10

Co-creating European Union Citizenship: Institutional Process and Crescive Norms

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Abstract

By focusing on processes and institutional change, EU citizenship emerges as a co-created institution. It is the product of institutional design and co-creation by actors at all levels of governance and is shaped by multilogues at the 'top', 'bottom' and 'sideways', as well as by citizens' formal and informal actions. A co-creation perspective leads us to reconsider state-centred assumptions about which form of citizenship should be predominant and the dualism of centralism (supra-nationalism) versus 'home-rule' (intergovernmentalism), and to embrace a genuinely citizen-centred perspective. The chapter develops the co-creation paradigm, examines its dimensions, various forms and patterns and, by discussing the post-*Rottmann* and *Zambrano* case law (*McCarthy*, *Dereci*, *Iida*, *O, S and L* and *Ymeraga*) as well as *Tsakouridis* and *PI*, sheds light onto the complex dynamics that make EU citizenship a vehicle of transformative institutional change but that can also work against it.

I. INTRODUCTION

THE EMERGENCE OF two different debates has featured prominently in recent EU citizenship literature. The first debate concerns the strong rights-based dimension which the Court of Justice of the European Union (hereinafter 'the Court') has given to EU citizenship since *Grzelczyk*, where the Court described it as 'the fundamental status of the

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nationals of the Member States'.[1] The Court's rulings in a number of important cases have swung the pendulum away from the market bias that has characterised most, but not all, of the literature for nearly two decades and have endowed EU citizenship with a normative vision.[2] The second debate revolves around the legitimacy of the Court's interventions. Participants in this debate have expressed concerns that legal interpretation is arbitrary and that the judicial decision making undermines democratic processes by subverting the legislature's mandate and function.[3]

Although these debates are conducted somewhat independently of each other, they are closely connected, and some of the opposing positions within and across these debates tend to obscure important issues surrounding the origin, evolution and content of EU citizenship and the role of law as interpretation. By resting on a series of oppositional logics, such as the individual versus society, the Member States versus supra-national institutional actors, freedom of movement of persons versus the sociality it involves, the economic versus the socio-political, and law as enacted versus law as interpretation, they fail to capture the complexity and multi-dimensionality of EU citizenship. In reality, none of these dimensions can have a definite meaning or effect independently from the others.

More specifically, the free movement of persons has strong socio-political dimensions which market-based perspectives underscore. Individuals are almost never solely economic agents; they are also social actors and moral agents, and to insist on prioritising the former over the latter results in

[1] Case C-184/99 *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193 [31].

[2] See, inter alia, D Kochenov and R Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance?' (2012) 37 *European Law Review* 369; F Wollenschlager, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17(1) *European Law Journal* 1; J Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in P Craig and G de Búrca (eds), *The Evolution of European Union Law* (Oxford, Oxford University Press, 2011); N Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *CML Rev* 1597; W Maas, 'Unrespected, Unequal, Hollow? Contingent Citizenship and Reversible Rights in the European Union' (2009) 15(2) *Columbia Journal of European Law* 265; M Everson, 'The Legacy of the Market Citizen' in J Shaw and J More (eds), *New Legal Dynamics of European Union* (Oxford, Oxford University Press, 1995) 73–90. Compare also E Recchi, 'Cross-state Mobility in the EU' (2008) 10(2) *European Societies* 197; D Kostakopoulou, 'European Union Citizenship: The Journey Goes On' in A Ott and E Vos (eds), *50 Years of European Integration: Foundations and Perspectives* (The Hague, TMC Asser Press, 2009), 270–90; 'EU Citizenship: Writing the Future' (2007) 13(5) *European Law Journal* 623; F Jacobs, 'Citizenship of the European Union—A Legal Analysis' (2007) 13(5) *European Law Journal* 591; M Elmore and P Starup, 'Union Citizenship—Background, Jurisprudence and Perspective: The Past, Present and Future of Law and Policy' (2007) 26 *Yearbook of European Law* 57.

[3] For a recent overview, see B de Witte and H-W Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Leiden, Intersentia, 2012). But compare A Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford, Oxford University Press, 2000).

positing fragmentary selves which bear little resemblance to real human beings. Similarly, EU citizens are not, and have never been, 'consumers' of lifestyle choices provided for by EU integration.[4] For the term 'consumer' captures neither their membership status and their concrete life experiences nor the complexity of the social and political relations that envelop them and are, in turn, created by their actions and multifarious practices. Living, working and engaging with the world go beyond the individualised consumption of 'choices', goods and services. The content and actual exercise of EU citizenship rights, on the other hand, depend on the Member States' decisive input and their role in implementing treaty provisions, the secondary legislation and the Court's rulings. And, finally, law as interpretation plays a very important role in realising legal provisions. Without the former, legal rules are not 'living' prescriptions and their relevance to individuals appears to be limited. In other words, the antithetical logic characterising the above debates conceals both correlational realities and social and institutional processes.

In all institutions, and in the process of European integration itself, the economic and the socio-political are closely intertwined and nothing happens disconnectedly. In addition, institutions are not monolithic creations obeying a singular logic.[5] They are situated in time and space, and are multilayered constructions that are subject to ongoing change. From moment to moment, from past to present to future, various institutional dimensions, be they essential or non-essential, mutate, expand or just become replaced by others. Moreover, the valuations, objectives, functions and principles animating them are themselves products of socio-political processes. In what follows, I build on these reflections and argue that correlational thinking and a processual approach enable us to see EU citizenship as a complex whole, to understand its evolution over time and to produce more nuanced accounts of the recent case law and its transformative potential.

By making both process and institutional change the foci of inquiry, EU citizenship emerges as a co-created institution.[6] By the latter I mean that

[4] Compare, here, Favell's notion of 'Eurostars': A Favell, 'Immigration, Migration, and Free Movement in the Making of Europe' in JT Checkel and PJ Katzenstein (eds), *European Identity* (New York, Cambridge University Press, 2009) 167–89.

[5] I adhere to a broad definition of institutions encompassing formal as well as informal practices, rules, norms, procedures and organisations facilitating human cooperation and coordinated action. See A Norgaard, 'Rediscovering Reasonable Rationality in Institutional Analysis' (1996) 29 *European Journal of Political Research* 31, 39; K Armstrong and S Bulmer, *The Governance of the Single Market* (Manchester, Manchester University Press, 1998) 56.

[6] The co-creation or co-construction of reality was the subject matter of P Berger and T Luckmann's book entitled *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (London, Penguin Books, 1971 [1966]). In it, they sought to develop a theory of society as a dialectical process between objective and subjective realities. They referred to the existence of multiple realities and the process of weaving a coherent sense of meaning among them. Their thoughtful comments and observations unravel the activist, in the sense of participatory as well as activity-based (that is, practice-oriented), construction of all institutional realities.

it is the product of institutional design and co-creation by actors at all levels of governance and is shaped by multilogues at the 'top', 'bottom' and 'sideways', as well as by citizens' formal and informal actions. A co-creation perspective leads us to reconsider state-centred assumptions about which form of citizenship should be predominant and the dualism of centralism (supra-nationalism) versus 'home-rule' (intergovernmentalism) and to embrace a genuinely citizen-centred perspective.[7] This perspective is not premised on the existence of pre-established ideas about the primacy of one level of governance or of certain institutional actors. Nor does it rely on preconceived notions about where or how co-creation should take place. Instead, it welcomes the co-involvement of actors, both individual and collective, the combination of old and new ideas and law and policy experimentation with a view to upgrading rights' protection, tackling policy gaps, providing more enriched life horizons for citizens and reducing the structural and ideological barriers to their self-realisation.

The subsequent discussion is structured as follows. In section II, I unravel the main dimensions of the co-creation of EU citizenship, while section III examines EU citizenship's institutional past and the double movement of co-creation. In section IV, I discuss in more detail the unfolding logic of co-creation and the Court's contribution to refining, and redefining, EU citizenship by aligning judicial output during the period 2010–13 to institutional change. The concluding remarks are contained in the last section. In it, I argue that the robustness of EU citizenship will be measured less on uniformity and the absence of ambiguity, and more on its ability to engage various individual and institutional actors and to provide solutions that enhance the life prospects of EU citizens. The latter is actualised very simply in the will to 'live in common' and to enjoy equal treatment irrespective of their Member State nationality in the territory of the EU. It is EU citizenship's radical progressive tendency towards association[8] and the intention to supersede past (and present) divisions and discrimination on the ground of nationality as far as possible that has made it, and continues to make it, a vehicle of transformative institutional change.

II. DIMENSIONS OF CO-CREATION

One might identify three important dimensions in the co-creation of EU citizenship. First, EU citizenship is not the product of mimesis;[9] it is an act of original creation. Lacking clearly defined and well-functioning

[7] D Kostakopoulou, 'The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions' in de Witte and Micklitz (eds) (n 3) 202–03.

