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**The „substance of the rights” of the Union citizenship  
in the recent case law of the ECJ  
– potential and limits of the concept**

*The case of Ruiz Zambrano*

The term „substance of the rights conferred by virtue of their status as citizens of the Union“ was used by the ECJ for the first time in 2011 in the case of *Ruiz Zambrano*.<sup>1</sup> The judgment was based on the following facts<sup>2</sup>: The couple *Ruiz Zambrano* applied for asylum in Belgium. Both spouses had Colombian citizenship. The request was rejected, but the couple was not deported for the time being. Despite of his immigration status not being clarified and without residence permit, the husband kept on working in Belgium. During this time, his wife gave birth to two children who acquired Belgian nationality by jus soli principle. Their nationality was a so-called substitute nationality, which the children obtained due to the fact that their parents had failed to apply for Colombian citizenship at the Colombian Embassy. When the husband became unemployed, the competent Belgian authorities refused to grant him unemployment benefits: Even if he had actually paid the unemployment contributions regularly, he had reached the relevant number of working days only in violation of the provisions of the Belgian Nationality Code – so the reasoning. The husband appealed against this decision, arguing that he was entitled to the right of residence directly by virtue of the EC Treaty because he was the father of underage citizens of the Union. Since the existence of such a right of residence entitled him automatically to unem-

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<sup>1</sup> Case C-34/09 *Ruiz Zambrano* [2011], No. 42.

<sup>2</sup> Case C-34/09 *Ruiz Zambrano* [2011], No. 14 ff.

ployment benefits, the competent Belgian labour court made the matter the subject of a question referred to the ECJ.

The Court held that the minor children of *Ruiz Zambrano* would be deprived of the benefits of the substance of the rights conferred by virtue of their status as citizens of the Union as long as their father did not receive a residence and work permit.<sup>3</sup> Since he granted maintenance to his children, the children would be compelled to leave the territory of the Union in order to accompany their father to his home country.

If the substance of the rights is denied, the Union law applies – this is the main legal statement of the judgment. This creates a new element of Union citizenship and opens its scope of application to cases, which are independent from any cross-border element. It also includes a new feature of European citizenship: The status of citizen of the Union makes it possible to invoke European Union law, without the relevant facts having a cross-border element.<sup>4</sup>

### *The new function of Union citizenship*

The verbalisation of this new feature of European citizenship by the ECJ is seen as an epic event of integration politics – as here is a quote – a „dawn of a new Union”.<sup>5</sup>

The reason for this can be seen in the fact that for a certain group of cases the mobility dogma is abandoned, a dogma which states that EU law is relevant only if the Union citizen's freedom of movement is exercised.<sup>6</sup> From now on, the EU law is relevant even in purely domestic situations. The Union law protects the individual against his own state and that only due to the fact that he or she is a Union citizen.<sup>7</sup>

<sup>3</sup> Case C-34/09 *Ruiz Zambrano* [2011], No. 44.

<sup>4</sup> See also K. Hailbronner, D. Thym, *Ruiz Zambrano – Die Entwicklung des Kernbereichs der Unionsbürgerschaft*, „Neue Zeitschrift für Verwaltungsrecht” (NVwZ) 2001, p. 2009; A. Mohay, D. Muhvic, *The legal nature of the EU citizenship: perspectives from international and EU law*, [in:] *Contemporary Legal Challenges: EU – Hungary – Croatia*, ed. T. Drinoczi, M. Zupan, Z. Ercsey, M. Vinkovic, Pecs–Osijek 2012, p. 72 f.; D. Kochenov, *The essence of EU citizenship emerging from the last ten years of academic debate: Beyond the cherry blossoms and the moon?*, ICLQ 2013, p. 111 ff.

<sup>5</sup> *Ibidem*, p. 134.

<sup>6</sup> Regarding the development of the case law see D. Kochenov, R. Plender, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, E.L. Rev. 2012, p. 375 ff.

<sup>7</sup> In the Case *Grzelczyk* the ECJ formulated the much cited formula that the Union citizenship is destined to „be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided”. See Case C-184/99 *Grzelczyk* [2001], No. 31.

