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FUNDAMENTAL RIGHTS OF EU CITIZENS IN PURELY INTERNAL
SITUATIONS: FROM REVERSE DISCRIMINATION TO
INCORPORATION?

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SUMMARY

The phenomenon of reverse discrimination in the EU has been in the focus of academic research and debate due to the inequality it generates between citizens of the European Union, and it continues to create controversies. Reverse discrimination occurs when a Member State treats its own nationals who cannot point to a link with EU law less favourably than those whose situation is covered by EU law. Such difference in treatment leads to double standards in fundamental rights protection granted to EU citizens, undermining the EU principle of equality. At the same time, the development of EU citizenship suggests this legal status has the potential to tackle the issues of inequality. The Court of Justice has in its jurisprudence developed EU citizenship as a fundamental status of nationals of EU Member States, provoking many interesting and potentially outbreaking interpretations of citizenship in terms of pushing the borders of EU competences to protect fundamental rights. In that context, it seems relevant to explore the extent and the transformative potential of EU citizenship which rejects the supplementary market paradigm and embraces equality as its underlying purpose. This paper discusses the prospect of using the citizenship provisions of EU Treaties as a legal basis to end reverse discrimination by claiming EU competence in purely internal situations. To explain the possible implications of this option, a parallel is drawn with the US constitutional doctrine of incorporation. To that extent, the paper argues that the effects of applying EU fundamental rights protection in purely internal situations on the basis of EU citizenship would be similar to the effects of the incorporation doctrine in the US. Such possible development in EU law, even if normatively desirable, would be contrary to the EU's current constitutional design. The right forums to end reverse discrimination based on the principle of equality common to the Member States are, at the moment, only national courts or the European Court of Human Rights acting outside the EU's own legal framework. Still, a reform of the current system of EU fundamental rights protection would be welcome as the only way to efficiently end this type of inequality. The problem of reverse discrimination should no longer be tolerated under EU law as it contradicts its underlying substantive values and legal principles.

KEY WORDS: EU law, purely internal situations, reverse discrimination, EU citizenship, fundamental rights, incorporation doctrine

SAŽETAK

Fenomen obrnute diskriminacije u Europskoj uniji u fokusu je akademskih istraživanja i rasprava zbog nejednakosti koju uzrokuje među građanima Europske unije, te nastavlja izazivati kontroverze. Do obrnute diskriminacije dolazi kada država članica svoje državljane koji ne mogu ukazati na poveznicu s pravom Unije stavlja u nepovoljniji položaj od onih koji uživaju zaštitu prava Unije. Takva razlika u postupanju dovodi do dvostrukih standarda u zaštiti temeljnih prava namijenjenih građanima Unije i potkopava europsko načelo jednakosti. U isto vrijeme, razvoj građanstva Europske unije sugerira da ovaj pravni status ima potencijal za borbu protiv nejednakosti. Naime, Sud Europske unije u svojoj je praksi razvio građanstvo Europske unije kao temeljni status državljanina država članica, izazivajući mnoga zanimljiva i potencijalno revolucionarna tumačenja statusa građanstva u smislu širenja nadležnosti Unije u zaštiti temeljnih prava. U tom kontekstu čini se relevantnim istražiti opseg i transformacijski potencijal građanstva Unije koji odbacuje supstitucijsku tržišnu paradigmu i prihvaća jednakost kao svoju osnovnu svrhu. U radu se raspravlja o mogućnosti korištenja odredbi Osnivačkih ugovora koje se odnose na građanstvo kao pravne osnove za dokidanje obrnute diskriminacije i uspostavljanje nadležnosti Unije u isključivo unutarnjim situacijama. Kako bi se objasnili mogući učinci ovakvog razvoja, povlači se paralela s američkom ustavnom doktrinom o inkorporaciji. U radu se stoga brani teza da bi posljedice primjene standarda temeljnih prava Europske unije na temelju statusa građanstva Unije u isključivo unutarnjim situacijama bile slične učincima doktrine o inkorporaciji u Sjedinjenim Američkim Državama. Takav mogući razvoj u pravu Europske unije, iako normativno poželjan, bio bi suprotan trenutnom ustavnom uređenju Unije. Odgovarajući forumi za borbu protiv obrnute diskriminacije, na temelju načela jednakosti koje je zajedničko državama članicama, u ovome trenutku su samo nacionalni sudovi ili Europski sud za ljudska prava, djelujući van pravnih okvira Europske unije. Ipak, reforma sustava zaštite temeljnih prava u Europskoj uniji je dobrodošla jer je to jedini način da se učinkovito stane na kraj ovoj vrsti nejednakosti. S obzirom da pojava obrnute diskriminacije narušava temeljne materijalne vrijednosti i pravna načela Europske unije, više se kao takva ne bi smjela tolerirati.

KLJUČNE RIJEČI: pravo Europske unije, isključivo unutarnje situacije, obrnuta diskriminacija, građanstvo Europske unije, temeljna prava, doktrina inkorporacije

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ABBREVIATIONS

AG Advocate General

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

EU European Union

TEU Treaty on the European Union

TFEU Treaty on the Functioning of the European Union

US United States of America

1. INTRODUCTION

European Union is a community of limited powers based on the principle of conferral.¹ Relatedly, the reach of EU law is limited to situations situated within its sphere of competence. EU law does not apply to EU citizens who find themselves in purely internal situations. In other words, those who cannot point to a cross-border element are left without the protection of EU law. This feature of EU law gives rise to reverse discrimination, “a less favourable treatment that is suffered by persons who are in a purely internal situation and, as a result of that, cannot enjoy EU law protection in their own Member State”.² EU citizens falling within the scope of EU law are thus suitable to enjoy the benefits of EU law in any Member State. In contrast, the same Member State is not required under EU law to grant the same standard of protection to its own nationals whose situation lacks cross-border elements. In that sense, reverse discrimination, as any other form of discrimination, fosters inequality and goes directly against “the values of equality, rule of law and human rights protection, enshrined in the foundations of the European Union”.³ On a substantive level, this phenomenon indeed poses a problem for equal and effective implementation of those principles.

