poland to Germany. In the latter case, Ms Zablocka-Weyhermuller, the surviving spouse of a German national victim of war, was denied the partial pension she received in Germany when she took residence in Poland. In both cases, the Polish and German governments, respectively, put forward justifications for the existence such a residence clause, which in effect limited the scope of potential beneficiaries of the benefits, such as, the need for the effective monitoring of the employment and social situation of the beneficiaries and for restricting the obligations of solidarity to those who retain a sufficient degree of connection with the national society. But these arguments failed to convince the Court. Quite rightly, in *Nerkowska* the ECJ concluded that a change of residence does not imply the shaking off of a necessary connection with the MS of origin. What mattered, instead, was that Ms Nerkowska was a national of the MS granting the benefit and had lived in that state for more than 20 years. Accordingly, 'the residence clause throughout the period of payment of the benefit concerned did not meet the test of proportionality'.[69] Similarly, the residence clause imposed by the German legislation was a restriction deterring Union citizens from taking advantage of their full rights to free movement and residence in the EU which did not comply with the principle of proportionality.[70] This is because the German legislation had confined the applicability of the residence requirement to certain MS only and not to others where the cost of living is lower that that in Germany and provided for the suspension of payment of benefits – and not for their adaptation in line with the cost of living in the state of residence or domicile. What is astonishing in these cases is not the ECJ's intervention in favour of Europe's war victims and the progressive interpretation of EU law in line of the changing landscape of the Union,[71] but the Member States'

68 ECJ 22 May 2008, Case C-499/06, *Halina Nerkowska* v *Zaklad Ubezpieczen Spolecznych* [2008] ECR I-3993; ECJ 4 December 2008, Case C-221/07, *Krystyna Zablocka-Weyhermuller* v *Land Baden-Wurttembrg*, [2008] ECR I-9029.

69 Ibid, paras 35, 37 and 39-47.

70 Paras 36-44.

71 As the ECJ stated in ECJ 18 December 2007, Joined Cases C-396/05, C-419/05 and C-450/05, *Doris Habelt and Others v Deutsche Rentenversicherung Bund* [2007] ECR I-11895 'To allow the competent MS to rely on grounds of integration into the social environment of the state in order to impose a residence clause would run directly counter to the fundamental objective of the Union which is to encourage the movement of persons within the Union and their integration into the society of other MS'; para 2.

appalling treatment of some of the most vulnerable members of their publics, namely, their elderly citizens and members of their families who have been exposed to unbelievable suffering.[72]

In the field of education, the Court ruled that national law which stipulates that education and training grants for studies in another MS can only be awarded for studies which are a continuation of education or training pursued for at least one year in the MS awarding the grant is liable to deter citizens of the Union from exercising their fundamental rights under Article 18(1) EC. In this respect, it constitutes an unjustified restriction on the free movement of Union citizens.[73] By moving beyond the discrimination model,[74] the Court has thus managed to provide effective protection to Union citizens who have taken advantage of the opportunities afforded by the Treaty but have been placed at a disadvantage by legislation of their state of origin.

2.4. INCREASED PROTECTION OF UNION CITIZENS IN THE MEMBER STATE OF RESIDENCE

The public security, public policy and public health derogations from free movement have been marked by the disjunction between governmental interests and sovereign power and Union regulation. Member States have been keen on maintaining the vestiges of their sovereignty. Under Union law, they have the power to restrict the free movement rights of Union citizens and their family members on public security, public policy and public health grounds (Article 45(3) TFEU), but the latter must be strictly interpreted and comply with the principle of proportionality.[75] These grounds cannot be invoked by a MS in order to serve economic ends. Instead, they have to be based exclusively on the personal conduct of the individual concerned and may never be imposed automatically.[76] MS must verify that a Union citizen's personal conduct poses 'a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental in-

72 On this see C. Lyons' excellent analysis in 'A Door into the Dark; Doing Justice to History in the Courts of the European Union'. EUI Working Paper, 2008/11, EUI, Florence.

73 ECJ 23 October 2007, Joined Cases C-11/06 and C-12/06, *Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren* [2007] ECR I-9161. See also ECJ 11 September 2007, Case C-76/05, *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849.