[8] This phrase is borrowed from J Ortega y Gasset, *The Revolt of the Masses* (New York, WW Norton and Company, 1957 [1930]) 75–76.

[9] Aristotle, *Poetics*, 1448b.

predecessors, this form of citizenship beyond the nation state did not have to exist. Its juridical roots lie in the free movement of workers provisions of the Treaties of Paris and Rome, which Walter Hallstein, the first President of the Commission (1958–69), saw as the foundation of a 'European Economic and Social Community'.[10] Since the very beginning, labour mobility was thus tangled with a broader normative vision, that is, of establishing a European citizenship. This is how Lionello Levi Sandri, the Vice-President of the Commission, imagined the future.[11] The Preamble to Council Regulation 1612/68 explicitly referred to 'the fundamental right of workers to improve their standard of living which must be exercised in freedom and dignity'.[12] And as workers could invoke and exercise their free movement rights without the unnecessary interference and approval of the host Member States, it has been convincingly argued that the EEC Treaty established an incipient form of EU citizenship for certain classes of persons, that is, workers, professionals, service providers and their families.[13]

In addition to its construction *ex nihilo*, it has undergone, and is still undergoing, change due to the simultaneous interaction, and sometimes collision, of four spheres; namely, the EU, national-statist orders, exogenous developments of a more global nature, and actors' normative expectations and claims. The system comprising these four spheres is thus neither closed nor open; rather, it is in constant flux. All of them are changing, thereby triggering changes and mutations to one another. In the late 1990s, I used the term 'nested EU and national citizenships' in order to study the mutual interactions and the Europeanisation of national citizenship.[14] But nestedness also implies nestedness within a bigger setting, that is, within the world, as well as within a network of micro-actions by agents who activate processes of systemic change. Rules are located within the context, which, in turn, is nested within a larger context and this, in turn, is nested within a larger environment. All of them are interlinked and are capable of triggering ripples of change. In this sense, context does not merely point to entailment, detail and causation, but also reveals constraints as well as possibilities.

Historically, it is not difficult to trace the mutating and enriching nature of EU citizenship. In the early 1970s, the Member States manifested their

[10] W Hallstein, *Europe in the Making* (London, Allen & Unwin, 1972 [1969]) 173–74.

[11] The Free Movement of Workers in the Countries of the European Economic Community, Bull EC 6/61, 5–10, 6.

[12] European Council, Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, OJ Special Edition 475, [1968] OJ L257/2.

[13] R Plender, 'An Incipient Form of European Citizenship' in F Jacobs (ed), *European Law and the Individual* (Amsterdam, North Holland, 1976).

[14] T Kostakopoulou, 'Nested "Old" and "New" Citizenships in the EU: Bringing Forth the Complexity' (2000) *5 Columbia Journal of European Law* 389. See also T Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester, Manchester University Press, 2001).

determination to build 'a Community of law and democracy which measures up to the needs of the individual and preserves the rich variety of national cultures by adopting the Declaration on European Identity'.[15] Leo Tindemans, the Belgian Prime Minister, who was instructed by the Paris conference to articulate concrete proposals for strengthening citizens' rights, produced a report which advocated the protection of fundamental rights in the EU, consumer rights for European citizens and the protection of the environment.[16] The establishment of common European rights was envisaged to bring 'Europe close to its citizens', create a feeling of identification with the EU as a whole and to make a 'people's Europe' a reality. In this respect, Tindemans' report on the EU contained a number of recommendations for the creation of a 'Europe of citizens' anchored on solidarity.

Further reforms at the turn of that decade, such as the first direct elections to the European Parliament in 1979,[17] the introduction of uniform passport in 1981, the prospect of the abolition of internal frontier controls coupled with the Commission's draft directive on residence of Community nationals in the territory of host Member States in 1979, and its proposal to grant local electoral rights to Community nationals residing in host Member States,[18] gave more impetus to the idea of common European citizenship. In fact, they re-casted established conceptions of community membership and intra-Community migration away from the Member States' classificatory and regulatory matrix.[19] The Member States opposed the relaxation of the national citizenship requirement for franchise in the 1970s, thereby forcing the Commission to shift its attention from political rights to establishing local consultative councils for migrant workers in the host Member States. In the mid-1980s, the Adonnino Report[20] favoured the grant of local electoral rights and voting rights in European Parliament elections in the Member State of residence, and the Draft Treaty on European Union (DTEU) proposed by the European Parliament in 1984 recommended the formal establishment of EU citizenship conditioned on the possession of Member State citizenship. Indeed, the Draft Treaty echoed Spinelli's belief that the Second World War had reduced 'the habitual respect of citizens for

[15] European Commission, '7th General Report EC' (1973) annex 2, ch II.

[16] For a more detailed exposition, see A Wiener, *Building Institutions: The Developing Practice of European Citizenship* (Boulder, Westview, 1998); Kostakopoulou, *Citizenship, Identity and Immigration in the European Union* (n 14); W Maas, *Creating European Citizens* (Lanham, Rowman & Littlefield, 2007).

[17] [1977] OJ 278/1.

[18] (1972) 10 *EC Bull.*

[19] The latter term is borrowed from R Brubaker, 'Migration, Membership and the Modern Nation-State: Internal and External Dimensions of Belonging' (2010) XLI(I) *Journal of Interdisciplinary History* 61, 76.

[20] Pietro Adonnino chaired the ad hoc Committee for a People's Europe in line with the mandate given to it by the Fontainebleau Council in 1984.

their states and their myths and opened the way to the united European transformation'.[21]

Although the Draft Treaty did not have a formal institutional impact in the sense of its provisions finding their way into the concrete articles of the Single European Act, it nevertheless provided important normative and ideational resources which would be utilised at Maastricht and beyond. In fact, it may be argued that the DTEU's provisions on EU citizenship, the Adonnino Committee's work[22] coupled with the Commission's determination to expand the personal scope of free movement beyond active economic actors, which was also reflected in the 1985 Paper on Completing the Internal Market,[23] and the formal adoption of the three 1990 Residence Directives (on students, pensioners and self-sufficient European citizens, provided that they had medical insurance and sufficient means so as to avoid becoming a burden on the welfare system of the host state)[24] led to the constitutional framework on EU citizenship at Maastricht.

The foregoing discussion of the 'generative' citizenship templates during the first decades of European integration exerting a structuring efficacy,[25] which was fully utilised at Maastricht, leads us to the third dimension of a co-created institutional reality: namely, the fact that EU citizenship comes into being by being activated by actors. To put it differently, EU citizenship cannot exist without EU citizens doing it, that is, actualising it in their everyday lives. True, there exists no compulsion on the part of an EU national to activate it. In fact, one may never activate it and thus may have no clear sense of either its existence or its significance. For until the end of the first decade of the new millennium, it was only by deciding to cross national borders and to enter the territory of another Member State that an EU national became an EU citizen and a bearer of rights which governmental authorities had to respect.[26] EU citizenship was thus not 'given' in a meaningful sense prior to a process of one's participation in border crossings which initiated new experiences, a new form of identification and political negotiations across a whole range of social and political sites.

This performative dimension inherent in EU citizenship transforms an EU national/EU citizen into a central actor in the overall motion picture.

[21] A Spinelli, 1966, 7, quoted in Maas (n 16) 120.

[22] See Adonnino Committee, 'Second Report' (1985) 2 *EC Bull Supplement* 7, 9–14.

[23] European Commission, 'Completing the Internal Market (White Paper)' COM(85) 310.

[24] Directives 90/364, 90/365 and 90/366, which were replaced by Directive 93/96. The European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their Family Members to move and reside freely within the territory of the Member States [2004] OJ L158/77, which repeals the above-mentioned Directives, introduces three separate categories of residence rights and establishes an unqualified right of permanent residence after five years of continuous legal residence in the host Member State.

[25] The term is borrowed from P Bourdieu, *Outline of a Theory of Practice* (Cambridge, Cambridge University Press, 1999 [1977]) 97.

[26] See the discussion in section IV below.

The institutional reality of EU citizenship becomes inseparable from his or her reality and the whole system maintains its equilibrium by internal, agency-related motion. Successive personal 'stages' or 'moments', such as crossing the border without an impediment, residing in another Member State without (unlawful) restrictions, engaging in employment or seeking employment, bringing one's spouse and dependent children to live with him or her, enrolling them in schools, claiming family reduction railcards in order to visit other places during the weekend and so on—in short, the movement from time t to time t+1 to t+2 etc—instantiate EU citizenship. But they may also reveal obstacles to realising it. The expectation of equal treatment which has been nurtured by formal rules may collide with administrative realities, and the experience accumulated between successive moments may lead to future-oriented action and thus to demands for improvement or institutional change. The parameters of what is possible, and what is normatively desirable, become broadened as a result of agents' actions and their claims-making. Having identified the three dimensions of the co-created reality of EU citizenship, namely: a) institutional design and construction without precedent; b) the presence of dynamic and restless change on multiple levels; and c) the involvement of a *social self in action*,[27] it is important to examine how co-creation works before investigating the evolutionary dynamics of this institution.