Since 1986, it has been pointed out that reverse discrimination is unsustainable in a true common market.⁴ As European integration moved forward, the introduction of the status of EU citizenship in the Maastricht Treaty in 1992 has intensified legal debate on this issue, because “reverse discrimination is difficult to reconcile with the notion of EU citizenship”.⁵ The status of EU citizenship has enabled certain modifications of the purely internal rule.⁶ The ‘*Ruiz Zambrano* test’ established by the Court of Justice of the EU (hereinafter the Court) in the ‘eponymous judgment’⁷ introduced the possibility of applying EU law in purely internal situations to a limited extent. The ‘deprivation of genuine enjoyment of the substance of rights

¹ Consolidated version of the Treaty on European Union [2012] OJ 326/13, Art 5 (2) (TEU)

² Alina Tryfonidou, ‘*Purely Internal Situations and Reverse Discrimination In a Citizens’ Europe: Time to “Reverse” Reverse Discrimination*’, in Peter George Xuereb (ed) ‘*Issues in Social Policy: A New Agenda*.’ Jean Monnet Seminar Series (Progress Press 2009), p. 11

³ Art 2 TEU

⁴ Opinion of Advocate General Mischo in Joint Cases C-80/85 and C-159/85 *Edah* [1986] ECLI:EU:C:1986:333

⁵ Peter Van Elsuwege, ‘*The Phenomenon of Reverse Discrimination: An Anomaly in the European Constitutional Order?*’, in Lucia Serena Rossi, Federico Casolari (eds) ‘*The EU after Lisbon: Amending or coping with the existing treaties?*’ (Springer 2014), p. 162

⁶ See Nathan Cambien, ‘*The scope of EU Law in recent ECJ case law: reversing ‘reverse discrimination’ or aggravating inequalities?*’ 2012 n. 47 Cuadernos Europeos de Deusto, pp. 127 - 148

⁷ Case C-34/09 *Ruiz Zambrano* [2011] ECLI:EU:C:2011:124

attached to the status of EU citizen' caused by a national measure in purely internal situations does allow for Article 20 TFEU to be applied in absence of any cross-border element, and set aside the contested measure.⁸

However, the *Ruiz Zambrano* route has been restricted to a great extent by future case law, most notably in *McCarthy*⁹ and *Dereci*¹⁰. In those cases, the Court did not find that national measures undermined 'the effectiveness of the EU citizenship rights'.¹¹ Nonetheless, the legal debate on the potential of EU citizenship as a trigger for applying fundamental rights protection in reverse discrimination cases is still ongoing.¹² More specifically, as put by AG Kokott, "it cannot of course be ruled out that the Court will review its case law when the occasion arises and be led from then on to derive a prohibition on discrimination against one's own nationals from citizenship of the Union".¹³ The right to move and reside freely on the territory of the Union could be interpreted as to contain a self-standing right to reside, which includes EU citizens residing in the Member State of their nationality.¹⁴ This approach would cover the cases of EU citizens in purely internal situations and provide them with EU standard of fundamental rights protection.

Although such a shift in interpretation would provide an efficient solution to the problem of reverse discrimination, it would change the underlying bases of EU constitutional law. As AG Sharpston argued in her opinion in the *Ruiz Zambrano* case, the prospect of applying the Charter of fundamental rights of the EU¹⁵ (hereinafter the Charter) on the basis of a free-standing right to reside which is not confined to cross-border element "would involve introducing an overtly federal element into the structure of the EU's legal and political system".¹⁶ In the same opinion, AG Sharpston compares the described development in application of EU fundamental rights to the doctrine of incorporation in US law, "based on the 'due process' clause of the Fourteenth Amendment, which does not require an inter-state

⁸ *ibid.*, para. 42

⁹ Case C-434/09 *McCarthy* [2011] ECLI:EU:C:2011:277

¹⁰ Case C-256/11 *Dereci* [2011] ECLI:EU:C:2011:734

¹¹ For further explanation of the Court's strict approach to the 'deprivation of substance of rights' test and effectiveness of EU citizenship rights see Katerina Kalaitzaki, 'EU Citizenship as a Means of Broadening the Application of EU Fundamental Rights: Developments and Limits', in Nathan Cambien, Dimitry Kochenov, Elise Muir (eds) 'EU Citizenship Under Stress: Social Justice, Brexit and Other Challenges' Nijhoff Studies in European Union Law, vol.16 (Brill 2020), pp. 55 - 57

¹² See Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator', in Dimitry Kochenov (ed) 'EU Citizenship and Federalism: The Role of Rights' (Cambridge University Press 2017), pp. 11 - 12

¹³ Opinion of AG Kokott in Case C-434/09 *McCarthy* [2011] ECLI:EU:C:2010:718, para. 42

¹⁴ Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2010] ECLI:EU:C:2010:560, paras. 80 - 101

¹⁵ Charter of Fundamental Rights of the European Union [2010] OJ C83/02 (Charter)

¹⁶ Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2010] ECLI:EU:C:2010:560, para. 172

movement nor legislative acts from Congress” in federal protection of fundamental rights against the States.¹⁷

This paper will build upon the analysis of AG Sharpston and argue that the interpretation of EU citizenship provisions which situates purely internal situations within the field of EU competence is contrary to current EU constitutional design. A parallel will be drawn between the US constitutional doctrine of incorporation to illustrate why does the EU not have a proper legal basis in the Treaties to allow for such a derogation from the principle of conferral.¹⁸ It will be concluded that incorporation of fundamental rights protection through EU citizenship would be difficult to reconcile with the EU’s constitutional principles because its effects would radically change the division of powers between the Member States and the Union.

The argument will be presented as follows. First, reverse discrimination will be further examined as an underminer of the core values of the EU legal order. An analysis of case law on EU citizenship in purely internal situations will follow, explaining the extent to which the Court expanded the reach of EU citizenship, providing a critique of market-based notion of citizenship. The central part of the paper then places the problem in a comparative perspective by assessing the main features of the incorporation doctrine developed by the US Supreme Court. Finally, it will be acknowledged that, as things currently stand, national law should be regarded as the proper legal arena for taking action against reverse discrimination. Nevertheless, it will be emphasized that reverse discrimination should still stay in the focus of the Union ‘de lege ferenda’ and a political commitment by the Member States would be necessary to achieve full equality.