74 This also applies to matters other than the payment of financial benefits, such as the recognition of surnames; see ECJ 14 October 2008, Case C-353/06, *Grunkin and Paul* [2008] ECR I-7639. In this case, a refusal by the authorities of a MS to recognise the surname of a child as already determined and registered in another Member State in which the child was born and resident since birth was seen to hamper the exercise of the right to free movement and residence under Article 18(1) EC.

75 ECJ 26 November 2002, Case C-100/01, *Ministre de l'Interieur v Aitor Oteiza Olazabal* [2002] ECR I-10981; ECJ 29 April 2004, Joined Cases C-482/01 and C-493/01, *Orfanopoulos and Oliveri v Land Baden-Wurttemberg* [2004] ECR I-5257.

76 See the Opinion of Adv. General Mazak 14 February 2008, Case C-33/07, *Gheorghe Jipa* [2008] ECR I-5157 delivered on, para 23.

terests of society'.[77] This also applies to restrictions on the right of exit imposed by the MS of origin on one of its nationals. In *Jipa*, a reverse discrimination case since the applicant requested his state of origin to lift a restriction on his right to cross-border movement (Article 38 of Romanian Law 248/2005) in order to travel to Belgium which had repatriated him owing to his irregular residence there, the Court ruled that in the absence of a genuine threat to public policy or public security the MS of origin cannot restrict an EU national's right of exit.[78] The same assessment must take place with respect to third country national spouses of Union nationals who have been the subject of alerts entered in the Schengen Information System. The ECJ has stated that both the Member State issuing an alert and the Member State that consults the Schengen Information System state must first establish that the presence of a person constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.[79]

The ECJ's preference for a rights-based approach to the interpretation of the Treaty's derogations form the free movement provisions has attributed priority to the interests of the protected persons over the interests of states and has sedimented the requirement that policy or security risks are clearly personified before any action is taken by national authorities. By requiring concreteness, as opposed to abstract interpretations of threats or risks, and contextualism, that is, the identification of real and specific harms caused by individuals' actions as opposed to abstract harms and exaggerated risks flowing from the authorities' perceptions about certain individuals and their actions, Union nationals and their families have been shielded from utilitarian calculations and arbitrary state practices. Accordingly, a MS cannot order the expulsion of a Union citizen as a deterrent or a general preventive action.[80] Nor can exclusion or expulsion decisions be justified on the basis of governmental policy agendas, such as, for example, tackling pornography or organized crime. This also rules out the application of pre-emption or the precautionary principle which became salient in counter-terrorist law and policy post 9/11. And previous criminal convictions shall not in themselves constitute grounds for imposing limitations on cross-border movement.[81] As Article 27(2) of Council Directive 2004/38 states, 'justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted'. According to Advocate General Mazak, 'it follows from the ruling of the Court in *Commission v Spain* that a MS, when limiting the rights granted to Union citizens pursuant to Article 18(1) EC,

77 ECJ 27 October 1977, Case 30/77, *R v Bouchereau* [1977] ECR 1999.

78 ECJ 10 July 2008, Case C-33/07, *Gheorghe Jipa* [2008] ECR I-5157. Romania had placed this restriction following a Readmission agreement it had signed with Belgium before its accession to the EU.

79 ECJ 31 January 2006, Case C-503/03, *Commission v Kingdom of Spain* [2006] ECR I-1097.

80 ECJ 26 February 1975, Case 67/74, *Bonsignore* [1975] ECR 297, para 6, and ECJ 28 October 1975, Case 36/75 *Rutili* [1975] ECR 1219, para 29.