The mobility dogma was linked to the original concept of the market citizen, as it was put forward in the 60s and 70s. According to this concept, the European Community law changed the legal status of foreign citizens of other EC Member States in any EC Member State to the extent required for the purposes of EC integration.<sup>8</sup> And since these purposes were limited on the economic integration – it was about the creation of a common market – one used the term „market citizens“. In this sense, the market citizens in the EC Member States were „not as foreign as other foreigners“.<sup>9</sup> However, this change in status only had a functional character, linked to the EC aims.<sup>10</sup>

Over time, the dogma of mobility as a criterion of applicability of Union law has lost its tangibility. The functional linkage of European integration to the realisation of the common market was abandoned. The current catalogue of integration objectives, which is defined in Article 3 TEU – this will be discussed later on – is far more comprehensive, as it also includes the implementation of a catalogue of values codified in Article 2 TEU. By this, the European integration goes beyond its original purpose. It is not anymore just a matter of developing international cooperation in Europe after the horrors of World War II. Insofar, the promotion of mobility of citizens in a variety of forms<sup>11</sup>, which has found expression in the European fundamental freedoms, has effectively proved to be a fitting instrument. Now, there is more at stake. It is about building a community that is based on certain values<sup>12</sup>, without necessarily being understood as one state („non-state polity“).<sup>13</sup> It is therefore not surprising that the ECJ asks itself, whether this integration can be achieved, if the applicability of EU law remains dependent on cross-border movement.

<sup>8</sup> H.P. Ipsen, *Europäisches Gemeinschaftsrecht*, Tübingen 1972, p. 252. This development is partly conceived as a gradual overcoming of the traditional aliens laws approach, which has its roots in police laws of the 19<sup>th</sup> century, by the European immigration law, created to promote the free movement of Europeans. See J. Bergmann, *Abschied vom deutschen Ausländerrecht? – Europarechtliche Provokationen*, ZAR 2013, p. 321; similar from a British perspective J. Shaw, N. Miller, M. Fletcher, *Getting to grips with EU citizenship: Understanding the friction between UK immigration law and EU free movement law*, Edinburgh 2013, p. 36.

<sup>9</sup> H.P. Ipsen, *op. cit.*, p. 252.

<sup>10</sup> *Ibidem*, p. 251.

<sup>11</sup> See N. Nic Shuibhne, *The resilience of EU market citizenship*, CMLR 2010, p. 1608.

<sup>12</sup> According to Chr. Callies, the „structural features of a liberal constitutional state“ are embodied in the values and integration objectives of the TEU. See Ch. Callies, *Die neue Europäische Union nach dem Vertrag von Lissabon. Ein Überblick über die Reformen unter Berücksichtigung ihrer Implikationen für das deutsche Recht*, Tübingen 2010, p. 87. See also D. Kochenov, R. Plender, *op. cit.*, p. 383.

<sup>13</sup> Regarding the concept of „non-state polity“ see N. Nic Shuibhne, *op. cit.*, p. 1600 ff., whereupon the author does not think that the concept of the market citizen is antiquated. See also D. Kochenov, *op. cit.*, p. 127.

Consequently, the Union citizenship introduced by the Maastricht Treaty is more than just a market citizenship. The European Union citizenship led accordingly to a much deeper change in the legal status of foreigners than a pure market citizenship. The original paradigm, that the effect of Union citizenship was limited to major or minor corrections of national provisions of immigration law of one Member State regarding citizens of other Member States, was upheld only as long as the applicability of Union law was linked to the criterion of mobility.

Since the judgment in the case of *Ruiz Zambrano*, this paradigm has been undermined. However, it had been under challenge for some time anyway.<sup>14</sup> That was the case not only because of the profound changes, which the status of EU citizens had undergone by Union law, but also because of the fact that the requirement of a cross-border element is interpreted very widely.

The cross-border requirement is fulfilled even if a Brit – as in the case *Carpenter*<sup>15</sup> – is selling advertising spaces from the UK in British newspapers for advertisers from other Member States, such as from Germany. It is obvious that German immigration law is not affected by this. In the case of *Garcia Avello*, even a *de facto* surrender of the criterion of a cross-border element can be observed.<sup>16</sup> Whether the Belgian prohibition of a child to be named according to the Spanish custom of a double name has a negative effect on the mobility of this child if it has the desire to move to Spain is only speculation. Due to the continuous weakening of the criterion of „cross-border facts“ legal certainty is negatively affected: It is now difficult to apprehend, whether a situation has a cross-border nature. The cross-border element of a case – and therefore also the applicability of EU law – depends thus on contingencies.<sup>17</sup>

Since the case of *Ruiz Zambrano*, in cases, in which the substance of the status of a Union citizenship is denied to an EU citizen, the immigration law aspect of Union citizenship has vanished not only *de facto*, but also as a matter of principle.