2. THE PHENOMENON OF REVERSE DISCRIMINATION IN THE EU LEGAL ORDER

The following chapter will place the phenomenon of reverse discrimination in a broader context of the EU legal order. The first part provides an analysis of reverse discrimination as a product of applying the purely internal rule. The second part explores reverse discrimination as an unwanted feature of a legal order which is based on equality and rule of law.

¹⁷ *ibid.*

¹⁸ For a comparative perspective on federalism in the EU and the US, see Sergio Fabbrini (ed), *Democracy and Federalism in the European Union and the United States: Exploring Post-National Governance* (Routledge 2004) and Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009)

2.1. Etiology of Reverse Discrimination: Purely Internal Rule

Reverse discrimination is caused by the application of the purely internal rule.¹⁹ According to that rule developed by the Court, a case is purely internal when all of its elements “are confined within a single Member State”.²⁰ These ‘purely internal situations’ are thus out of reach of EU law. EU citizens who cannot point to a link with EU law are left without the protection of EU law.

The case *Saunders*²¹ was the first case in which the Court applied the purely internal rule. The facts of the case concerned an order issued by the Crown Court of Bristol in a criminal procedure against Mrs Saunders. The order demanded her to move to Northern Ireland and not to return to England and Wales for three years. The Court’s decision in the preliminary ruling procedure held that freedom of movement within the territory of a single Member State constituted a situation purely internal to the Member State in question and therefore fell outside the scope of Treaty provisions on free movement of workers.²² As the ruling in *Saunders* stated, “the provisions of the Treaty on freedom of movement for workers cannot ... be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law”.²³ In essence, the purely internal rule has been developed by the Court to make sure that the application of EU law is in line with the scope of EU law as defined in the Treaties.²⁴ Consequently, reverse discrimination can be understood as a “by-product of the vertical division of competences” in the EU.²⁵

2.1.1. Vertical Division of Competences

When it comes to defining the division of competences between the EU and the Member States, two types of principles are applied. The limits of EU competences are governed by the principle of conferral, while the use of EU competences is governed by the principles of

¹⁹ Alina Tryfonidou, ‘The outer limits of Article 28 EC: Purely internal situations and the development of the Court’s approach through the years’, in Catherine Barnard, Okeoghene Odudu (eds) ‘*The Outer Limits of European Union Law*’ (Hart Publishing 2009), p. 203

²⁰ Sara Iglesias Sánchez, ‘Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?’ (2018) vol. 14, n. 1 *European Constitutional Law Review*, pp. 9 - 10

²¹ Case 175/78 [1979] *The Queen v Vera Ann Saunders* ECLI:EU:C:1979:88

²² *ibid.*, para. 12

²³ *ibid.*, para. 11

²⁴ Peter Van Elswege, ‘The Phenomenon of Reverse Discrimination: An Anomaly in the European Constitutional Order?’, in Lucia Serena Rossi, Federico Casolari (eds) ‘*The EU after Lisbon: Amending or coping with the existing treaties?*’ (Springer 2014), p. 164

²⁵ *ibid.*, pp. 163 - 164

subsidiarity and proportionality.²⁶ The principle of conferral is the main principle at stake when assessing the possibility of abolishing the purely internal rule.²⁷ The content of the principle, laid out in Art 5 TEU, defines the Union as acting only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.²⁸ Competences not conferred upon the Union in the Treaties remain with the Member States, following the rule of retained powers of the Member States.²⁹ Principle of conferral, as a core principle of the EU constitutional design, enables the EU to function by conferring sovereignty of the Member States to the bodies of the Union, but only in certain areas and to a certain extent.³⁰ This principle enables the EU to pass laws which are binding on the Member States while giving them, at the same time, a guarantee that it won't act in the areas of competences which are retained by the Member States.

In that light, EU citizenship as a legal status also functions under these principles and rights attached to that status are exercised within the sphere of EU law. The status of EU citizenship did create certain autonomous rights of free movement and residence independent of other Treaty provisions governing free movement in the context of market freedoms.³¹ The Directive 2004/38 (Citizens' Rights Directive)³² formulates that it shall apply exclusively to Union citizens (and their family members) who move to or reside in a Member State other than that of which they are a national, thus defining that the scope of that right is confined to cross-border movement.³³ Once EU citizens use their free movement rights they also enjoy protection of fundamental rights under EU law.

The fundamental rights enshrined in the Charter are also applied only in situations which are situated in the sphere of EU law. Moreover, the provisions of the Charter governing its

²⁶ Art 5 TEU

²⁷ For a broader analysis of division of competences in the EU see Jacques Ziller, 'Separation of Powers in the European Union's Intertwined System of Government - A Treaty Based Analysis for the Use of Political Scientists and Constitutional Lawyers' (2008) vol. 73, n. 3 *Il Politico*, pp. 133 - 179

²⁸ Art 5 TEU

²⁹ *ibid.*

³⁰ "The transfer by the states from their domestic legal system to the community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights", in Case 6-64 *Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66, para. 3

³¹ Paul Craig and Gráinne de Búrca, 'EU Law: Text, Cases and Materials' (6th Edition, Oxford University Press 2015), p. 853

³² Directive 2004/38/EC of the European Parliament and of the Council of 29 Apr. 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 1612/68 and repealing Directives 64/221, 68/360, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96 [2004] OJ L158/77 (Citizens' Rights Directive)

³³ Art 3 (1) of the Citizens' Rights Directive as explained in Anja Wiesbrock, 'Union Citizenship and the Redefinition of the "Internal Situations" Rule: The Implications of Zambrano', (2011) vol. 12 *German Law Journal*, p. 2079

field of application explicitly say that the provisions of the Charter are addressed to the Member States only when they are implementing Union law.³⁴ The Charter text codified the pre-Charter case law on fundamental rights protection in which the Court protected fundamental rights as general principles of EU law only when the Member States were acting within the scope of EU law, demonstrating the Court's respect for the principle of conferred powers.³⁵

2.2. Notion and Instances of Reverse Discrimination

As the purpose of the purely internal rule is to make sure the EU does not overstep its area of competence, a number of EU citizens who cannot point to a link with EU law are discriminated against by their own state of nationality since "Member States are free to apply a more restrictive regime than the one applicable by virtue of EU law to situations that fall within the scope of EU law".³⁶ The issue of reverse discrimination is therefore a flaw in the system which is based on rule of law and the principle of equality.