81 Article 27(2) of Dir. 2004/38; ECJ 19 January 1999, Case C-348/96, *Calfa* [1999] ECR I-11, paras 22 to 24.

cannot rely on general non-specific assertions made, in relation to the conduct of a Union citizen, by another MS. A MS when limiting the fundamental freedoms of Union citizens must itself verify and confirm whether the exercise of those freedoms poses a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'.[82] True, there is no isomorphomism in the definition of public policy across the EU – public policy and public security remain 'national concepts', that is, they are defined on the basis of national laws and traditions. However, the European Court of Justice has clearly stated for more than three decades that the Member States' discretion in this area is circumscribed by European law.[83]

Although the strict interpretation of the public policy derogations furnished by secondary legislation (Dir 64/221 initially and Dir 2004/38 from 30 April 2006) and the ECJ's jurisprudence have circumscribed the Member States' discretionary power, they, nevertheless, continue to deport Union citizens owing to enforceable criminal convictions. In *Calfa* automatic expulsion for life following a criminal conviction without consideration of the personal conduct of the offender or the danger (s)he represents for the requirement of public policy was seen to contravene Treaty provisions (Article 49 EC) and Dir 64//221 (now Dir 2004/38).[84] And Advocate General Stix-Hackl has stated in *Commission v Germany* that 'the German practice of automatic deportation, without regard for personal circumstances, justified on the ground of its deterrent effect on other foreigners and in breach of the fundamental right to family life breaches Community law'.[85] Recently, in *Huber* the ECJ took issue with the German Central Register of Foreign Nationals and ruled that the prohibition of discrimination on the ground of nationality laid down in Article 12(1) EC precluded the establishment of a system for processing personal data for the purpose of fighting crime specifically for Union citizens while no such similar system exists with respect to nationals of that Member State. But it reached the opposite conclusion with respect to the use of a central register for foreign nationals for the purpose of regulating their residential status.[86]

The Citizenship Directive (2004/38) has enhanced security of residence for Union citizens.[87] It stipulates that permanent residents can be ordered to leave only on 'serious grounds of public policy or public security' (Article 28(2)), and permanent resident Union citizens for the previous ten years and minors may not be ordered to leave the territory of a Member State, except on imperative grounds

82 ECJ 27 October 1977, Case 30/77, *R v Bouchereau* [1977] ECR 1999, para 43.
83 ECJ 4 December 1974, Case 41/74, *van Duyn* [1974] ECR 1337.
84 ECJ 19 January 1999, Case C-348/96, *Calfa* [1999] ECR I-11.
85 See the Advocate General's Opinion 2 June 2005, Case C-441/02, *Commission v Federal Republic of Germany* [2006] ECR I-3449.
86 ECJ 16 December 2008, Case C-524/06, *Heinz Huber v Bundesrepublik Deutschland* [2008] ECR I-9705.
87 Article 28(1) of Directive 2004/38.

of public security (Article 28(3)).[88] In addition, according to Article 33 of Dir 2004/38, an expulsion order cannot be issued by the host MS as a penalty or legal consequence of a custodial penalty unless the general requirements pertaining to the application of restrictions on entry and residence apply (Articles 27-29) and if it is issued, it should be subject to assessment after two years (Article 33).

Notwithstanding the ECJ's continued supervision of MS' compliance with Union law and the increasing weight and relevance of European Union citizenship, it may be argued that that the continuation of the practice of deportation on the grounds of security and public policy undermines the principle of equal treatment irrespective of nationality fostered by Union citizenship. For although the gradual relaxation of MS' coercive powers is noticeable enough and the public policy, public security and public health derogations have now become restrictions in the exercise of the European free movement rights, it, nevertheless, remains the case that, as far as security of residence is concerned, Union citizenship appears to be a lesser status than that of national citizenship. Essentially, it approximates third country national long-term residence status. The paradox here is that while EU citizenship has demonstrated that community belonging does not have to be based on organic-national qualities, cultural commonalities or individuals' conformity to national values, but can be built on de facto associative relations and connections brought about through residence and de jure equal membership as far as possible,[89] the deportation of Union citizens makes nationality the ultimate determinant of belonging.[90] The latter issue is further explored in the subsequent section which examines the relation between Member State nationality and Union citizenship.