III. HOW CO-CREATION WORKS: CRESCIVE NORMS AND THE DOUBLE MOVEMENT OF CO-CREATION

When ideas become translated into policy prescriptions and legal regulatory templates, it is only natural that they take a concrete, sedimented form which appears to be divorced from their previous penumbrae. By the latter, I mean the meanings, conceptions, norms, notions, conditions, facts, programmatic statements and so on that surrounded them. Crystallisation invariably freezes a fluid context and institutional crystallisation constitutes no exception. What existed before, and was intimately connected with the chosen form or rule, becomes forgotten and previously strong connecting links become fragmentary, isolated and discrepant. The pre-existing ideas and notions also lack coherence and their often floating meanings circulate around the chosen law or policy, but have not yet found their appropriate place.

[27] Compare here Dewey's understanding of society and agents as forming a restless and fully integrated system. Indeed, according to Dewey, we are parts of a moving, dynamic, interactive system: 'we, who are also parts of the moving present, create ourselves as we create an unknown future': J Dewey, *Individualism Old and New* (Amherst, NY, Prometheus Books, 1999) 83.

Painstaking archival work and the personal accounts of the actors who sat at the negotiating table and took part in the discussions which culminated in the adoption of the final legal text often shed light onto the penumbra of law. Other (activist) actors seeking to make a claim for the development or revision of law or policy will often find the unchosen 'might have beens', give them recognition and will incorporate them into their agendas. And, eventually, changed conditions and the requisite need to respond to them might resurrect them, thereby inaugurating processes of extending and thus transforming the form, scope and value of the institution. The history of the present (the past of the present) affirms itself and both present and past are altered by the present circumstances, which inevitably bring the future within the present. The future more often than not is in the past in the same way that if one starts peeling off layers of the present, one uncovers the traces of the past. In a slightly different way, Thelen has discussed the 'layering process of institutional change, whereby certain elements of a given set of institutions are renegotiated whereas others are left in place'.[28] This is one way of orchestrating the co-creation of institutional realities.

Instead of focusing directly on the penumbra of a policy, legal rule or norm, another, but not necessarily unrelated, way of understanding co-creation would be to put the emphasis on their core and to amplify the normative or cognitive depth of the idea or principle underpinning them. This amplification happens as a result of the 'collision' of the idea or principle with empirical reality or the raw data. The latter constantly reveal openings which could have been anticipated. This sparks a double movement from the ideational or the principled template to partial (and often confused) observations and raw facts and from the latter back to the former. This back-and-forth movement from the abstract to the particular connects the idea, principle or norm with the actual data or need, thereby expanding the former's application and possible meanings. New operations of the same principle or modifications of the principle emerge. The new circumstances become premises of reasoning and opportunities for experimentation which impact upon the abstract whole. General principles thus convert isolated particulars on the one hand, and particulars refine, extend and revise general principles on the other. This working back and forth flows in a way that is almost impossible to stop; it is an ongoing relational process that is bound to remain incomplete, always flowing like a stream and craving for more inclusive and far-reaching meanings, and for a better reciprocal adjustment between the ideational and the real.[29]

[28] K Thelen, 'How Institutions Evolve: Insights from Comparative-Historical Analysis' in J Mahoney and D Rueschemeyer (eds), *Comparative Historical Analysis in the Social Sciences* (Cambridge, Cambridge University Press, 2003) 225.

[29] As Dewey has observed, 'in every judgement some meaning is employed as a basis for estimating and interpreting some fact; by this application the meaning is itself enlarged and tested. When the general meaning is regarded as complete in itself, application is treated as an

Institutional development and change are thus intrinsic parts of the process—and not epiphenomena of critical junctures, as the institutionalist literature has indicated.[30] The double movement described above can occur in a more or less regulated manner as well as at random. Certainly, it is likely to be more successful if the surrounding environment is congenial, but even an uncongenial environment cannot thwart change; it merely affects its rate and amplitude. The adoption of the Citizenship Directive (2004/38)[31] is a manifestation of the former process, while the unpredictability of cases on EU citizenship reaching the Court and of adjudication are manifestations of the latter. Notwithstanding their differences, however, both processes fill existing breaches, bridge gaps in coherence, bring previously unconnected facts together under the ambit of a norm, extend the norm by linking it to other adjacent norms, jump from one consideration to another and discover new connections between principles and pragmatic considerations in the light of new environmental exigencies and the facts at hand. The process is quite complex and multi-dimensional.

In the unfolding process of co-creating EU citizenship in the 1990s, the Court played a key role. It began to display innovative reasoning in the *Martinez Sala* case by planting the seeds for a shift from protecting the rights of active economic actors to affirming the equal treatment of all EU citizens irrespective of their nationality.[32] Soon afterwards, it stated that 'Union citizenship is destined to be a 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'.[33] In that case, EU national students studying in another Member State and facing temporary economic difficulties could rely on the non-discrimination clause in claiming social advantages, provided that they did not place an unreasonable burden on the welfare system of the host Member State. More frequent

external, non-intellectual use to which for practical purposes alone it is advisable to put the meaning. The principle is one self-contained thing; its use is another and independent thing. When this divorce occurs, principles become fossilised and rigid; they lose their inherent vitality, their self-impelling power … A true conception is a moving idea': J Dewey, *How We Think* (Memphis, Central Books, 2012) 59.

[30] See DC North, *Institutions, Institutional Change and Economic Performance* (Cambridge, Cambridge University Press, 1990); K Thelen and F Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge, Cambridge University Press, 1992). But compare P Pierson, 'The Limits of Design: Explaining Institutional Origins and Change' (2000) 13 *Governance* 474.

[31] Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77 (Citizenship Directive).

[32] Case C-85/96 *Maria Martinez Sala v Freistaat Bayern* [1998] ECR I-2691.

[33] *Grzelczyk* (n 1) [31].

judicial interventions in the new millennium made EU citizenship more loosely connected with economic and migration status and more closely aligned with 'a powerful mission of protection of individual rights'.[34]

Accordingly, it comes as no surprise that in *Baumb*ast the Court explicitly recognised that Article 21(1) of the Treaty on the Functioning of the European Union (TFEU) (formerly 18(1) TEC) is directly effective, that is, it confers rights on individuals which are enforceable before national courts.[35] Since *Baumbast*, the Court has almost re-defined EU citizenship: besides direct and indirect discrimination, it has outlawed non-discriminatory restrictions that hinder or make the former less attractive by posing 'unjustified burdens'[36] and 'serious inconveniences',[37] and has made denationalisation (and naturalisation) decisions taken by the Member States subject to judicial review and subject to a proportionality test,[38] thereby intruding into what was previously thought to be the Member States' core preserve of sovereign jurisdiction.[39]

Although the Court's rulings have not escaped criticism in some quarters, it would nevertheless be problematic to ignore the arrow of time[40] and to disregard the relation between seemingly momentary and fragmentary factual details and binding principles or rules. EU citizenship has assumed central constitutional importance and this paradigmatic change, which the Court has effectuated, has taken place in a coherent as well as a reflexive way. Coherence captures to a greater extent the unfolding logic of realising equal treatment irrespective of nationality, which is the normative premise of EU citizenship, and less pleas for predictability and smooth outcomes, while reflexivity, on the other hand, points to the construction of a para-

[34] S Weatherill, *Cases and Materials on EU Law* (Oxford, Oxford University Press, 2003) 490; P Van Der Mei, *Free Movement of Persons within the European Community* (Oxford, Hart Publishing, 2003); D Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 65(2) *MLR* 233; N Reich, 'The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union' (2005) 11 *European Law Journal* 675; M Dougan, 'The Constitutional Dimension of the Case Law on Union Citizenship' (2006) 31 *European Law Review* 613; A Albors-Llorens, 'A Broader Construction of the EC Treaty Provisions on Citizenship' (1998) 57 *CLJ* 461.

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

[36] Case C-224/02 *Heikki Antero Pusa v Osuuspankkien Keskinainen Vakuutusythio* [2004] ECR I-5763; Case C-406/04 *G De Cuyper v Office national de l'emploi* [2006] ECR I-06947; Case C-192/05 *K Tas-Hagen and RA Tas v Raadskamer WUBO van de Pensioen—en Uitkeringsraad* [2006] ECR I-10451; 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.