In cases of discrimination that is 'reverse', "an unexpected group of persons is treated less favourably than a group of persons that is normally treated less beneficially".³⁷ Generally, Member States tend to favour their own nationals, therefore discrimination suffered by Member State nationals in purely internal situations is considered as 'reverse discrimination'.³⁸ According to Tryfonidou, instances of reverse discrimination can emerge in three ways: (A) a Member State decides to apply to its nationals a legal regime that is more restrictive than the one granted to nationals of other Member States on its territory, (B) a ruling of the Court obliges a Member State to disregard a national measure that is breaching one of the fundamental freedoms in situations under EU law regime, and (C) a piece of Community minimum harmonisation legislation contains a market access clause that allows a Member State to impose on its own nationals stricter requirements than the minimum laid down by the legislation.³⁹

³⁴ Art 51 (1) of the Charter. A similar provision is found in Art 6 (1) TEU.

³⁵ See <https://fra.europa.eu/en/eu-charter/article/51-field-application> last accessed 15 April 2021

³⁶ Alina Tryfonidou, 'The outer limits of Article 28 EC: Purely internal situations and the development of the Court's approach through the years', in Catherine Barnard, Okeoghene Odudu (eds) 'The Outer Limits of European Union Law' (Hart Publishing 2009), p. 203

³⁷ Alina Tryfonidou, 'Purely Internal Situations and Reverse Discrimination In a Citizens' Europe: Time to "Reverse" Reverse Discrimination', in Peter George Xuereb (ed) 'Issues in Social Policy: A New Agenda.' Jean Monnet Seminar Series (Progress Press 2009), p.14

³⁸ *ibid.*, pp. 14 - 15

³⁹ *ibid.*, p.16

In all of these instances, the phenomenon of reverse discrimination generates inequality of EU citizens that is contrary to both the requirement of respecting fundamental rights of individuals and the respect for the rule of law. In substance, creating a divide between EU citizens who can point to a cross-border link and those who cannot and are therefore left without the protection of EU law is breaching core principles of the Union.

2.2.1. An Illustration: Mutual Recognition of Same-Sex Marriages and Possibilities of Reverse Discrimination

To illustrate how the phenomenon of reverse discrimination unravels in practice leading to violations of fundamental rights protected by EU law, a recent ruling of the Court will be taken as an example. In case *Coman*,⁴⁰ the Court held that the term ‘spouse’ in Citizens' Rights Directive includes same-sex spouses. Consequently, the ruling required all Member States to mutually recognize same-sex marriages lawfully entered into in other Member States for the purpose of EU free movement rights.⁴¹ Implementation of this ruling can generate reverse discrimination. In this case, inequality would be caused directly by a ruling of the Court that requires application of the principle of mutual recognition.

In order for provisions of EU law on free movement to be applicable, there has to be a cross-border element that links the case with EU law. In *Coman*, the cross-border element was genuine residence and solemnization of a (same-sex) marriage in Belgium between a Romanian national and a third country national who later moved back to Romania.⁴² The cross-border movement between two EU member states served as a link to EU law and thus made EU law applicable.

In other circumstances, “if a Union citizen happens to be a national of, and reside in, a Member State which does not legally recognise same-sex relationships, (s)he will not be able to be joined there by his/her same-sex third-country national spouse, unless, of course, the latter has the right to enter that Member State on a basis other than the EU family reunification rights enjoyed by the Union citizen”.⁴³ The proportionality assessment in *Coman*

⁴⁰ Case C-673/16 *Coman* [2018] ECLI:EU:C:2018:385

⁴¹ For an exhaustive analysis of the ruling, see Dimitry Kochenov and Uladzislau Belavusau, ‘*After the celebration: Marriage equality in EU Law post-Coman in eight questions and some further thoughts*’ (2020) vol. 27, n. 5 Maastricht Journal of European and Comparative Law, pp. 549 - 572

⁴² Case C-673/16 *Coman* [2018] ECLI:EU:C:2018:385, para. 32

⁴³ Alina Tryfonidou, ‘*An analysis of the ECJ ruling in case C-673/16 Coman - The right of Same-Sex Spouses Under EU Law to move freely between EU Member States*’ – a report for NELFA (January 2019), p. 16 available at <http://nelfa.org/inprogress/wp-content/uploads/2019/01/NELFA-Tryfonidou-report-Coman-final-NEW.pdf> last accessed 15 April 2021

involved a fundamental rights argument and Romania, as it was implementing EU provisions on free movement, had to respect the family life of Mr Coman and his spouse as guaranteed under EU law.⁴⁴

However, a same-sex couple in a purely internal situation in Romania could not invoke EU law protection in national courts and Romania would not be obliged to provide protection of their right to respect for family life because its national law does not offer any form of protection to same-sex couples. Romania will therefore grant residence permits to married same-sex couples on the basis of EU law but its own nationals who are not qualified for the protection of EU law and wish to have their same-sex marriage recognized for the purpose of residing in Romania will be left with no protection. Their fundamental rights which are protected under EU law would simply be irrelevant to Romanian authorities because the situation would be purely internal. EU citizens are therefore discriminated against on the basis of having or not having a cross-border element which is relevant enough to trigger the application of EU law.

2.2.2. Reverse Discrimination and Discrimination Based on Nationality

Although reverse discrimination in some cases might seem as discrimination based on nationality, that is not entirely the case because nationality is not used as the main ground to draw a line between two groups of people that are treated differently.⁴⁵ If we go back to case *Coman*, it is apparent that EU law obliged Romania to issue a residence permit to a same-sex spouse of their own national who exercised his free movement rights before returning to Romania. The case concerned migration from the Member State of nationality to a different Member State (host Member State) and then back to the Member State of nationality.