3. EU CITIZENSHIP AND MEMBER STATE NATIONALITY: RETHINKING THE LINK?

That European Union citizenship remains an unfinished institution is beyond any doubt. Even its modest original content enshrined in the Treaty of European Union revealed this. Article 22 EC (now Article 25 TFEU) had always carried the promise of a future extension of the material scope of Union citizenship by a unanimous decision of the Council on a proposal from the Commission and following consultation with the European Parliament. Although this procedure has not been activated yet, the discussion in the previous section demonstrat-

88 Article 28(3) of Directive 2004/38.

89 D. Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13:5 *ELJ* 623-646.

90 By so doing, it facilitates the stigmatisation of EU citizens and the possible erosion of their special, citizen status in the host MS by official discourses on 'the deportation of foreign criminals. Such anti-migrant and xenophobic discourses have featured in the media in the UK, Italy and the Netherlands recently.

ed the evolutionary and experimental character of Union citizenship. For more than a decade, the ECJ has not hesitated to subject it to critical reflection and inquiry and to embark upon unknown and controversial terrains, thereby inviting both admiration and fierce criticism. European judges have taken quite seriously constitutionalisation of Union citizenship and sought to respond positively to citizens' needs and expectations. But as their decisions are guided by norms which often conflict with states' interest in unilateral migration control and the pursuit of power, governments have not hesitated to express their disapproval of what they perceive to be judicial policy-making.

Having said this, one must not overlook the fact that the ECJ's interventions have been uneven. While the material scope of Union citizenship has been adjusted in ways that are responsive to Union citizens' welfare needs and their concerns, its personal scope, that is, the question of how and under what conditions can EU citizenship be acquired and lost, has largely evaded critical reflection and adaptation. Access to EU citizenship was premised on the possession or acquisition of MS nationality (Article 17 EC) and any attempt to loosen the grip of the latter on the former is hastily taken to signal an external intrusion into the sovereign domain of MS (– the so called creeping Communitarisation) or a threat of an aggressive Community take over. Sovereignty concerns have thus marked off the field of determination of nationality, which falls within the exclusive competence of the MS but must nonetheless be exercised with due regard to Union law,[91] from review by the Union institutions.

And yet polarised positions and 'either/or dualisms' more often than not hide the complexity and potentialities inherent in relationships. For in relations of all sorts, not only does mutual dependence co-exist with mutual 'relative' autonomy, but also if the latter is denied or circumscribed within a very narrow margin then the relationship ceases to function properly. By analogy, although the relationship between EU citizenship and MS nationality is one of dependence, if it is dogmatically asserted that dependence rules out the existence of relative autonomy in domain of either EU citizenship or national citizenship then the relationship is bound to exhibit cracks. With respect to MS nationality, the ECJ has made it clear that the MS enjoy relative autonomy by upholding the international law maxim that determination of nationality falls within their exclusive jurisdiction, despite the anomalies that this creates in the field of application of EU law and its exclusionary implications with respect to the rights of long-term resident third country nationals.[92] In *Micheletti*, the ECJ confirmed

[91] ECJ 7 July 1992, Case C-369/90, *Micheletti and Others v Delegacion del Gobierno en Catanbria* [1992] ECR I- 4329.

[92] The debate on the position of long-term resident third country nationals has highlighted the exclusionary effects of Union citizenship. For proposals to disentangle Union citizenship from state nationality and to award it to all persons residing lawfully in the territories of the Union for a certain period of time, see European Parliament (1989) Resolution on the Declaration of Fundamental Rights and Freedoms, A2-0003/89; (1989) Resolution on the Joint Declaration Against Racism and Xenophobia and an Action Programme by the Council of Ministers, A2-

that determination of nationality falls within the exclusive competence of the Member States, but it went on to add that this competence must be exercised with due regard to the requirements of Community law,[93] and in *Kaur* it stated that 'it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.[94] Accordingly, nationals of a Member state should be able to exercise their rights to free movement without impediments imposed by additional regulations adopted by other Member States. In *Chen*, the European Court of Justice criticised the restrictive impact of such additional conditions for the recognition of nationality of a Member State. It ruled that the United Kingdom had an obligation to recognise a minor's (Catherine Zhu) Union citizenship status even though her MS nationality had been acquired in order to secure a right of residence for her mother Chen, a third country national, in the United Kingdom. Since Catherine had legally acquired Irish nationality under the ius soli principle enshrined in the Irish Nationality and Citizenship Act 1956 and had both sickness insurance and sufficient resources, provided by her mother, the limitations and conditions referred to in Article 18 EC and laid down by Directive 90/364 had been met thereby conferring on her an entitlement to reside for an indefinite period in the UK.[95]