### *The content of the substance of the rights according to previous case law of the ECJ*

The entire post-*Ruiz Zambrano* case law, in which the concept of the substance of the rights of the EU citizen was relevant, is related to the right of resi-

<sup>14</sup> See K. Hailbronner, D. Thym, *op. cit.*, p. 2008; D. Kochenov, R. Plender, *op. cit.*, p. 375 f.

<sup>15</sup> See Case C-60/00 *Carpenter* [2001], No. 14 and 37. This case is cited by the case *Ruiz Zambrano* by Advocate General Sharpston, see A.G. Sharpston, 30.09.2010, No. 73.

<sup>16</sup> See Case C-148/02 *Garcia Avello* [2003].

<sup>17</sup> In this sense AG Sharpston, 30.09.2010, No. 84.

dence for those third-country nationals who are family members of a Union citizen. The consequence of all this case law is that the actual enjoyment of the substance of the rights resulting from Union citizenship can then be considered denied, if the Union citizen is *de facto* compelled to leave the territory of the Union. Of the seven previously decided cases, the Court has affirmed that condition only in one case – in the case of *Ruiz Zambrano*.<sup>18</sup> Since the judgment in the case *Dereci* the Court emphasizes that it is for the national courts to determine the existence of these conditions.<sup>19</sup> In the case of *O. and S.*, the Court requires the existence of a relationship of dependency between the citizens of the Union and the third country national, who derives his right of residence from the Union citizen status of the Union citizen.<sup>20</sup> In the same decision, the Court notes that the principles, which have been established in the case of *Ruiz Zambrano*, apply only under „exceptional circumstances”.<sup>21</sup> It should be added that a case like *Ruiz Zambrano* will not occur frequently, as naturalisation under the *jus soli* principle has been restricted through a reform of immigration law, for example in Belgium and Ireland, in response to the ECJ case law.<sup>22</sup>

As epochal as the function of the concept of „substance of the rights of a Union citizen“, as meagre, if not marginal, is its normative content. It is a paradox that an approach that poor in substance is regarded as one of the most important developments in the ECJ’s case law.

### *Legitimity*

The concept was subject to a lot of criticism. It is put into question by referring to the derivative character of Union citizenship. The Union citizenship said to be a *ius tractum*; deriving from the national citizenship. Therefore – according to the critics – it is not correct to derive rights from the Union citizenship, if these rights are not expressly assigned to the Union citizens in other provisions of the founding treaties. Union citizenship is said to be kind

<sup>18</sup> The following decisions were based on the approach developed in *Ruiz Zambrano*: Case C-434/09 *McCarthy* [2011]; Case C-256/11 *Dereci* [2011]; Cases C-356/11, C-357/11 *O. and S.* [2011]; Case C-40/11 *Lida* [2012]; Case C-87/12 *Ymerga* [2013] and Case C-86/12 *Alopa* [2013].

<sup>19</sup> Case C-256/11 *Dereci* [2011], No. 74.

<sup>20</sup> Cases C-356/11, C-357/11 *O. and S.* [2011], No. 56.

<sup>21</sup> Cases C-356/11, C-357/11 *O. and S.* [2011], No. 55.

<sup>22</sup> See S. Corneloup, *Citoyenneté européenne: la Cour de justice apporte une nouvelle pierre à son édifice*, Rec. Dalloz 2011, p. 1325 et seq.

of an umbrella term that gives a name to the rights, which have been conferred on the citizens of the Member States anyway.<sup>23</sup>

This argument is not convincing.<sup>24</sup> It is correct that the possession of a national citizenship is a prerequisite for the acquisition of Union citizenship. However, the logical conclusion that the acquisition of the citizenship limits the potential of Union citizenship, needs further justification. The wording of the Treaty is not a valid argument. According to Article 20 TFEU Union citizenship shall be additional to and not replace national citizenship. This formulation suggests that European citizenship is has an autonomous character. This is even truer, since earlier wordings of the contract held that citizenship of the Union was only complementing national citizenship.<sup>25</sup> The Union citizenship appears as an autonomous concept, if approached from the historical perspective. It stands for a political programme of a Europe of the citizens targeted as early as in the 60s. The programme did not only include the extension of the right of residence, but also the social equalisation of EU citizens and nationals as well as the guarantee of political rights.<sup>26</sup> It is hard to imagine that this programme was officially realised in 1992 with the inclusion of citizenship in the texts of the treaty and that it was only about giving a name to the different elements scattered in the different parts of the treaty. In contrast, Article 25 TFEU links the reporting on the implementation of rules connected to Union citizenship to the further development of the Union. The Maastricht Treaty was certainly not the final step within the program of the „Europe of citizens“; it rather marked a beginning of its new phase. What Europe of citizens means, has to be defined continuously. In any