[37] See Case C-391/09 *Runevič-Vardyn* (ECJ, 12 May 2011); Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693.

[38] Case C-135/08 *Janco Rottmann v Freistaat Bayern* [2010] ECR I-1449. See also Case C-200/02 *Zhu and Chen v Secretary for the Home Department* [2004] ECR I-9925.

[39] Wollenschlager (n 2).

[40] P Pierson, *Politics in Time* (Princeton, Princeton University Press, 2004).

digm that discourages neither criticism nor modifications. True, our lives would be easier if we were confronted with certainties, but we all know that the predominant trend is change and evolution. The latter unfold with little regard to predictive rules and linear determinism, and the above-mentioned cases show how the 'new', which does not fit into the established grid, prompts modifications and extensions of the EU citizenship template. Norms are crescive, that is, evolving and growing, and the general process of institutional change brought about by actors exhibits a clear direction.

IV. CO-CREATION'S WAYS

The process of co-creation outlined in the preceding sections presupposes neither the existence of a determinate agenda nor the presence of a given and closed universe of meaning whereby change will be activated by the existence of a lack, or a fault, or, indeed, a weakness and therefore concomitant attempts to go beyond all of them. Instead, co-creation leads us to realise that in all types of institutional decision making and evolution, the index is as important as the agenda, various layers of meaning can be juxtaposed, superimposed or just used to push one another out of the way, and that change can occur without giving prior intimations. In fact, in vast multiverses of meanings, settled interpretations can live for some time or become easily disrupted by sub-universes of meanings which had been previously excluded or left dormant. In brief, history, institutions and politics exist in time and time horizons vary.[41]

Although it would be futile to seek to map out such a process so prone to unpredictability and complexity, one can nevertheless discern in both decision making and adjudication some patterns, which are as follows: a) roundabout moves creating what may be called a pre-pattern; b) cul-de-sac moves, leaving actors and audiences disappointed and thus occasioning a return to the drawing board; c) back-and-forth oscillations between new and old meanings; and d) breaks. The latter can either be a clearly visible derogation from the past (rupture), an enhancement of it (adaptation and acceleration) or an epistrophe to it (regression). In what follows, I elaborate on these patterns by focusing on two areas of EU citizenship case law, namely, family migration and the deportation of long-term resident EU citizens on the ground of public security. This focus is important not only because of the Court's vital contribution to the co-creation of EU citizenship and to norm-creation, but also because it sheds ample light onto the evolving process of institutional change.

[41] Ibid.

A. Step Change

Although the Court has been influential in the domain of EU citizens' family reunification and has made respect for family life an integral part of the general principles of EU law, thereby causing fictions with national migration laws,[42] it is generally acknowledged that its judgment in *Zambrano*[43] is revolutionary.[44] In this case, the Court extended the scope of EU law to a 'wholly internal situation' by ruling that the Colombian parents of two Belgian (and thus EU citizen) children could not be denied residence and work permits if such a denial would result in the children's deprivation 'of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. A refusal to grant a right of residence to a third-country national with dependent minor children in the Member State where those children are nationals and reside … has such an effect'.[45] The refusal to grant a right to residence to the parents of the children would thus result in the children's departure from 'the territory of the Union' and the deprivation of the opportunity to exercise their EU citizenship rights.

[42] Case C-60/00 *M. Carpenter* [2002] ECR I-6279; *Baumbast* (n 35); Case C-459/99 *MRAX* [2002] ECR I-6591; Case C-540/03 *European Parliament v Council* [2006] ECR I-5769; Case C-127/08 *Metock* [2008] ECR I-6241.

[43] Case C-34/09 *Ruiz Zambrano v Office national de l'emploi (ONEM)* [2011] ECR I-0000. Ruiz Zambrano was a Colombian national who had been residing in Belgium without a residence permit following the rejection of his asylum application, but could not be deported to his country of origin, Colombia, owing to non-refoulement reasons. His wife gave birth to two children, Diego and Jessica, both Belgian nationals and EU citizens since the father failed to register the births with the Colombian embassy. Although Mr Zambrano and his wife could not leave Belgium and were denied work and residence permits, he nevertheless had taken up full-time employment for five years in order to support his family and contributed to the tax and social security burden of the Belgian commonwealth. But when, following his redundancy, he challenged the authorities' refusal to recognise his entitlement to unemployment benefit, he and his family faced the prospect of exclusion from Belgium and thus from the European Union.

[44] S Mantu, 'European Union Citizenship anno 2011: Zambrano, McCarthy and Dereci' (2012) 26(1) *Journal of Immigration Asylum and Nationality Law* 40; A Hinarejos, 'Citizenship of the EU: Clarifying "Genuine Enjoyment of the Substance" of Citizenship Rights' (2012) 71(2) *CLJ* 279; A Tryfonidou, 'Redefining the Outer Boundaries of EU Law: The Zambrano, McCarthy and Dereci Trilogy' (2012) 18 *European Public Law* 493; A Wiesbrock, 'Disentangling the "Union Citizenship Puzzle"? The McCarthy Case' (2011) 26 *European Law Review* 861; K Hailbronner and D Thym, 'Annotation of Case C-34/09 Ruiz Zambrano' (2011) 48 *CML Rev* 1253.

[45] *Zambrano* (n 43) [44]. For commentary, see also C Lenaerts, '"Civis Europeaus Sum": From the Cross-Border Link to the Status of Citizen of the Union' (2011) 2 *Online Journal of Free Movement of Workers within the EU* 12; D Kochenov, 'A Real European Citizenship: The Court of Justice Opening a New Chapter in the Development of the Union in Europe' (2012) 18(1) *Columbia Journal of European Law* 55; D Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62(1) *International and Comparative Law Quarterly* 97; M Hailbronner and S Iglesias Sanchez, 'The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status' (2011) 5 *International Constitutional Law Journal* 498.

Prior to *Rottmann*[46] and *Zambrano*, the boundaries between 'wholly internal situations' which are governed by national law, on the one hand, and cross-border activity activating the application of EC/EU law, on the other, had remained settled until the first decade of the new millennium because Justices were unwilling to call them into question.[47] Quite often the boundaries were fuzzy, cases tested them[48] and on several occasions the issue surfaced and re-surfaced in judgments and in submissions by the Member States. At this point, one might also argue that the maintenance of these boundaries served the EU integration process by steering an equilibrium between national competences and the evolving Community law. However, as the 'purely internal situations' doctrine has been in itself historically and politically conditioned, it would be a mistake to reify it, that is, to view it as a special kind of doctrine resisting adaptation and critical reflection.

What changed initially in *Rottmann*[49] and subsequently in a clearer way in *Zambrano* was the Court's willingness to address some of the paradoxical results that the wholly internal/EU law dualism had generated, since they did not only appear to contradict the fundamental status of EU citizenship, but they also threatened to make it ephemeral. In this respect, the *Rottmann* and *Zambrano* judgments are seminal as they re-inscribe EU citizenship within a Europolitical frame that cannot tolerate Member States' actions of rendering this status meaningless or completely ineffective.[50] Here, I discern the same rights-based logic that brought about the foundational doctrines of the Community legal order, such as direct effect, supremacy and state liability. This is none other than the need for the intervention of EU law in order to protect individuals in cases of state failure which limits the effectiveness of EU law. This is the moment of co-creation at work—a moment of important institutional change due to the Court's willingness to intervene

[46] *Rottmann* (n 38).

[47] Case 175/78 *R v Saunders* [1979] ECR 1129, [1979] 2 CMLR 216. See also R White, 'A Fresh Look at Reverse Discrimination?' [1993] *European Law Review* 527.

[48] Case 180/83 *Moser v Land Baden-Wurttemberg* [1984] ECR 2539; Case 35-36/82 *Morson and Jhanjan v The Netherlands* [1982] ECR 3723; Case 298/84 *Iorio v Arienda automata delle Ferrovie dello stato* [1986] ECR 257; Cases C-64 and 65/96 *Uecker and Jacquet v Land Nordrhein-Westfalen* [1997] 3 CMLR 963; Joined Cases C-225/95, C-226/95 and C-227/95 *Anestis Kapasakalis, Dimitris Skiathitis and Antonis Kougiaskas v Elliniko Dimosio* [1998] ECR I-4239.

[49] In *Rottmann* (n 38) [42], the Court held that 'by reason of its nature and its consequences, the situation fell within the ambit of European Union law'.