261/88; (1990) Resolution on Freedom of Movement for Non-EEC Nationals, A3-175/90, OJ C175, 16.7.90; (1991) Resolution on the Free movement of Persons A3-0199/91, OJ C 159/12-15, 17.6.91; ECSC (1991) Opinion on the Status of Migrant Workers from Third Countries 91/C 159/05, OJ C 159/12, 17 June 1991. Early academic literature on this subject includes: A. Evans, Third Country Nationals and the Treaty on European Union', (1994) 5 *European Journal of International Law* 199-219; D. O'Keeffe, 'Union Citizenship' in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, Wiley, Chichester, 1994; M. Martiniello, 'European Citizenship, European Identity and Migrants: Towards the Postnational State?' in R. Miles and D. Thranhardt (eds), *Migration and European Integration: The Politics of Inclusion and Exclusion in Europe*, Pinter, London, 1995, 37-52; D. Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe', (1996) 4:4 *Journal of Political Philosophy* 337-358; H. Lardy, 'The Political Rights of Union Citizenship', (1996) 2 *European Public Law* 611-33; S. Peers, 'Towards Equality: Actual and Potential Rights of Third Country Nationals in the European Union, (1996) 33:1 *CMLR* 7-50; D Kostakopoulou, 'European Citizenship and Immigration After Amsterdam: Openings, Silences, Paradoxes', (1998) 24:4 *Journal of Ethnic and Migration Studies* 639-656; M. La Torre (ed.), *European Citizenship: An Institutional Challenge*, Kluwer Law International, The Hague, 1998 and in particular the essays written by R. de-Groot, J. Monar, A. Castro Oliveira, R. Rubio-Marin, M.-J. Garot, A. Evans and Antje Wiener; D Kostakopoulou, 'Nested 'Old' and 'New' Citizenships in the EU: Bringing Forth the Complexity', (1999) 5:3 *Columbia Journal of European Law* 389-413; E. Guild, *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union*, Kluwer Law International, The Hague, 1999; H. Staples, *The Legal Status of Third Country Nationals Resident in the European Union,* Kluwer Law International, The Hague, 1999. For a recent account, see J. Shaw, *The Transformation of Citizenship in the European Union; Electoral Rights and the Restructuring of Political Space*, Cambridge University Press, Cambridge, 2007.

93 ECJ 7 July 1992, Case C-369/90, *Micheletti and Others v Delegacion del Gobierno en Catanbria* [1992] ECR I-4329.

94 ECJ 20 February 2001, Case C-192/99, *R v Secretary of State for the Home Department, ex parte Kaur* [2001] ECR I-1237, para 19.

95 ECJ 19 October 2004, Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, [2004] ECR I-9925.

But the 'relative autonomy' of the other party to this relationship, that is, of EU citizenship, has not been addressed in a systematic way yet. Does this mean that it should be ruled out a priori that EU citizenship may be relatively autonomous under certain conditions and within certain parameters even though it is activated by the possession of MS nationality? Could it be argued that the Member States' regulatory autonomy in nationality matters would be infringed, thereby leading to a violation of Article 17(1) EC, if EU citizenship were seen to survive if the MS nationality link which gave it rise in the first place ceased to exist? Such questions have recently arisen by virtue of the Rottmann case.[96]