<sup>23</sup> See the similar position of S. Haack, *Staatsangehörigkeit – Unionsbürgerschaft – Völkerrechtssubjektivität*, [in:] J. Isensee, P. Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Band X: *Deutschland in der Staatengemeinschaft*, 3. Aufl., Heidelberg 2012, No. 28–29, see also K. Hailbronner, D. Thym, *op. cit.*, p. 2011.

<sup>24</sup> Against it also D. Kochenov, *op. cit.*, p. 106 („ius tractum nature does not mean ius tractum essence“).

<sup>25</sup> To what extent this change in the wording plays a crucial role is controversial. As here Nette-  
sheim, *Der „Kernbereich“ der Unionsbürgerschaft – vom Schutz der Mobilität zur Gewährleistung  
eines Lebensumfelds*, *Juristenzeitung (JZ)* 2011, p. 1036 f.; sceptical S. Haack, *op. cit.*, No. 24.

<sup>26</sup> See also older literature: H. Bülck, *Der Europabürger*, [in:] *Staatsrecht – Europarecht – Völker-  
recht. Festschrift für Hans-Jürgen Schlochauer zu 75. Geburtstag am 28. März 1981*, ed. I. von  
Münch, Berlin–New York 1981, p. 809-810; S. Magiera, *Die Europäische Gemeinschaft auf  
dem Wege zu einem Europa der Bürger*, „Die öffentliche Verwaltung“ (DÖV) 1987, p. 222. The  
nationals of the Member States should therefore be seen not only as an „economic function  
carrier“, but as persons with all the rights and obligations making up a democratic society  
which the Member States are based upon (S. Magiera, *op. cit.*, p. 231); see now also M. Nette-  
sheim, *op. cit.*, p. 1032.

case, the European citizenship is an innovation, which I intended as a boost to the development of the European Union.<sup>27</sup>

From the perspective of comparative law, it can also not be confirmed that the mere coexistence of two citizenships – the one of the Member State and the union citizenship – precludes that the latter constitutes a separate „substance of the rights”. Thus, Art. 37 of the Swiss Federal Constitution defines a Swiss citizen as someone, who has the right of citizenship of a Swiss commune and a Swiss canton. Also, the citizenship of the North German Confederation was conferred to a person via his or her affiliation to a Member State of the Confederation. And since both Switzerland and the North German Confederation<sup>28</sup> were, respectively still are, sovereign subjects of international law, it cannot be said that their citizenships cannot constitute a substance of the rights.

This argument is, however, also the main difficulty arising out of the new case law of the ECJ: The European Union is not sovereign.<sup>29</sup> The sovereignty still remains with the Member States. The ECJ does not have the power to confer the attribute of statehood upon the EU. If the ECJ deviates rights from the citizenship of a non-sovereign entity, does it then act *ultra vires*?

This can be explained if one conceptually separates the citizenship from the nationality. Such a separation is not only possible in legal theory<sup>30</sup>, it is also practice in several states. In British law<sup>31</sup>, for example, nationality means an attribution of a person to a state within the meaning of the public international law. In contrast, British law knows five categories of persons to which different citizenship rights are granted.<sup>32</sup> Citizenship is thus seen as a label for a particular set of rights to which the possession of the nationality serves

<sup>27</sup> It was recognized early, that the introduction of EU citizenship substantially changes regarding the legal status of the Union. See S. Hobe, *Die Unionsbürgerschaft nach dem Vertrag von Maastricht. Auf dem Weg zu einem europäischen Bundesstaat?*, “Der Staat” 1993, p. 264.

<sup>28</sup> See M. Kotulla, *Deutsche Verfassungsgeschichte. Vom Alten Reich bis Weimar (1495 bis 1934)*, Berlin–Heidelberg 2008, p. 1932.

<sup>29</sup> However, it should be noted that the concept of sovereignty as an explanatory model of the relationship between the Union and the Member States has been controversially discussed already for some period of time. See J. Kokott, *Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen von Europäisierung und Internationalisierung*, “Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer” (VVDStL) Vol. 63 (2003), p. 7 et seq. and the following discussion, p. 71 et seq.