This line of reasoning dates back to case *Singh*⁴⁶ which established the following. Free movement rights under EU law include a right to return to the Member State of nationality (a different approach would discourage EU citizens to move in the first place). At the same time, the residence rights of family members of EU citizens who move back to their Member State of nationality should correspond to the rights they would be granted if they moved to a

⁴⁴ Case C-673/16 *Coman* [2018] ECLI:EU:C:2018:385, paras. 47 - 50

⁴⁵ Alina Tryfonidou, 'Purely Internal Situations and Reverse Discrimination In a Citizens' Europe: Time to "Reverse" Reverse Discrimination', in Peter George Xuereb (ed) 'Issues in Social Policy: A New Agenda.' Jean Monnet Seminar Series (Progress Press 2009), p. 16

⁴⁶ Case C-370/90 *Surrinder Singh* [1992] ECLI:EU:C:1992:296.

different Member State.⁴⁷ The cross-border element that triggered the application of EU law in *Coman* was the cross-border movement between Belgium and the Member State of nationality of the applicant, Romania.

Therefore, Romanian nationals who went to the US, got married with an American national of the same sex in New York and then came back to Romania would be treated less favourably than Mr Coman because they would not be able to rely on EU law to have their marriage recognized for the purpose of residence rights. It is evident from this example that the main ground for discriminating against EU citizens who find themselves in purely internal situations is not their nationality, but their inability to find a factor which situates their case within the scope of EU law, such as cross-border movement between Member States.⁴⁸

3. CONSTITUTIONAL IMPLICATIONS OF EU CITIZENSHIP AND FUNDAMENTAL RIGHTS PROTECTION

As it was laid out in the previous chapter, reverse discrimination generated by the application of the purely internal rule goes directly against substantive values of the EU. Equality of EU citizens is a basic value of the Union enshrined in the primary law of the EU.⁴⁹ Art 2 TEU provides that equality and respect for human rights are amongst the values the Union is founded on. The wording of the Article defines them as values that are “common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.⁵⁰

The phenomenon of reverse discrimination reveals that “equality in the EU does not in fact behave as a true principle of law”.⁵¹ As Kochenov explains, “it is impossible to uphold key elements of a mature legal system” such as “equal citizenship, legal certainty and democratic legitimation” when equality “depends on establishing a cross-border element or proving deprivation of substance of EU citizenship rights”.⁵² Equality in EU legal order is not

⁴⁷ Colin Yeo, ‘*The Surinder Singh immigration route: how does it work?*’

<https://www.freemovement.org.uk/surinder-singh-immigration-route/> last accessed 15 April 2021

⁴⁸ Alina Tryfonidou, ‘*Purely Internal Situations and Reverse Discrimination In a Citizens’ Europe: Time to “Reverse” Reverse Discrimination*’, in Peter George Xuereb (ed) ‘*Issues in Social Policy: A New Agenda.*’ Jean Monnet Seminar Series (Progress Press 2009), p. 17

⁴⁹ Equality and non-discrimination as founding EU values are deeply enshrined in EU primary law. See Art 2, 3, 9 TEU, Art 8, 10, 18, 19 TFEU and Art 20, 21 of the Charter.

⁵⁰ Art 2 TEU

⁵¹ Dimitry Kochenov, ‘*Equality across the Legal Orders; Or Voiding EU Citizenship of Content*’ in Elspeth Guild, Cristina Gortázar Rotaache and Dora Kostakopoulou (eds) ‘*The Reconceptualisation of European Citizenship*’ (Martinus Nijhoff 2014), p. 303

⁵² *ibid.*

unconditional as it depends on whether one can point to a link with EU law or not. EU citizenship therefore is not a status based on equality due to its dependence on links with EU law –“its declared benefits and protections can always be overridden by personal circumstances of the holder”.⁵³

3.1. EU Citizenship and Internal Market: Market Citizenship

In general, the legal concept of citizenship is about equality of individuals in a society – “any individual can expect to be regarded as being as valuable a member of the community as any other individual possessing the same status”.⁵⁴ It follows that “the laws apply to all the citizens equally and no action on the part of the citizen is required in order to be entitled to treatment equal with others”.⁵⁵ Accordingly, the legal concept of citizenship guarantees equality to all citizens without asking them anything in return.⁵⁶

EU citizenship is driven by a different rationale. The Court accepted the ‘internal market logic’ when deciding EU citizenship cases, focusing on “market citizenship [to] compensate[] those whom it claims to have empowered”.⁵⁷ In order for a measure to constitute restriction on market freedoms, the Court examines three requirements: existence of a cross-border element, the situation has to concern movement with an economic aim, and finally, the relevant measure has to specifically restrict the pursuit of cross-border movement with an economic aim.⁵⁸ The compensatory logic behind the market freedoms is applied to EU citizenship cases, meaning that those who contribute to the internal market are also the ones who enjoy the protection of EU law.

EU citizenship has changed the strictly economic rationale of EU law to a certain, but very limited extent.⁵⁹

⁵³ Dimitry Kochenov, ‘*The Citizenship of Personal Circumstances in Europe*’ in Daniel Thym (ed) ‘*Questioning EU Citizenship Judges and the Limits of Free Movement and Solidarity in the EU*’ (Hart Publishing 2018), p. 37

⁵⁴ Dimitry Kochenov, ‘*Ius Tractum of Many Faces: European citizenship and the difficult relationship between status and rights*’ (2009) vol. 15, n. 2 Columbia Journal of European Law, p. 173

⁵⁵ *ibid.*

⁵⁶ Dimitry Kochenov, ‘*Equality across the Legal Orders; Or Voiding EU Citizenship of Content*’ in Elspeth Guild, Cristina Gortázar Rotaecche and Dora Kostakopoulou (eds) ‘*The Reconceptualisation of European Citizenship*’ (Martinus Nijhoff 2014), p. 304

⁵⁷ Dimitry Kochenov, ‘*The Oxymoron of ‘Market Citizenship’ and the Future of the Union*’ in Fabian Amtenbrink,, Gareth Davies, Dimitry Kochenov, Justin Lindeboom (eds) ‘*The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley*’ (Cambridge University Press 2019), p. 228