[50] Shuibhne does not detect a novel approach in the Court's judgment in *Zambrano* (N Nic Shuibhne, 'Annotation of Case C-434/09 *McCarthy* and Case C-256/11 *Dereci*' (2012) 49 *CML Rev* 349). Kochenov, Hailbronner and Thym see 'the substance of rights' as a judicial innovation: K Hailbronner and D Thym, '*Zambrano*' (2012) 48 *CML Rev* 1253 (note), 1257; Kochenov, 2012 (n 45). Compare also MP Maduro, 'The Scope of European Remedies' in C Kilpatrick et al (eds), *The Future of Remedies in Europe* (Oxford, Hart Publishing, 2000) 117, 134–35; S Kadelbach, 'Union Citizenship' in A Von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Munich, CH Beck, 2009) 435.

in extraordinary situations where the EU citizenship status itself is at stake in order to protect the rights of the vulnerable EU citizens. As already argued, *Rottmann* subjects the withdrawal of nationality leading to de facto and de jure statelessness to judicial review and to a proportionality test, while in *Zambrano*, the Court essentially preserves the normative integrity of respect for family life as a fundamental right,[51] which the EU Charter of Fundamental Rights has upgraded to a constitutional guarantee,[52] by precluding the deportation of, and the non-issuing of a work permit to, non-EU national parents of EU citizen children. By so doing, it increased the 'volume' of EU citizenship and extended its 'surface radius' so that it could be invoked by non-mobile children who are EU citizens at home facing departure from the EU.[53]

B. Back-and-Forth Oscillations between 'the New' and 'the Old' and Change as Direction and Suggestibility

Having stretched the outer limits of EU law in *Zambrano*, the Court decided to circumscribe change in the subsequent case of *McCarthy*[54] by maintaining the cross-border link as the crucial factor for the activation of EU law. But circumscribing change by stressing, for instance, the *exceptionality* of the facts of *Zambrano* does not mean that an institutional actor does not have the conviction to continue on the same path. Nor does it imply that change is stalled. To believe so would be tantamount to viewing institutional change as a continuously upward movement resembling the ascendance of a ladder. But ladder ascendance captures neither the complex process of change nor the multiplicity of the forms it takes.

[51] Advocate General Sharpston, in her Opinion on *Zambrano* of 30 September 2010, highlighted the importance of fundamental rights in the light of the legally binding Charter of Fundamental Rights, but the Court premised its decision on EU citizenship rather than on fundamental rights. Notably, AG Sharpston had also stated that 'Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national law that entails a violation of a fundamental right protected by EU law, where at least equivalent protection is not available under national law' (point 144).

[52] It would have been impossible for the judiciary, but also for other Community institutions to ignore the Charter's Preamblic reference to '[the Union] places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice'. Compare also the British case *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 [30].

[53] N Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?' (2002) 39 *CML Rev* 731; E Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *CML Rev* 13; A Tryfonidou, *Reverse Discrimination in EC Law* (Alphen aan den Rijn, Kluwer, 2009).

[54] Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-03375.

McCarthy, a dual national of British and Irish nationality who wished to secure a right of residence for her spouse, a Jamaican national, by invoking her newly acquired Irish nationality, had not been a worker or a self-employed person or a self-sufficient person exercising her free movement rights under EU law, and the Court concluded that the UK authorities' refusal to grant a residence permit to her Jamaican husband did not have any impact upon her right to move and reside freely within the EU. The structure of the legal argumentation and decision is premised on a distinction between this case and *Zambrano* in that the restrictive UK migration provisions did not have the effect of necessitating Mrs McCarthy's departure from the territory of the EU[55] and thus did not result in the deprivation of the genuine enjoyment of her rights or impeding the exercising of her freedom to move and reside freely within the territory of the Member States under Article 21 TFEU.[56]

Clearly, this judgment, as well as the subsequent one in *Dereci and others*,[57] represented roundabout moves following the step change brought about by *Zambrano*. Perhaps the Court felt that it had to create a series of buffers that cushioned the impact of *Zambrano*. Alternatively, it might be argued that the Court felt that the time was not right for a total 'rupture', that is, the abolition of the 'purely internal situation' doctrine, since this would trigger an unauthorised upgrading of the EU constitutional settlement. But it would equally be fallacious to view the Court's rulings in post-*Zambrano* cases as simple backward moves (or regress) and thus criticise it for introducing uncertainty, incoherence and ambiguity in EU citizenship-related case law. For it is often the case that radical institutional change, such as the step change in *Zambrano*, is frequently followed by a period of 'back-and-forth oscillations' which prepares the ground for another kind of change, namely, adaptive change. In post-*Zambrano* judgments (*Dereci and others*[58] and *Iida*),[59] we thus discern another kind of institutional change, namely, change as direction, a choice and suggestibility.

In *Dereci and others*, the Court distinguished *Dereci* from *Zambrano* by stressing the *exceptionality* of *Zambrano*,[60] that is, its application to an EU citizen's denial of the substance of his or her rights manifested in his or her forced departure from not only the territory of a Member State

[55] Ibid [50].
[56] Ibid [49].
[57] Case C-256/11 *Dereci, Heiml, Kokollari, Maduike and Stevic v Bundesministerium fur Inneres* (ECJ, 15 November 2011).
[58] According to the Court, third-country national members of the family of EU citizens (in that case, all Austrian nationals) who had never exercised their right to free movement and did not rely on their spouses for their subsistence fell within the ambit of the internal situation doctrine. Accordingly, both the family reunification directive (art 3(3) 2003/86) and the Citizenship Directive (n 31) did not apply.
[59] Case C-40/11 *Yoshikazu Iida v Stadt Ulm* (ECJ, 8 November 2012).
[60] *Dereci* (n 57) [67].

but also the territory of the EU,[61] thereby compromising the *effet utile* of EU citizenship.[62] It also embarked upon suggestibility, that is, it provided a clear direction that fits into the overall normative context by stating that if the Austrian measures were found by the referring court not to fall within the ambit of the 'deprivation of the substance of the EU citizenship rights doctrine', then 'other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused' may be examined.[63] An 'order of possible options' was thus established:

> Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.[64]

The activation of the right to respect for private and family life under Article 7 of the EU Charter of Fundamental Rights (EUCFR) and Article 8(1) of the European Convention on Human Rights (ECHR), if there exists a connecting link with EU law, thus emerges as an alternative option to mitigate the 'wrongs' resulting from the 'exceptional' applicability of the 'deprivation of the substance of EU citizenship rights' doctrine. In other words, the Court (Grand Chamber) did not wish the novelty of *Zambrano* to melt away and, even though it refrained from commenting on all possible links between Articles 20 and 21 TFEU and fundamental rights,[65] it clearly conveyed the importance of affirming the importance of the right to family life for all EU citizens irrespective of their mobility status, thereby instructing national courts to be circumspect with regard to the application of national migration law to the family reunion domain. This was re-affirmed in *Rahman and others*, where the Grand Chamber made it clear that 'other family members' of an EU citizen whose entry and residence in the host Member State must be 'facilitated' under Article 3(2)(a) of the Citizenship Directive are entitled to a judicial review of whether national legislation

[61] Ibid [66].
[62] Ibid [67].
[63] Ibid [69].
[64] Ibid [72].
[65] The association of fundamental rights and EU citizenship was discussed more explicitly in *Yoshikazu Iida v Stadt Ulm* (n 59). For the proposal of linking 'the substance of rights' doctrine of EU citizenship with fundamental rights, thereby enabling EU citizens to activate a 'reverse Solange' situation and rebut the presumption that the Member States comply with fundamental rights by relying on Article 20 TFEU before national courts and the Court, see A Von Bogdandy, M Kottmann, C Antpohler, J Dickschen, S Hentri and M Smrkolj, 'Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *CML Review* 489.

and its application satisfied the conditions laid down by the Directive.[66] The Grand Chamber reminded national judges of their responsibilities to uphold the fundamental right of respect for family life and to ensure that the Member States fulfil their obligations in this area.

It was not so much in *Iida*, where the Court did not find a connecting link with EU law between a refusal to grant a residence right in Germany to the Japanese father of an EU child residing with her mother in a second Member State and the restriction of the child's free movement rights in order to justify the application of the Charter of Fundamental Rights (Articles 7 and 24(3)) or the ECHR (Article 8),[67] as in *O, S and L*,[68] that this 'instructed normative template' became clearer. These joined cases concerned the derivation of a right of residence for third-country national stepfathers from the EU citizenship of their stepchildren. In *O and S*, a Ghanaian national, who had been married to a Finnish national with whom she had a child of Finnish nationality and had sole custody of the child before and after her divorce, remarried a third-country national (an Ivory Coast national), O, and had another child with him. When O applied for a residence permit, his application was refused on the ground that he did not have sufficient means of subsistence. The same refusal of a residence permit took place in *L*, where an Algerian national, who married another Algerian national following her divorce from a Finnish national with whom she had a child of Finnish nationality who was under her sole custody. The referring Finnish court sought the applicability of the principles of *Zambrano* in the context of a reconstituted family in which the step-parent of an EU citizen child has no parental or financial responsibility over him or her. While the Advocate General was clear about the non-applicability of *Zambrano* on the ground that, since the EU citizen children were under the exclusive parental and financial responsibility of their mothers, who had a permanent right of residence in Finland, the denial of resident permits to their non-biological and non-custodian fathers could not result in their forced departure from the territory of the EU,[69] the Court left it to the national court to decide whether the deprivation of 'the genuine enjoyment of the substance of rights' accompanying Article 20 TFEU could take place.[70] But it proceeded to furnish a number of guiding considerations, such as the

[66] Case C-83/11 *Secretary of State for the Home Department v Muhammad Sazzadur Rahman, Fazly Rabby Islam, Mohibullah Rahman* (ECJ, 5 September 2012) [25] and [26].