<sup>30</sup> In detail Chr. Schönberger, *Unionsbürger. Europas föderales Bürgerrecht in vergleichender Sicht*, Tübingen 2005, p. 22 et seq.; G.-R. de Groot, *Nationality Law*, [in:] *Elgar Encyclopedia of Comparative Law*, ed. J.M. Smits, Cheltenham–Northampton p. 477; A. Mohay, D. Muhvic, *op. cit.*, p. 157.

<sup>31</sup> G.-R. de Groot, *op. cit.*, p. 477.

<sup>32</sup> See British Nationality Act von 1981, Part I, British Citizenship, available under [www.legislation.gov.uk](http://www.legislation.gov.uk).

as condition. However, the citizenship represents an autonomous concept, which needs to be distinguished from the nationality and the question of sovereignty. Hence, the Union citizenship of itself has the capacity to confer rights. In contrast to the British categorisation of civil rights, Union citizenship can be acquired on the basis of different nationalities, whereas the British nationality constitutes several citizenships.

The lived Union law emerges in a dialogue between the Member States and the ECJ. The former agree on abstract and general international treaty provisions. The Court's task is to solve practical legal issues, which are submitted to it. In doing so, it fills the provisions agreed upon by the states with tangible content. Both the free movement of the citizens of the Union and the Union citizenship itself found their legal basis in the Maastricht Treaty. By Article 8a of the EC Treaty, every citizen of the Union has been granted the right to move freely within the territory of the Member States and reside therein. Five years later, in the case *Martinez Sala*, the ECJ filled the wording of that provision with life and found that the free movement of EU citizens exists solely by virtue of EU citizenship;<sup>33</sup> the emergence of the right to freedom of movement does therefore not depend on the economic activity of the Union citizen.<sup>34</sup>

While in the case of *Martinez Sala*, it was the intention of the Court to emphasize the new wording of the EC Treaty or to affirm it by judgment,<sup>35</sup> it now seems to be a matter of reinterpreting the citizenship of the Union in the light of the new legal nature of the European Union. The characteristics of the EU's changing legal character are to be found in Article 2 and Article 6 TFEU. The European Union is based on a set of values, in which the rule of law and the protection of human rights are mentioned. Also, the legal position of the individual is substantially strengthened, which becomes manifest in the embedment of the Charter of Fundamental Rights in the Treaty.

The presence of a cross-border element is at no point explicitly mentioned in the EU primary law as a condition for the applicability of Union law.<sup>36</sup>

<sup>33</sup> Case C-85/96 *Martinez Sala* [1998], No. 61–63.

<sup>34</sup> Since civil rights have no absolute character and can be subject to limitations (see the wording of Art. 21 Abs. 1 TFEU, also P. Kubicki, *Die subjektivrechtliche Komponente der Unionsbürgerschaft*, *Zeitschrift Europarecht* (EuR) 2006, p. 496; S. Haack, *op. cit.*, No. 31, it is not impossible to differentiate in the area of residence law taking into account the economic activity of the Union citizen and his property. Such differentiations are also prescribed in secondary legislation, see Art. 7 of the Free Movement Directive (Directive 2004/38/EC of 29 April 2004, ABl. EU 2004 L 158/77). See also P.M. Huber, *Unionsbürgerschaft*, EuR 2013, p. 648; also A. Mohay, D. Muhvic, *op. cit.*, p. 167–168 and p. 170.

<sup>35</sup> See also D. Kochenov, R. Plender, *op. cit.*, p. 373 et seq.

<sup>36</sup> Emphatically D. Kochenov, R. Plender, *op. cit.*, p. 377.

It is an element of the case law of the ECJ, which was elaborated in order to pay due regard to the character of the EU as a union of states aiming at completion of internal market and promotion of international cooperation. If its legal character of the EU changes, it is not surprising that the condition of application of Union law – the existence of a cross-border element – is also put to the test. And since the EU by the Lisbon Reform Treaty has been clearly converted towards a polity, it is difficult to justify the need for a cross-border element if the core set of citizenship rights is affected.

The new approach in the case of *Ruiz Zambrano* is to be understood precisely in this sense. However, and at this point the critique of the judgment is entirely justified<sup>37</sup> – the ECJ has not adequately explained its new approach.