⁵⁸ Pedro Caro de Sousa, ‘*Quest for the Holy Grail—Is a Unified Approach to the Market Freedoms and European Citizenship Justified?*’ (2014) vol. 20, n. 4 European Law Journal, pp. 501 - 502

⁵⁹ *ibid.*, pp. 507 - 508

3.1.1. The *Ruiz Zambrano* Case and ‘Deprivation of Substance of Rights’

The seminal case concerning the status of EU citizenship and application of EU law in purely internal situations is the free movement case *Ruiz Zambrano*. Mr Ruiz Zambrano was a Colombian national who sought asylum in Belgium. His two children were born in Belgium and thus acquired Belgian nationality by ‘ius soli’. The entire family was to be deported so Mr Zambrano lodged an application for a residence permit based on Belgian nationality of his children, invoking the protection of EU law. The situation in the case was purely internal, “as there was no cross-border element, even remote one, which could provide a bridge with EU law”.⁶⁰ All the governments which submitted observations in the case argued that the situation of Mr Zambrano is purely internal to Belgium and as such should be kept out of reach of EU law.⁶¹ Nevertheless, the Court ruled in favour of Mr Zambrano, establishing a test of ‘deprivation of genuine enjoyment of substance of rights attached to the status of EU citizenship’.⁶² Refusing to grant a residence permit to parents who held Colombian citizenship would force the children, EU citizens to leave the territory of the EU, and thus deprive them of the enjoyment of the substance of rights attached to their EU citizenship status.⁶³ The Court also decided that the rights granted to EU citizens who are children of third-country nationals include the right to a work permit for the third country national parents to support the children because otherwise they would not be able to exercise the substance of rights attached to their EU citizenship status.⁶⁴

The vague concept of ‘substance of rights’ was introduced in the judgment without any elaboration whatsoever. The same outcome of the case could have been reached by straightforwardly abolishing the purely internal rule. Instead, the Court circumvented the intricacies of revoking the purely internal rule and took the ‘substance of rights’ route. Unlike the extensive argumentation provided in the opinion of AG Sharpston,⁶⁵ the Court restrained itself from entering into a profound analysis of the problems which arise from the case.⁶⁶ In

⁶⁰ Erik Kotlárík, ‘*The EU Citizenship in Purely Internal Situations and Reverse Discrimination*’ (2013), available at SSRN: <https://ssrn.com/abstract=2279861> or <http://dx.doi.org/10.2139/ssrn.2279861>, p. 5 last accessed 15 April 2021

⁶¹ Case C-34/09 *Ruiz Zambrano* [2011] ECLI:EU:C:2011:124, para. 37

⁶² *ibid.*, para. 44

⁶³ See Erik Kotlárík, ‘*The EU Citizenship in Purely Internal Situations and Reverse Discrimination*’ (2013), available at SSRN: <https://ssrn.com/abstract=2279861> or <http://dx.doi.org/10.2139/ssrn.2279861>, pp. 5 - 6 last accessed 15 April 2021

⁶⁴ Case C-34/09 *Ruiz Zambrano* [2011] ECLI:EU:C:2011:124, para. 44

⁶⁵ Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2010] ECLI:EU:C:2010:560.

⁶⁶ Koen Lenaerts, ‘*EU citizenship and the European Court of Justice's ‘stone-by-stone’ approach*’ (2015) vol 1., n.1. International Comparative Jurisprudence, p. 2

her opinion, AG Sharpston provided a broad analysis of the problem of reverse discrimination in the context of evolving case law on EU citizenship, adding emphasis on the scope of application of EU fundamental rights and proposing application of EU fundamental rights which would depend on “the existence and scope of a material EU competence”.⁶⁷ Nonetheless, she concluded that “at the time of the relevant facts, the fundamental right to family life under EU law could not be invoked as a free-standing right, independently of any other link with EU law”.⁶⁸ The Grand Chamber took a different approach. The minimalistic approach is quite visible in the judgment – the Court decided the case without mentioning the right to respect for family life.⁶⁹ Its “cryptic” ruling addressed only the citizenship dimension of the case.⁷⁰

Although *Ruiz Zambrano* indeed is a groundbreaking judgment, its reasoning is based on previous case law and “it did not come out of the blue”.⁷¹ The ruling was based on an antecedent decision in case *Rottmann*,⁷² which “set the founding stone that paved the way towards the emancipation of EU citizenship from the limits inherent in its free movement origins”.⁷³ In *Rottmann*, concerning the applicant who lost both his German and Austrian nationality, the Court of Justice ruled that the situation in which a Member State decides to withdraw naturalisation of an EU citizen who has already lost the nationality of a Member State he previously possessed does fall in the sphere of EU law.⁷⁴ The situation in *Rottmann* is situated within the ambit of EU law “by its nature and its consequences” due to the fact that the concerned EU citizen is in a position “capable of causing him to lose his EU citizenship status”.⁷⁵

In *Ruiz Zambrano*, the Court applied the principles laid out in *Rottmann* and also took a step further in developing the social aspect of EU citizenship which arised in *Grzelczyk*.⁷⁶ EU citizenship, which is destined to be the fundamental status of nationals of EU Member States,

⁶⁷ Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2010] ECLI:EU:C:2010:560., para. 163

⁶⁸ *ibid.*, para. 176

⁶⁹ Xavier Groussot, Gunnar Thor Petursson, Nina Louisa Arold, ‘*The paradox of human rights protection in Europe: two courts, one goal?*’ in Oddný Mjöll Arnardóttir, Antoine Buyse (eds) ‘*Shifting Centres of Gravity in Human Rights Protection*’ (Routledge 2016), p. 13

⁷⁰ *ibid.*

⁷¹ Koen Lenaerts, ‘*EU citizenship and the European Court of Justice's ‘stone-by-stone’ approach*’ (2015) vol. 1, n. 1 International Comparative Jurisprudence, p. 2

⁷² Case C-135/08 *Rottmann* [2010] ECLI:EU:C:2010:104

⁷³ *ibid.*

⁷⁴ Case C-135/08 *Rottmann* [2010] ECLI:EU:C:2010:104, para. 42

⁷⁵ *ibid.*

⁷⁶ Anja Wiesbrock, ‘*Union Citizenship and the Redefinition of the “Internal Situations” Rule: The Implications of Zambrano*’ (2011) vol. 12 German Law Journal, pp. 2083 – 2084, referring to Case C-184/99 *Grzelczyk* [2001] ECLI:EU:C:2001:458, para. 31