Mr Rottmann, an Austrian national by birth, fearing arrest for suspected serious fraud, emigrated to Germany where he subsequently obtained citizenship by naturalization. He lost his Austrian nationality under Austrian nationality law, and, when the Austrian authorities revealed that he had been the subject of a criminal investigation for fraud and an arrest warrant, Germany revoked his naturalisation on the ground that he had received German citizenship fraudulently. Mr Rottman sought the annulment of this decision arguing that the deprivation of his German citizenship makes him stateless under public international law and that it would lead to loss of Union citizenship which is contrary to Union law. The preliminary ruling reference procedure was activated by the national court which required clarification on whether EU law prevented the loss of Union citizenship under the circumstances pertaining to the case in hand and whether either Germany or Austria had an obligation to comply with EU law. Advocate General Maduro made it clear that the case was not a purely internal matter falling outside the remit of application of Union law since it entailed the requisite cross-border dimension (points 9-13) and proceeded to elaborate on the scope of the Member States' obligation to comply with Union law in exercising their regulative autonomy in nationality matters (point 22 et seq). While the Advocate General eloquently pinpointed that EU citizenship and MS nationality are 'inextricably linked but also autonomous' (point 23), 'all rights and obligations attached to Union citizenship cannot be unreasonably limited' by the conditions pertaining to access to Union citizenship (point 23) and that national rules determining the acquisition and loss of nationality must be compatible with EU rules and respect the rights of EU citizens (point 23), he proceeded to state that inferring that the withdrawal of nationality is impossible if it entails loss of Union citizenship would violate MS autonomy in this area and thus contravene Article 17(1) EC as well as Article 6(3) EU concerning the EU's obligation to respect the national identities of the MS.[97]

Although the analysis provided by the Advocate General is significant and illuminating, it may be worthy to pause for a moment to reflect on his conclusion.

[96] Opinion of AG Maduro 30 September 2009, Case C-135/08, *Janko Rottmann v Freistaat Bayern*, nyr.

[97] Ibid, paras 24 and 25.

In examining closely his Opinion, it seems to me that there exist two lines of argumentation that are congruent with the analysis up to point 23. The first, which is encapsulated in point 24, is that a MS cannot revoke naturalisation or withdraw nationality, if this leads to a loss of Union citizenship. This, as the Advocate General has noted, would constrain MS autonomy in an area that falls within the MS exclusive jurisdiction. But the Advocate General overlooks a second possible argument; namely, that the MS can revoke naturalization or withdraw their nationality, provided, of course, that they comply with Union law, but Union law precludes the ensuring automatic loss of Union citizenship if a Union citizen is rendered stateless. In other words, loss of MS nationality would not automatically result in the forfeiture of Union citizenship, if the Union citizen concerned were rendered stateless. Indeed, given that EU citizenship is dynamic concept and institution and a fundamental status, a certain degree of autonomy as far as Union citizenship is concerned is required in order to preserve the link between the citizen and the Union and his/her place in the European community of citizens. Arguably, it is not fair that a Union citizen who has established a multitude of relations and connections in a MS other than his/her state or origin and a link directly with the Union (and its Treaties) from which directly effective rights and obligations flow, is automatically denied of social and political standing in the Union legal order because a MS decides to deprive him/her of nationality, however legitimate the reasons may be. After all, the EU law rights of free movement, residence and equal treatment do not come into view because one is a MS national (millions of MS nationals can not invoke these rights if their situations are purely internal, that is, they have not established links with Union law by engaging in activities with a cross-border dimension), but because a MS national has activated his Union law status. Accordingly, this status, which is not a status of subjection – as nationality is – but a status of participation in civil society, needs to be protected. This can be done by recognizing that each person holding the nationality of a Member State is a citizen of the Union, but this status shall be unaffected by a subsequent loss of state nationality which renders the individual stateless.

True, critics may be quick to observe that national governments are likely to react negatively against such a conclusion fearing that EU citizenship might take over national citizenship. Such fears have been expressed in the past but they lack empirical foundations. One may recall the Declaration on Nationality of a Member State, annexed to the Final Act of the Treaty on European Union, which expressly stated, 'the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned'.[98] Similar declarations were adopted by the European Council at Edinburgh and Birmingham. The Birmingham declaration confirmed that, in the eyes of national executives, Union citizenship constitutes an additional

[98] OJ C 191, 29 July 1992.

tier of rights and protection which is not intended to replace national citizenship – a position that found concrete expression in the amended Article 17(1) at Amsterdam[99] and the Lisbon Treaty.[100]

On close reflection, however, the above mentioned possibility neither contravenes the Declaration on Nationality of a MS nor threatens to replace national citizenship. Nor does it in may way impinge upon state autonomy which is clearly manifested in the act of deprivation of citizenship. It merely maintains the legal effects of Union citizenship and safeguards the rights that individuals derive directly from EU law, thereby enabling a stateless EU citizen to continue to enjoy the freedoms guaranteed by the Treaty and the protection afforded to him/her by EU law, including security of residence, respect for family life and the maintenance of the relations (s)he has established. True, this would be of little use to persons holding two or more MS nationalities. But it would make a great deal of difference to mono-national EU citizens resident in another MS. It would also demonstrate in practice that EU citizenship is a fundamental status and that it matters. In what follows, I wish to defend such an argument on both analytical and legal grounds, namely, the fundamental status of Union citizenship (the EU citizenship norm) and the *effet utile* of Union law.