## Outlook

With a view to further development, the question arises whether the citizenship inevitably leads to the emergence of a new European sovereign people, and a new European state. Do the decisions on the Union citizenship provoke a „bursting of a dam” or do they – as it is seen by some voices in the literature – constitute an unstoppable legal development, or even a revolution<sup>38</sup>, which is incompatible with our legal system? Since the question of citizenship can be separated from the issue of sovereignty – as seen above – the discussions about the case *Ruiz Zambrano* should not be dramatised and should not be regarded through the prism of federalism, as some voices do.<sup>39</sup> It is true that there are some examples in history, in which the establishment of a supranational indigenats has led to statehood. Here, the North German Confederation is an example.<sup>40</sup> On the other hand, there is the example of the Socialist Federal Republic of Yugoslavia, in which the coexistence of two citizenships – that of the Republics and that of the Federation<sup>41</sup> – ultimately led to the demise of the latter. A historical determinism cannot be seen.

<sup>37</sup> See K. Hailbronner, D. Thym, *op. cit.*, p. 2013.

<sup>38</sup> See S. Haack, *op. cit.*, No. 36.

<sup>39</sup> See K. Hailbronner, D. Thym, *op. cit.*, p. 2011; S. Haack, *op. cit.*, No. 23, No. 36, but also D. Kochenov, *op. cit.*, No. 4, p. 98.

<sup>40</sup> Hereto in detail S. Hobe, *op. cit.*, p. 252 ff.

<sup>41</sup> See the Nationality Act of Yugoslavia from 1976, Sluzbeni list SFJR 58/1976. The dual citizenship was considered in the Yugoslav constitutional law doctrine as an expression of the federal state principle, see S. Popovic, *Upravno pravo, 10th edition*, Belgrade 1980, p. 325. Under international law, relevant was only the citizenship of the Federation. The loss and the acquisition of the citizenship were regulated by a federal law. The citizenship laws of the member states (the so-called Socialist Republics) referred in this regard to federal legislation, see S. D. Jovanovic, *Drzavljanstvo Socialisticke Federativne Republike Jugoslavije*, Belgrade 1977, p. 32–33.

Also, a revolution in the field of fundamental right protection is not to be expected. The assumption that the ECJ will extend the notion „the substance of the rights of a Union citizen” to a general clause is too far-fetched. Revolutionary developments are not to be feared, as the personal scope of most fundamental rights does not depend on the possession of a certain nationality. The core of the rights would be of importance especially in the range of those fundamental rights, which institute influence of the individual on the exercise of official authority.<sup>42</sup> Many of them have been codified in the European Charter of Fundamental Rights under the Title V („civil rights“).

Just as little it is to be feared that Article 51 of the Charter of Fundamental Rights will be undermined. Under this provision, the Charter is applicable „only in the case of enforcement of Union law“. The scope of this phrase is highly controversial.<sup>43</sup> At first glance, the new case law of the ECJ on the „substance of the rights of a Union citizen“ is an antithesis to the cited regulation: whereas on the one hand, Article 51 of the Charter presupposes the applicability of Union law or even its enforcement, on the other hand, the interference in the core of the rights of a citizen of the Union is conceived as a trigger of the applicability of Union law.

It has to be admitted that the complex, multi-level system of protection of fundamental rights within the EU could be further complicated. However, conflicting interpretations can be avoided entirely. It must first be borne in mind that Article 51 applies only to matters governed by the Charter of Fundamental Rights.<sup>44</sup> Parallel to the Charter, the unwritten fundamental rights developed as general principles of Union law by the ECJ continue to exist. This parallelism is explicitly stated in primary European law, in Art. 6 para. 3 TEU.

The ruling in *Ruiz Zambrano* could be conceived as a starting point for yet another, third level of fundamental rights protection. It would include those fundamental rights, which constitute the core of the rights of a EU citizen. As compared to the Charter and to the general principles, this third level wo-

<sup>42</sup> On this issue from the perspective of German constitutional law see P.M. Huber, *Unionsbürgerschaft*, EuR 2013, p. 650 ff.

<sup>43</sup> See J. Meyer, S. Magiera, *Charta der Grundrechte der Europäischen Union*, Baden-Baden 2011, Art. 51, No. 30-30a. For recent case law see Case C-617/10 *Åkerberg Fransson* [2013] and the critique of the German constitutional Court and academics in Germany see D. Thym, *Die Reichweite der EU-Grundrechte-Charta – Zu viel Grundrechtsschutz?*, NVwZ 2013, p. 889 et seq.