“precludes nationals measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”.⁷⁷ However, this change in approach did not solve the problem of reverse discrimination and inequality of EU citizens. When it comes to “drawing the boundaries between the scope of application of EU and national law,” the ‘genuine enjoyment of substance of rights’ criterion even added “a feeling of legal uncertainty”.⁷⁸ Many questions were left open and the Court still had to clarify the role of EU citizenship regarding the fundamental rights protection. It was particularly left unclear whether fundamental rights could be regarded as a part of the ‘substance of EU citizenship rights’ or not. If the answer was affirmative, then the EU fundamental rights protection could go beyond the purely internal rule. However, it soon became evident the Court chose a different path. The possible effects of *Ruiz Zambrano* were significantly constrained by future cases *McCarthy* and *Dereci*.

3.1.2. Clarifying ‘Deprivation of Substance of Rights’

Dereci concerned joined cases which all dealt with a third country national who wished to reside in Austria with their family member who was an EU citizen, a national of Austria and who never exercised their free movement rights. The case gave the Court of Justice an opportunity to provide further clarification on the scope of ‘the substance of EU citizenship rights’.⁷⁹ In a nutshell, the denial of the genuine enjoyment of substance of EU citizenship rights exists if the EU citizen has to leave not only the territory of the state of their nationality but also the territory of the EU as a whole.⁸⁰ Furthermore, a mere desire to keep the family together in the Member State of nationality for economic or other reasons does not indicate to the Court that the EU citizen will be forced to leave the EU territory and thus be deprived of the effectiveness of EU citizenship.⁸¹ The case did address the issue of fundamental rights protection, but the Court simply stated that Art 7 of the Charter is applicable only if the case is situated in the sphere of EU law while, if the case is out of the scope of EU law, the protection

⁷⁷ Case C-34/09 *Ruiz Zambrano* [2011] ECLI:EU:C:2011:124, para. 42

⁷⁸ Peter Van Elsuwege and Dimitry Kochenov, ‘*On Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*’ (2011) vol.13, n. 4 *European Journal of Migration and Law*, p. 453

⁷⁹ For a critical perspective on developments in EU citizenship case law (*Ruiz Zambrano*, *McCarthy* and *Dereci*) see Iris Goldner Lang, ‘*The Reach of EU Citizenship Rights for “Static” EU Citizens: Time to Move On?*’ in Ana Paula Dourado (ed) ‘*Movement of Persons and Tax Mobility in the European Union: Changing Winds*’ (IBFD 2014), pp. 307 - 328

⁸⁰ Case C-256/11 *Dereci* [2011] ECLI:EU:C:2011:734, para. 66

⁸¹ *ibid.*, paras. 67 - 68

could potentially be granted at a national level or the level of ECHR.⁸² By deciding that the right to respect for private and family life is not a part of the ‘substance of rights’ pertaining to the EU citizenship status, the Court accepted that the family of a third country national who is facing expulsion from the Member State territory “could not rely” on their EU citizenship status.⁸³ This approach allows Member States to “practically shatter” families consisting of EU citizens and third country nationals.⁸⁴

Considering how the Court narrowed the criterion introduced in *Ruiz Zambrano*, the restrained outcome of *Dereci* might seem as a “reaction to the anger of the Member States which was stirred up by *Ruiz Zambrano*”.⁸⁵ From a doctrinal point of view, *Dereci* “simply restated the fundamental principle of *Ruiz Zambrano*”⁸⁶ and confirmed that the deprivation of substance of rights attached to EU citizenship is linked to the EU citizen having to leave the territory of the EU and not just the Member State. By developing the test of ‘deprivation of substance of EU citizenship rights,’ the Court definitely challenged the purely internal rule. However, the test of deprivation of genuine enjoyment of substance of rights applies to situations which are truly exceptional.⁸⁷ It does not function as a substitute for the purely internal rule, “but rather complements the cross-border approach in order to determine whether or not national measures fall within the scope of application of EU law”.⁸⁸

Instead of using only the logic inherent to the internal market and its economic aims, in a limited number of situations it is possible for EU citizens to find a link to EU law by proving deprivation of substance of EU citizenship rights. This development in EU law is welcome, but in practice it only accentuates the limits of EU citizenship and its divergence from the concept of citizenship based on human dignity and equality. Equality of EU citizens cannot be achieved as long as there are two types of citizens – those who contribute to the market and those who do not contribute to the market. Reverse discrimination stems directly from this scheme of two types of EU citizens, accentuating the dividing line between those

⁸² *ibid.*, para. 72

⁸³ Erik Kotlárík, ‘*The EU Citizenship in Purely Internal Situations and Reverse Discrimination*’ (2013), available at SSRN: <https://ssrn.com/abstract=2279861> or <http://dx.doi.org/10.2139/ssrn.2279861>, p. 9 last accessed 15 April 2021

⁸⁴ *ibid.*

⁸⁵ *ibid.*, p. 8

⁸⁶ Gareth Davies, ‘*The Family Rights of European Children: Expulsion of Non-European Parents*’ (February 10, 2012) EUI Working Paper No. RSCAS 2012/04, p. 3

⁸⁷ Hester Kroeze and Peter Van Elsuwege, ‘*Editorial: Revisiting Ruiz Zambrano: A Never Ending Story?*’ (2021) vol. 23, n. 1 European Journal of Migration and Law Volume, p. 5

⁸⁸ *ibid.*, p. 12

EU citizens who have activated their citizenship by contributing to the market, and those who have not.