Analytically, the argument in favour of the independent legal effect of EU citizenship in the event of statelessness can be derived from the intersystemic relation between EU citizenship (A) and MS nationality (B) as well as the nature of their interaction. By the latter, I mean the perception of the interaction as process-driven and dynamic. In most relations of dependence where A can only be activated by B, it would be incorrect to conclude that all properties and effects of A are contained by B. B may be the triggering mechanism or the source of A, but it can bear little or no relation to other parts of A and their reconfiguration at any time. I take this to be the true meaning of 'additionality' or 'complemetarity' or 'existing alongside': it delineates a degree of relative autonomy and, by no means, implies that A and B cannot function apart. Additionality cannot entail a logic of complete subsumption of Union citizenship to the extent that it automatically disappears when MS nationality is lost. To assert the latter would be tantamount to distorting the relation of complementarity or additionality and replacing it with a relation of complete subjugation. Such a relation of subordination may please state-centrists, but it would not be congruent with the principle of the maintenance of the full effectiveness of Union law[101] and Union citizens' legal positions which are protected by it. It is recognized that an individual who has

99 Bull. EC 10-1992 I 8.9. The Amsterdam Treaty added the statement that 'Union citizenship shall complement national citizenship' to Article 8(1) EC (Article 17(1) on renumbering).

100 Article 9 of the Consolidated Version of the Treaty on European Union (TEU) states that 'Citizenship of the Union shall be additional to national citizenship and shall not replace it'.

101 As the ECJ has stated in Joined Cases C-46 and 48/93, the full effectiveness of Community rules and the effective protection of the rights which they confer are principles inherent in the Community legal order; ECJ 5 March 1996, Joined Cases C-46 and 48/93, *Brasserie du Pecheur v Germany and R v Secretary of State for Transport ex parte Factortame* [1996] ECR I-1029.

activated Union law by crossing borders has the status of an EU citizen in addition to the status of a MS national. The former has been granted to him by virtue of EU law and authenticates all the rights (s)he derives in the host MS. A national decision depriving him/her of nationality interferes with his Union-based legal position and his/her free movement rights thereby depriving them of full force and legal effects. A Union citizen may thus find himself/herself stripped of all his/her rights overnight, totally unprotected in the territory of the host MS and bereft of Union citizenship.

In addition, all intersystemic relations are dynamic, that is, they entail a process-driven dimension in response to endogenous and exogenous pressures and possible discrepancies. As we have seen in the previous section, the relation between national citizenship and EU citizenship constitutes no exception. EU citizenship has become a fundamental status of Union citizens who have increasing expectations (and doubts) about the EU's capacity to deliver and to give meaning and depth to it. Accordingly, a system within which nested citizenships[102] overlap, interact, impact on each other, but also retain their relative autonomy and independent properties, would create the preconditions for citizens to develop their potential, enrich their life chances and to enjoy adequate protection.

The survival of EU citizenship following the break down of the link between an individual and a MS as a default option in cases of statelessness does not challenge the Member States' definitional monopoly over nationality and their autonomy to withdraw nationality on the ground of fraudulent naturalisation. It is thus consonant with the ECJ's rulings in *Michelletti* and *Kaur*. This tenet has no boundary-testing effects: it does not call into question the boundaries of national belonging. Nor does it undermine national identities. It merely ensures that the rights that Union law (Article 21 TFEU) has conferred on individuals remain fully effective thereby facilitating the attainment of the Community's objectives pursuant to the Community law doctrine of *effet utile* (the principles of effectiveness) and the fundamental status of Union citizenship.[103] For the full effectiveness of Community rules would be impaired and the protection of the

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102 D. Kostakopoulou, 'Nested 'Old' and 'New' Citizenships in the EU: Bringing Forth the Complexity', *Columbia Journal of European Law*, Vol. 5(3), 1999, 389-413; *Citizenship, Identity and Immigration in the European Union: Between Past and Future*, Manchester University Press, Manchester, 2001.