<sup>44</sup> This question is controversial, see W. Weiß, *Grundrechtsschutz durch den EuGH: Tendenzen seit Lissabon*, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2013, p. 288. A different interpretation would not be compatible with the wording of Art. 51 of the Charta („The provisions of this Charter are addressed to...“).

uld be, of course, depicted by a wide personal scope of the rights conferred: only the status of a citizen of the Union would activate the protection under Union law. But even in this respect, it should be noted that the third-country nationals would enjoy at best only derivative protection. Moreover, the level of material protection granted on the basis of the *Ruiz Zambrano* ruling could not be compared to the level of protection granted by the Charta and the general principles. Even the choice of words – „the substance of the rights“ – illustrates this. Currently, only the right not to be compelled to leave the territory of the Union, has been accepted as belonging to this substance. It is unlikely that the Court will display particular ambitions to extend the area of the „substance of rights”. The ECJ as „motor of integration“ should not work as ambitiously in the area of citizenship as it does in other fields of law.<sup>45</sup> In this regard, the traditional market- or mobility- oriented approach is more efficient than the new one based on citizenship. The right of residence of a spouse of a Union citizen who has exercised the freedom of movement – just to look at the cases of *Carpenter* and *Metock*<sup>46</sup> – has a broader scope than the right of residence based on a Union citizenship of a person who stays in his home country, as it can be seen in the case of *McCarthy*, which is the citizenship approach judgement.<sup>47</sup> So far, the ECJ shows that different national regulations can be tolerated more easily in respect of „the substance of the rights“ than in the presence of the cross-border element. In fact, the functioning of the Union as a legal community does in the case of a purely national issue not depend to the same extent on the uniformity of the application and the interpretation of Union law as it does in the case of the use of freedom of movement. Therefore an important argument<sup>48</sup> for the dynamic development of Union law by ECJ does not apply.

The right of residence of family members of a Union citizen is also considered a classic example of the so-called „reverse discrimination“, which exists when citizens of other EU Member States are better off compared to residents for reasons of Union law. Therefore, the question arises whether the concept of „the substance of the rights of a Union citizen“ defused the problem of reverse discrimination. At first glance, the potential of the new approach cannot be neglected.<sup>49</sup> Since a possible violation of „the substance of the rights“

<sup>45</sup> For a different opinion see S. Haack, *op. cit.*, No. 23, 34.

<sup>46</sup> Case C-60/00 *Carpenter* [2001]; Case C-127/08 *Metock* [2008].

<sup>47</sup> Case C-434/09 *McCarthy* [2009].

<sup>48</sup> Regarding the reasons for the dynamic interpretation see R. Bieber, A. Epiney, M. Haag, *Die Europäische Union*, 10. Aufl., Baden-Baden 2013, § 9, No. 5.

<sup>49</sup> The ruling of *Ruiz Zambrano* is interpreted as a prohibition of the discrimination of own nationals by J. Bergmann, *op. cit.*, p. 318. See also A. Mohay, D. Muhvic, *op. cit.*, p. 171 f.

is not limited to the crossing of a frontier, the substance of the rights can be affected by purely internal situations within one Member State. Hence the status of a national can be affected without him leaving his home country if he considers himself disadvantaged compared to a EU immigrant.<sup>50</sup> This situation is of concern with regard to the equal treatment commandments contained in the constitutions of the Member States.

The constitutional problem imposed by European Union law discrimination is not solved by the new judgment, but at best relocated. Even if one were to assume that European citizenship demands equal treatment of all EU citizens and thus also prohibits reverse discrimination, this does not apply to all residents, but only for those who possess the citizenship of the Union. Thus, another constitutional problem would open up: the problem of disadvantage of residents without citizenship of the Union in relation to EU citizens. For example, according to the German constitution, the possession of a certain nationality alone does not justify a different treatment of foreigners – except from a few exceptions provided by the constitution itself. Differentiations need to be measured according to the general principle of equality, which is codified in Art. 3 para. 1 of the German Basic Law.<sup>51</sup> Furthermore, not all differentiations between citizens of the Union would be covered, but only those falling under the area of “substance the rights”. The concept of “the substance of rights” would be than of no use for German breweries that do not want to brew according to the German purity law<sup>52</sup> – another classic example of national discrimination – even if the brewer is a citizen of the Union. Whether the *Ruiz Zambrano* ruling applies to the case of domestic legal persons suffering from a less favourable treatment in relation to legal persons from other EU countries is doubtful, given that the wording of the provisions on citizenship relate to natural persons only; the extent to which a corresponding application of the *Zambrano* approach is possible, remains unclear.<sup>53</sup>

<sup>50</sup> A.G. Sharpston requested a clarification by the ECJ in the case of *Ruiz Zambrano*, see A.G. Sharpston 30.09.2010, No. 143–144.