[67] Ibid. See AG Trstenjak's Opinion on *Yoshikazu Iida v Stadt Ulm* (n 59), which was delivered on 15 May 2012.

[68] Joined Cases C-356/11 and C-357/11 *O, S and L* (ECJ, 6 December 2012).

[69] Joined Cases C-356/11 and C-357/11 *O, S v Maahanmuuttovirasto and Maahanmuuttovirasto v L*, Opinion of AG Bot delivered on 27 September 2012, points 44–46. The Advocate General stressed that such decision would be 'freely' taken by the mother for a reason linked to the preservation of family life.

[70] *O, S and L* (n 68) [49].

possibility of depriving the children with all contact with their biological, Finnish fathers if the family had to depart from Finland;[71] the need for the referring court to examine 'all the circumstances of the case';[72] that the *Zambrano* principle is not confined to a blood relationship between a third-country national parent and an EU citizen child;[73] and, finally, that what would compel the child's departure would be the relationship of 'legal, financial or emotional dependence'.[74] And irrespective of the referring court's conclusion on the applicability of the provisions on EU citizenship, the Court, following *Dereci and others*, proceeded to examine the applicability of the fundamental rights provisions and, in particular, of the right to family life. By so doing, it clearly provided a 'working test of adherence to respect for family life' via either Article 20 TFEU and the 'deprivation of the substance of EU citizenship rights' or the Family Reunification Directive (2003/86)[75] in cases where there exists no cross-border movement to activate the application of the Citizenship Directive (2004/38).

It is in the latter context of the right to family reunification under Directive 2003/86 that the Court gives direction and coherent meaning to its case law and proceeds to make a much stronger claim about the normative authority of this fundamental right and the concomitant obligation of the Member States and national judges to uphold EU law and Charter rights. The third-country national mothers were thus regarded as 'sponsors' of their third-country national husbands within the meaning of Article 2(c) of the Directive and the Member States have 'precise positive obligations with corresponding clearly defined individual rights … to authorise the family reunification of certain members of the sponsor's family, without being left a margin of appreciation'.[76] Their decision must also comply with the *Chakroun* ruling on the meaning of the requirement the possession of 'stable and regular resources' by the sponsor under Article 7(1)(c) of the Family Reunification Directive[77] and with the Charter of Fundamental Rights. In particular, Article 7 on the right to respect family life must be read in conjunction with the obligation to taken into account the best interests of the child recognised in Article 24(2) and his or her interest to maintain a personal relationship with both parents on a regular basis Article 24(3). As the Court stated:

> The Member States must not only interpret their national law in a manner consistent with European Union law but also make sure that they do not rely on

[71] Ibid [51].
[72] Ibid [53].
[73] Ibid [55].
[74] Ibid [56] and AG Bot's Opinion (n 67) point 44.
[75] Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] OJ L251/12.
[76] *O, S and L* (n 68) [70].
[77] Case C-578/08 *Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-1839.

> an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the legal order of the European Union.[78]

Without a doubt, promoting family life and taking into account the interests of children are elevated into regulative ideals within the practice of all institutions in the multi-layered legal order, thereby prompting processes of normative socialisation in national legal orders. The obligations of states, migration authorities and national courts have been clearly delineated and the Court provides constraints for the interpretation of either national migration laws or the Family Reunification Directive in ways that do not conform with the shared values of respect for fundamental rights. The general process of change thus exhibits direction and implies normative adjustment tests for the Member States in the interface between EU citizenship and national migration laws.

The Court's judgments examined above show that imaginative action and step change, decisive inactions, inconsistent actions, consistent inactions and consistent instructed interpretations are all modes of the incremental co-creation of an institutional reality. In *Zambrano* and *Rottmann*, we discern the development or reconfiguration of EU citizenship as the past becomes unsettled, re-opened and re-read not only in the light of a new factual context but also in the light of a normative imperative of saying 'yes' to vulnerable individuals who are facing deportation or statelessness. Such facts 'beg' for a response; they have an ethical demand character, as Maslow would argue.[79] The notion of a coherent and easily pigeon-holed institutional reality is revealed to be an illusion, since the latter is always susceptible to unpredictable dynamics, chance encounters and visionary projections.

In *McCarthy*, on the other hand, the Court took a step backward. It appeared unwilling to extend the ambit of EU citizenship protection to an adult EU citizen seeking family reunification with her Jamaican spouse who had no leave to remain in the UK on the ground that the reluctance of the UK authorities to take into account her Irish nationality—the crucial element that would activate the application of EU law—did not interfere with her rights to free movement or 'any other right conferred on her by virtue of her status as a Union citizen'.[80] The Court's decisive inaction (ie, refraining from extending the 'deprivation of the genuine enjoyment of the substance of rights doctrine') led to an inconsistent action, that is, the differential treatment of an adult EU citizenship who had not exercised

[78] *O, S and L* (n 68) [78].

[79] Indeed, according to Maslow, 'facts are to a certain extent signposts which tell you what to do, which make suggestions to you, which nudge you in one direction or another': AH Maslow, *The Farther Reaches of Human Nature* (Harmondsworth, Penguin Books, 1971) 28.

[80] *McCarthy* (n 54) [50].

her free movement rights, which, in turn, necessitated the explicit differentiation of *Zambrano* from *McCarthy* and *Dereci* by the Court (consistent inaction). Yet, in *Dereci*, the seeds for asserting the normative priority of the right to family reunification of the third-country national spouses of 'static' EU citizens were planted; the non-application of the *Zambrano* test does not rule out the application of the EU law provisions on the protection of fundamental rights (*Iida*; *O, S and L*). And if the Charter cannot apply because the situation is not covered by EU law, then the ECHR is applicable (*Dereci and others*; *Ymeraga*).[81]

Although it is only natural that our attention is fixed on the non-continuation of an evolving logic, co-creating an institutional reality is a multiform process. It is easy to side-step graduated affinities in our quest for clear resemblances among the different moments of a process. But, as argued above, it is imprudent to under-estimate the importance of drawing 'available options', modifying interpretations once a 'break' has been made and making fresh 'suggestions for action'. Quite often minor, and thus imperceptible, variations tend to accumulate over time in order to produce creeping innovations. The importance of choice in legal grounds for reaching the 'right' solution, suggestibility and the call for normative adjustment processes on the part of Member States' authorities emerge clearly in *O, S and L*.

Although national executives may complain about the Court's intrusions into their regulatory powers in the fields of nationality and migration, to sidetrack EU citizenship to the task of promoting executive power and restrictive national migration policies would be to miss something important of its range and its vision.[82] In this respect, Lenaerts is correct to state that in light of *Zambrano*, an EU citizen can invoke AG Jacobs' phrase in *Konstadinidis*[83] 'civis Europaeus sum' against all Member States, including

[81] Case C-87/12 *Kreshnik Ymeraga, Kasim Ymeraga, Afijete Ymeraga-Tafarshiku, Kushtrim Ymeraga, Labinot Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration* (ECJ, 8 May 2013). In this case, a former national of Kosovo who naturalised in Luxembourg but could not invoke the Citizenship Directive (n 31) because he had not crossed borders (Directive 2003/86 could not apply because he had become an EU citizen). He could not rely on art 20 TFEU in order to secure a right of residence in Luxembourg for his mother, father and two of his brothers if 'the deprivation of the genuine substance of rights' test was not met.

[82] For if one takes into account its diachronic evolution (see sections II and III above) and, in particular, the normative ideas surrounding it since the 1970s and the trajectory of the Court's case law in the new millennium, one realises that the Court simply partook of the process of its co-creation by refining it and thus redefining it. In fact, the leap between 'depriving the effective exercise of EU citizenship rights' to 'depriving the genuine enjoyment of the substance of the rights' conferred by EU citizenship is not a big one. Similarly, one can recall the use of the *effet utile* (ie, the principle of effectiveness of Community law) coupled with the solidarity clause (ie, the principle of sincere co-operation) by the Court—a line that can be traced back to *Simmenthal* in the early 1970s, in order to pronounce a specific obligation on bodies to provide full and effective protection of Community law rights.