103 AG Maduro has acknowledged that 'any standard of Community law may be invoked' – not only the general principles of Community law and human rights, in the exercise of state jurisdiction in matters of acquisition and loss of nationality (point 28). Relevant academic literature includes: S. Hall, 'Loss of Citizenship in Breach of Fundamental Rights', (1996) 21 *ELR* 129; *Nationality, Migration Rights and Citizenship of the Union*, Martinus Nijhoff, Dordrecht, 1995; G.-R. de Groot, 'The Relationship Between the Nationality Legislation of the Member States of the European Union and European Citizenship', in M. La Torre (ed.) *European Citizenship: An Institutional Challenge*, Kluwer, The Hague, 1998, 115-148; 'Towards a European Nationality Law', in H. Schneider (ed.), *Migration, Integration and Citizenship: Volume 1*, Maastricht, Forum Maastricht, 2006). Compare also ECJ 9 December 1997, Case C-265/95, *Commission v France* [1997] ECR I-6959; ECJ 15 May 2003, Case C-300/01 *Salzmann* [2003] ECR I-4899; ECJ 12 September 2006, Cases C-145/04, *Spain v UK* [2006] ECR I-7917

rights granted by Article 21 TFEU would be weakened, if in being an apatride and thus a person without 'the right to have rights', according to Arendt, one's Union citizen status were erased automatically. Conversely, as long as the fundamental status of Union citizenship and the *effet utile* of Union law are kept in the forefront of the analysis, a stateless person would continue to receive the protection of EU law, maintain his/her associative ties and be a participant in the European Union public. My main worry, here, is that if we look in the wrong place for European citizenship, it will become devoid of significance.

4. CONCLUSION

The foregoing discussion has examined the Court's contribution to enhancing the stature of Union citizenship and its perceived encroachment on Member State autonomy by comparing and contrasting developments in the material and personal scopes of Union citizenship. The discussion has shown that EU citizenship is an evolving, experimental institution set within a framework that is constantly in motion. As both observers of and participants in such a restless framework, we often struggle to comprehend how institutional change has taken place, how it affects domestic policies and the subsequent development of European norms and how it shapes actors' conduct. In this respect, it might be wise to eschew dogmas and political fixity and to maintain an open mind as to who and how advances citizens' rights, creates openings and unlocks potentialities which may be frustrated by unnecessary barriers. And we should not forget that 'national ways of doing things' and 'statal autonomy' have often disempowered citizens and helped to justify the raw force of restrictive and coercive practices. Accordingly, I deployed in this chapter the lens of 'the third party perspective', that is, the perspective of citizens, in order to reflect on judicial interventions in the domain of citizenship and migration. This has enabled the surmounting of the familiar suprationalism/intergovernmentalism dualism and concomitant debates about contestations of power and competition between supranational institutions and the Member States.

Bettering citizens' life chances, meeting their needs and enhancing their protection should not be perceived as a matter of accident or rebellion, praise or blame of the ECJ, defective exercise of jurisdiction and an anomalous bypassing of democratically elected legislatures. Instead, it has been the ECJ's working hypothesis consistently for decades. True, its preference for a rights-based approach to free movement of persons and Union citizenship has often conflicted with national governments' preference for the status quo, unilateral citizenship and migration control and a power-driven approach. However, as the preceding

and ECJ 12 September 2006, C-300/04, *Eman and Sevinger v College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055.

discussion has shown, concrete advances have been made that have enhanced the interests of ordinary citizens and states have had to concede a number of important changes in their practices that bring renewed growth in associated action and promote non-discrimination. In this respect, there is nothing fundamentally wrong in the ECJ's testing of the limits of the European public or EU citizenship. After all, we cannot expect things to operate unchanged for years to come and, more importantly, the more we test the limits of the European citizenship, the broader its limits will be.