<sup>51</sup> See T. Milej, *Verfassungsmäßigkeit der Unterscheidung nach dem Merkmal der Staatsangehörigkeit im Bereich der gewährenden Staatsbürgerschaft*, NVwZ 2013, p. 689.

<sup>52</sup> As a result of a free movement of goods, beer fabricated in violation of medieval German purity law in the EU member States other than Germany may be sold on the German market, whereas such beer fabricated in Germany may not.

<sup>53</sup> There are some TFEU provisions, which confer certain rights *expressis verbis* to both citizens of the Union as well as legal persons, such as Article 228 TFEU, which codifies the right to refer a complaint to the European Citizens’ Rights Ombudsman. It can thus be concluded that legal persons can enjoy certain civil rights only if this is expressly so provided in the Treaty. For an application of civil rights to legal persons see Ch. Callies, M. Ruffert, W. Kluth, *EUV/AEUV*, 4th edition, München 2011, Art. 20, No. 10. Sceptical J. Schwarze, U. Becker, A. Hatje, J. Schoo, *EU-Kommentar*, 3th edition, Baden-Baden 2012, Art. 20 AEUV, No. 11.

## Conclusion

The fundamental problem of the new approach of the ECJ is the vagueness of the concept of the „substance of the rights“ of a Union citizen.<sup>54</sup> We leave the familiar and we do not know where to head for. We want more than just a market citizen, but we do not know exactly what depicts a citizen of the Union. We do not even know in which area to search for a definition of the substance of European citizenship. The enumeration of civil rights of the Union in Article 20 et seq TFEU is open and to be developed. The extensive catalogue of values and objectives of integration, which can be found in Art. 2 and 3 TEU, does hardly give any guidance, as some of the values and objectives are mutually exclusive. The same is true for the abstract ideas invoked in the literature, such as equality or freedom<sup>55</sup> or – here is a quote – „views about life in just (maybe even good) conditions“.<sup>56</sup> However, the new approach of the ECJ does not automatically lead to a supranational state. It is rather a moderate change of law and a contribution of the Court to a closer Union of the peoples of Europe, which the preambles of the founding Treaties have repeatedly since 1951 declared as the aim of European integration. It is a small step with great symbolic power. It shows that the Court understands the European Union not only as a market but also as a polity.

### Streszczenie

#### Istota praw obywatelstwa Unii w najnowszym orzecznictwie TSUE – potencjał i ograniczenia

Orzecznictwo TSUE kontynuujące linię orzeczniczą rozpoczętą wyrokiem w sprawie Ruiz Zambrano stało się przyczynkiem do dyskusji o rozszerzeniu zakresu prawa pobytu w UE dla krewnych obywateli Unii. Orzecznictwo to nasuwa jednak także pytania bardziej zasadniczej natury: Do jakiego stopnia obywatel Unii jest kimś więcej, aniżeli tylko uczestnikiem Wspólnego Rynku? Czy sama koncepcja obywatelstwa Unii może stanowić źródło, z którego da się wywieść niepisane prawa? Czy koncepcja ta stanowi rozszerzenie zakresu ochrony praw podstawowych, czy może także sprzeczne z traktatami rozszerzenie kompetencji UE? Oraz wreszcie, jakie wnioski da się na podstawie tego orzecznictwa wyciągnąć co do charakteru prawnego samej Unii? Niniejszy tekst stanowi próbę odpowiedzi na te pytania.

**Słowa kluczowe:** obywatelstwo Unii, prawo pobytu, element transgraniczny, podmiotowy zakres stosowania traktatów, istota praw obywatela Unii

<sup>54</sup> This point of view is shared by both supporters (D. Kochenov, R. Plender, *op. cit.*, p. 390–391; D. Kochenov, *op. cit.*, p. 122) and critics (see K. Hailbronner, D. Thym, *op. cit.*, p. 2013) of the new approach.

<sup>55</sup> See D. Kochenov, *op. cit.*, p. 132.

<sup>56</sup> M. Nettesheim, *op. cit.*, p. 1032.