[83] Case C-168/91 *Konstadinidis* [1993] ECR I-1191 [46].

his or her own, in order to oppose any deprivation of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizenship.[84] It would also be an error to expect some form of stillness or immutability in EU citizenship's content and personal scope in the new millennium, particularly in the light of developments such as the entry into force of the Lisbon Treaty and the legally binding Charter of Fundamental Rights and the Citizenship Directive (2004/38). The world is never closed and mutations happen all the time. In this respect, institutional change, such as the EU citizenship's recent 'high velocity', and evolution are not exceptions in an ever-evolving world, and the intriguing questions concern both the forces that propel such change and its rate, as well as its intended and unintended effects.

But change remains incomplete. The incremental process of institutional co-creation always leaves 'co-creation remainders', that is, unaddressed issues which remain 'in the shadow' because they are denied recognition in time t. These remainders, however, trigger actors' interventions and inspire a search for more comprehensive solutions in the future. The case law discussed above shows that children who are EU citizens are no longer appendages of state sovereignty as far as family reunion and their life chances are concerned, and the same applies to adult family members who may be ill and disabled, but adult and fully independent EU citizens are still within the Member States' marked-off enclosure. Migration law has not been 'humanised' yet and the Member States can still envelop peoples' lives into a myriad of oppressive and restrictive provisions which bring about agony and insecurity in their lives. Those who have the resources to cross national borders can find solace in the protective layer of EU legislation, but family reunion has not been recognised as a necessary condition for a stable, peaceful and healthy self, and thus as a good to be shared by all. True, it may well be the case that following the accession of the EU to the ECHR, the two main European legal orders will deliberately converge on an upgraded normative response to the right to family unity. Another possibility might be the future activation of the so-called 'elastic clause' of Article 25 TFEU, resulting in a new explicit template of respect for family life in the TFEU's EU citizenship provisions stating that: The European Union and the Member States shall respect the right of family reunification of all Union citizens.

[84] Lenaerts (n 45). Similarly, although Lenaerts has argued that the deprivation effect relates to some and not necessarily to all of the EU citizenship rights and does not require the cross-border element, while the impeding effect refers to the traditional approach of the CJEU to indirect discrimination or non-discriminatory restrictions causing serious inconvenience for EU citizens (compare here Case C-391/09 *Runevič-Vardyn* [2011] ECR I-03787; Case 208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693), whereby the cross-border link is necessary. In [56] of the *Zambrano* ruling. the CJEU refers to both deprivation and impediment for EU citizens finding themselves in purely internal situations.

Critics might argue here that the present environment in Europe is not conducive to enlightened and liberal migration reforms which shift the centre of gravity from state power to liberal norms, and that ultranationalist parties might capitalise on such proposals for reform. Such an observation would undoubtedly be correct. But it will be equally unfortunate if our political life were captured by forces of conservatism. European integration has to make the EU a space conducive to human living. And ordinary human living can only flourish if people are able to experience the care and warmth of their loved ones without the often unnecessary interference of states in their loving relationships.[85]

C. Cul-de-Sacs

It is certainly counter-intuitive to suggest that institutional change could be associated with decisions that appear to stall it. This is certainly true if one looks at institutional change from a synchronic point of view. In such a case, reaching a cul-de-sac is nothing more than a dead end, a limitation. And yet, from a diachronic point of view, a cul-de-sac is also the beginning of change—as is the case in real life, it leads one to reverse and to embark upon a different course of action. It is the decision to 'start afresh', to go back to the 'drawing board' and, with respect to adjudication, to advance a different logic of interpretation that creates the new. In sum, creeping transformations and variations (sections IV.A and IV.B above) are also accompanied by deviations in adjacent fields. One thus must display caution even when revolutionary changes take place or milestone decisions have been made, for institutional realities are complex, that is, non-unified and non-linear.

Distinct and opposing tendencies may occupy the same field and exogenous change or endogenous developments can easily cohabit with endogenous risks. Such contradictions need to be brought out in the open by actors because micro-risks often create macro-limitations[86] and can easily

[85] Compare the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families adopted by the General Assembly Resolution 45/158 of 18 December 1990. Article 44(2) was phrased rather diplomatically: 'state parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their "family members"'. For the original text of UN Doc A/C.3/39/WG.1/WP.1 of 14 June 1984, which included a right to family reunification as opposed to recommendation to facilitate family reunification, see G Battistella, 'Migration and Human Rights: The Uneasy but Essential Relationship' in P de Gichteneire, A Pecoud and R Cholewinski (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge, Cambridge University Press, 2009).

[86] I have in mind Robert Cover's term 'jurispathic'. According to him, the 'jurisgenerative' is always partnered with the 'jurispathic'; R Cover, 'The Supreme Court, 1982 Term—Foreward: Nomos and Narrative' (1983) 97(4) *Harvard Law Review* 4–69.

undermine advances that have been made. But at the same time, limitations tend to become stepping stones for transformations and, as such, they are complementary phases of institutional change. In this section, I wish to highlight the distinct tendencies coexisting within the evolving template of EU citizenship by focusing on the first cases on the application of Article 28(3) of Directive 2004/38 concerning the deportation of long-term residence EU citizens and minors that have reached the Court.

Although the Member States have always had the power to derogate from the free movement provisions of the EC Treaty on the grounds of public policy, public security and public health, this power has been circumscribed by the European legislature and the Court.[87] The latter has always insisted on a strict interpretation of the derogations and the full application of the proportionality test. Its preference for a rights-based approach in this field has precluded the Member States from invoking amorphous threats or abstract risks to public policy or public security,[88] using the expulsion mechanism as a means of deterrence or as a general preventive action,[89] and necessitated concrete verifications that EU citizens pose actual and sufficiently serious threats to the requirements of public policy affecting one of the fundamental interests of society.[90] In this way, it has foiled the 'scapegoating' of EU citizens and the dissemination of xenophobic discourses about 'criminal outsiders'.

The Citizenship Directive (2004/38) has reinforced the system of protection afforded to EU citizens by transplanting aspects of the European Court of Human Rights case law[91] and by establishing a system of graduated protection as regards security of residence. More specifically, permanent residents, that is, those residing for five years in the host Member State, can be deported only 'on serious grounds of public policy or public security' (Article 28(2) of Directive 2004/38), while permanent resident EU citizens for the previous 10 years and minors can only be ordered to leave on

[87] Council Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 56 (OJ Special Edition 850/64) 117, which was replaced by the Citizenship Directive (n 31). For early accounts, see A Durand, 'European Citizenship' (1979) 4 *European Law Review* 3; A Evans, 'European Citizenship: A Novel Concept in EEC Law' (1984) 32(4) *American Journal of Comparative Law* 674; A Barav 'Court Recommendations to Deport and the Free Movement of Workers in EEC Law' (1981) 6 *European Law Review* 129; D O'Keeffe, 'Practical Difficulties in the Application of Article 48 of the EEC Treaty' (1982) 19 *CML Rev* 35; J Handoll, *Free Movement of Persons in the European Union* (London, John Wiley, 1995) ch 7.

[88] Case 36/75 *Rutili v Minister of the Interior* [1975] ECR 1219; Case 30/77 *R v Bouchereau* [1977] ECR 1999.

[89] *Rutili* (n 88) [29]; Case C-441/02 *Commission v Federal Republic of Germany* [2006] ECR I-3449; Case C-524/06 *Heinz Huber v Bundesrepublik Deutschland* [2008] ECR I-9705. See also art 27(2) of the Citizenship Directive (n 31).

[90] *R v Bouchereau* (n 88) [43].

[91] Article 28(1) of the Citizenship Directive (n 31).

'imperative grounds of public policy' (Article 28(3) of Directive 2004/38). The rationale behind this graduated system of protection is that the longer one's residence and thus entanglement with the host society is, the more difficult it becomes to justify forced uprootedness and the ensuing harm caused to him or her and his or her family.

It is true that the terms 'public policy or public security' (Article 28(2)) and 'imperative grounds of public policy' do not have a uniform EU law meaning; they are 'national law concepts' subject 'to some control by the EU institutions'.[92] It is equally true, however, that the Commission has provided guidance on the interpretations of these terms by stating that:

> [T]he Member States need to make a clear distinction between public policy and public security. The latter cannot be covered by the former. Public security is generally interpreted to cover both internal and external security along the lines of preserving the integrity of the territory of a Member State and its institutions.[93]

But this guidance has not been followed by the Court in the first two cases on the interpretation of the term 'imperative grounds of public security' under Article 28(3) of the Directive, namely, *Tsakouridis* and *PI*.[94]

Both Tsakouridis and PI, Greek and Italian nationals, respectively, had lived in Germany for more than 20 years. In fact, Mr Tsakouridis was born in Germany and went to school there. In his mid-twenties, he spent a few months in Greece running a crepe hall in Rhodes where he was eventually arrested for drug dealing as part of a criminal gang. He was transferred to Germany and the Regional Court in Stuttgart sentenced him to imprisonment of six years and six months, while the regional administration threatened him with expulsion to Greece. Mr Tsakouridis challenged this decision and the Administrative Court annulled the expulsion decision because, among other considerations, he had lived to Germany for more than 10 years and thus his situation fell within the scope of Article 28(3) and therefore he did not constitute a major threat to the external or internal security of the German state. The Land Baden-Wurttemberg appealed against this decision. When the question concerning the meaning of the notion 'imperative grounds of public security' reached the Court, the latter held that the term does not

[92] Case C-268/99 *Aldona Malgorzat Jany v Ministre de l'Interieur* [2001] ECR I-8615; Case C-430/10 *Hristo Gaydarov* (ECJ, 17 November 2011) [32]. I discussed this in 'European Union Citizenship: Enduring Patterns and Evolving Norms' (EUSA 12th Biennial International Conference, Boston MA, 3–5 March 2011) as well as in 'When EU Citizens Become Foreigners' (2nd Jean Monnet Workshop on 'The Reconceptualisation of EU Citizenship', Universidad Pontificia Comillas, Madrid, 7–8 October 2012).

[93] European Commission, 'On guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Communication)' COM(2009) 313 final, 10.

[94] Case C-145/09 *Land Baden-Wurttemberg v Panagiotis Tsakouridis* [2010] ECR I-11979; and Case C-348/09 *PI v Oberburgermeisterin der Stadt Remscheid* (ECJ, 22 May 2012).

exclude domestic criminal law matters and that the fight against crime in connection with dealing in narcotics as part of an organised group can fall within the ambit of Article 28(3) of Directive 2004/38.[95]

What is problematic about this judgment is that it renders the distinction between the second and the third paragraphs of Article 28 inexact, as national authorities contemplating expulsion decisions need not be concerned about the fact that public security threats are different from public policy threats or public order disturbances, in that they pose a threat to the existence of a Member State or its institutions, or the survival of the population is threatened.[96] Instead, any serious form of criminality can lead to the expulsion of EU citizens even though, like Tsakouridis, may have spent their whole lives on the territory of the Member State concerned. No careful consideration was given to the strong bonds that individuals have formed in the state of residence[97] as well as to the fact that national criminal justice systems provide ample scope for the punishment of undesirable conduct without the need of transforming EU citizens into criminal aliens who have no right to remain there.[98] After all, the rationale of punishment is to allow individuals to pay their debt to society which has been harmed by their offensive behaviour, not to be extricated from it.

Following *Tsakouridis*, the Court's judgment in *PI* raised similar questions about the security of residence of EU citizens and increased concerns that the status of EU citizenship can become a meaningless normative category in the deportation field. PI had lived in Germany since 1987, and in 2006 he was sentenced to a term of imprisonment of seven years and six months for the sexual abuse, sexual coercion and rape of his 14-year-old stepdaughter. He is due to complete his sentence on 9 July 2013, but an immediately enforceable expulsion order was served in May 2008. Advocate General Bot's Opinion referred to what he termed 'genuine integration' considerations and a 'presumption of integration' on the part of EU citizens which is rebuttable.[99] The Court did not follow the 'presumption of integration' argument, but it went on to rule that 'it is open to the Member States to regard certain criminal offences … [as] posing a direct threat to the calm and physical security of the population' and thus falling within the ambit of Article 28(3), 'as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the

[95] Compare also AG Bot's conclusion of his Opinion on *Tsakouridis* (n 94) delivered on 8 June 2010 [133].

[96] European Commission (n 93) 10.

[97] See recital 24 of the Citizenship Directive (n 31). Compare also AG Bot's Opinion (n 95) [45].

[98] Kostakopoulou, 'When EU Citizens Become Foreigners' (n 92).

[99] AG Bot, Opinion on Case C-348/09 *PI v Oberburgermeisterin der Stadt Remscheid*, delivered on 6 March 2012. For commentary, see L Azoulai and S Coutts, 'Restricting Union Citizens' Residence Rights on Grounds of Public Security. Where Union Citizenship and the AFSJ Meet: PI' (2013) 50 *CML Rev* 553.

referring court to determine on the basis of an individual examination of a specific case before it'.[100] In other words, in the light of these two judgments, not only does Article 28(3) of Directive 2004/58 become a gradation of Article 28(2)—a development that is not consonant with the intentions of the drafters of the Citizenship Directive and the Commission's written guidance on the proper interpretation of its provisions,[101] but the Member States are given the discretion to place a wide range of criminal offences within the ambit of public security and to defend the seriousness of the characteristics they entail before their national courts. Instead of focusing on the type of security threat itself, they shift the focus on to 'the security constellation' accompanying the offending conduct, thereby being empowered to designate certain crimes as particularly threatening in the light of 'the particular values' of their national legal orders which, according to the Court, cannot be uniform across the EU.[102]

The leeway given to the national authorities in this area undermines the European legislature's intention to guarantee the EU citizens' increased security of residence in the host Member State. The Court has reached a cul-de-sac in this domain and it would have to revisit its interpretations in the near future since they demote EU citizenship from a fundamental status to a mere 'phenomenology' of citizenship.

V. CONCLUSION

The foregoing discussion has shed light onto the evolving trajectory of EU citizenship and has unravelled the constraints and possibilities that have accompanied its evolution. In this non-linear path of connected events, normative aspirations and institutionalised rules, one finds dynamic patterns, complex adaptations, step changes, norm creation and contradictions. Moving from 'what exists' to 'what may be' and to 'what ought to be', that is, devising legal provisions and institutional openings that make a difference to the concrete lives of people (be they workers, work-seekers, non-active economic actors, EU citizens exercising their mobility rights and, following *Rottmann* and *Zambrano*, non-movers), has essentially been a tektology; a genuine process of institutional co-creation. True, co-creation's scope, duration and quality are contingent and could thus be reversible. Amidst contingency and indeterminacy, however, we can easily discern the transformation of practices into norms and the growth of EU citizenship. Noticeable too is the existence of an evolution momentum, in the sense of guaranteeing rights, notwithstanding the absence of a clearly defined and finite goal.

[100] *PI* (n 94) [33].
[101] Above n 93.
[102] *PI* (n 94) [21] and [29].

However, this does not mean that the evolution momentum cannot be called into question. The sovereign debt crisis in the Eurozone has triggered a number of unpredictable developments as well as a search for formulae for macroeconomic stability and for better fiscal regulation. As austerity programmes take hold in several European countries and the disquietness of Europe's populations becomes evident in public arenas, it is only natural that individuals and political actors wonder about the present and future of EU citizenship, particularly since generalised anxiety makes them believe that there are more problems and fewer solutions. Yet, the visible scene cannot subdue our sense of relief since we are not confronted with an historical crisis:[103] our convictions, our principles, our sense of political morality and our desire for common sense solutions to policy dilemmas remain unaffected. So while the debate about how to make undisciplined public expenditures more controllable and sustainable continues in a lively way and the pendulum is swinging towards the direction of a generalised reform, the importance of making EU citizenship responsive to citizens' everyday lives remains undiminished.

However, institutional growth is not something that simply happens. Growth or development is something agents bring into existence, as the foregoing discussion has demonstrated. In this respect, Pierson has advised a shift of focus 'from explaining moments of institutional choice to understanding processes of institutional development'.[104] For, more often than not, although the need for change is noticeable, the circumstances may not be apposite. This applies to the 'internal situations' treatment by the European judiciary. A changed environment and new facts requiring a stern approach and fair solutions make the same actors who hesitated in the past embark upon a step change. By so doing, they change not only the institutional reality but, in the light of the earlier discussion on the interconnected spheres, also political and human realities.

In this journey of the institutional development of EU citizenship, the combined efforts of so many institutional and ordinary actors have resulted in: a) positing normative templates; b) relativising Member States' sovereign prerogatives; c) generating respect for principles that advance human life and the growth of associated action; and d) prioritising equal treatment irrespective of nationality in as many spheres of life as possible. By facilitating life options and removing unnecessary obstacles that fill European citizens with anxiety, hardship and pain, the results are essentially life-affirming. Like other important foundational principles of EU law, such as direct effect, indirect effect, state liability and so on, EU citizenship comes, in the main, as a corrective of the wrongs of the national authorities and maladjustments between individuals and the (statist) world around them, and as a promoter of new associative bonds among individuals.

[103] For the definition of an historical crisis, see J Ortega y Gasset, *Man and Crisis* (London, Jarrold & Sons Ltd, 1958) 85–86.

[104] Pierson (n 40) 133.