3.2. Active vs Inactive EU Citizens and Fundamental Rights

Market citizenship disqualifies a number of citizens before the law, “those construed by law as economically active are viewed as inherently more valuable than the uninterested, less affluent or disabled”.⁸⁹ Consequently, EU law cares to protect fundamental rights of EU citizens who have ‘activated’ their citizenship by engaging in an economic activity with a cross-border element. The logic behind EU citizenship is therefore in conflict with the notion of citizenship based on equality and respect for fundamental rights – “human being, whose liberty and good life is at the core of the rationale of integration, came to be replaced with an economically active citizen who stands in the focus of EU's concern”.⁹⁰ Only those EU citizens who exercised their free movement rights enjoy protection of their fundamental rights, making other EU citizens akin to “second-class citizens”.⁹¹

3.2.1. The *McCarthy* Case: Whose Fundamental Rights?

This is clearly visible from the aforementioned judgment in the *McCarthy* case. Mrs McCarthy was a national of the United Kingdom who also held Irish citizenship. She has always lived in the United Kingdom and she was in receipt of State benefits, thus not being a worker, self-employed person or self-sufficient person. After marrying Mr McCarthy, a Jamaican national, they applied for a residence permit for Mr McCarthy in the United Kingdom under EU law. The Court ruled that Directive 2004/38 does not confer a derived right of residence on Mr McCarthy because Mrs McCarthy has never exercised her right of free movement. She is not a beneficiary of the Directive, so her husband is also not granted a derived right to reside in the United Kingdom on the basis of being married to an EU citizen who has never activated her free movement rights attached to her status as an EU citizen.⁹² The Court ruled that “Directive 2004/38 is not applicable to a Union citizen who has never

⁸⁹ Dimitry Kochenov, ‘*The Oxymoron of ‘Market Citizenship’ and the Future of the Union*’ in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov, Justin Lindeboom (eds) ‘*The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley*’ (Cambridge University Press 2019), p. 225

⁹⁰ Dimitry Kochenov, ‘*The Citizenship Paradigm*’ (2013) vol. 15 Cambridge Yearbook of European Legal Studies, p. 207

⁹¹ Dimitry Kochenov, ‘*Ius Tractum of Many Faces: European citizenship and the difficult relationship between status and rights*’ (2009) vol. 15, n. 2 Columbia Journal of European Law, p. 214

⁹² Case C-434/09 *McCarthy* [2011] ECLI:EU:C:2011:277, para. 42

exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State”.⁹³

After establishing that Mrs McCarthy is not covered by the Directive 2004/38, the Court went on to apply the *Ruiz Zambrano* test of deprivation of substance of EU citizenship rights. Despite the fact that the situation of an EU citizen who has not used his free movement rights could not automatically and for that reason alone be perceived as a purely internal situation, EU law could not help Mrs McCarthy to obtain a residence permit for her husband.⁹⁴ The refusal of the authorities to issue a residence permit to Mr McCarthy does not deprive Mrs McCarthy of the genuine enjoyment of the substance of her EU citizenship rights and it does not impede the exercise of her right to move and reside freely within the Member States.⁹⁵ The fact that Mrs McCarthy also held Irish nationality did not make any difference.⁹⁶

3.2.2. Establishing a Link With EU Law: The ‘Dual Citizenship’ Cases

In a striking contrast, in so called surname cases, *Garcia Avello*⁹⁷ and *Grunkin and Paul*,⁹⁸ dual nationality of EU citizens brought the situation into the sphere of EU law. Both cases dealt with EU citizens having different surnames in two legal systems which was liable to cause serious inconveniences for their right to free movement.⁹⁹

Garcia Avello dealt with two minors residing in Belgium, who never made use of their right to free movement.¹⁰⁰ Their father was of Spanish and mother of Belgian nationality. According to Spanish law, the Spanish Embassy registered the children with a dual surname, Garcia Weber, while Belgium registered them with their father's surname, Garcia Avello. The parents requested Belgian authorities to change the surname because they wanted their children to bear the Spanish version of the surname, but their request was refused. The case eventually reached the Court of Justice.

The judgment reiterated how the citizenship of the Union is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with

⁹³ *ibid.*, para. 43

⁹⁴ *ibid.*, para. 46

⁹⁵ *ibid.*, para. 49

⁹⁶ *ibid.*

⁹⁷ Case C-148/02 *García Avello* [2003] ECLI:EU:C:2003:539

⁹⁸ Case C- C-353/06 *Grunkin and Paul* [2008] ECLI:EU:C:2008:559

⁹⁹ Case C-434/09 *McCarthy* [2011] ECLI:EU:C:2011:277, paras. 51-52

¹⁰⁰ See Sandra Winkler, ‘*Pravo na osobno ime u praksi europskih sudova*’ in Aleksandra Korać Graovac, Irena Majstorović (eds) ‘*Europsko obiteljsko pravo*’ (Narodne Novine 2013), p. 135-136

Community law.¹⁰¹ However, such a link with Community law was found to exist in *García Avello*. The case “dealt with no actual migration across state lines, let alone that it entailed some economic objectives of the movement”.¹⁰² At first, facts of the case might seem as a classic purely internal situation case. In spite of an evident lack of cross-border movement, children of the applicant in the case were “nationals of one Member State lawfully resident in the territory of another Member State” because of the dual citizenship factor.¹⁰³ Furthermore, the discrepancy in surnames under the two legal systems might cause ‘serious inconvenience’ for EU citizens on many levels, including difficulties regarding recognition of various documents and diplomas obtained under a different surname.¹⁰⁴ Those difficulties therefore amount to restrictions on the free movement rights of EU citizens. The Court decided the case by applying the principle of non-discrimination based on nationality.¹⁰⁵ The outcome of the proportionality assessment was that Belgium failed to justify its refusal to grant a change of surname to dual EU citizens and consequently had to “recognize the surname of a dual Union citizen registered with another Member State”.¹⁰⁶

The next ‘dual citizenship’ case *Grunkin and Paul*, “unlike *García Avello*, concerned a less far-fetched cross-border situation of a child residing in Denmark, but having only German nationality”.¹⁰⁷ Germany refused to recognize Danish surname given to the child (double-barrelled surname Grunkin-Paul). The Court decided that rights granted by EU citizenship “preclude the authorities of a Member State, in applying national law, from refusing to recognise a child’s surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth”.¹⁰⁸ The ruling relied on the precedent established in *García Avello* – ‘serious inconveniences’ arising from the discrepancy of surnames of EU citizens possessing dual nationality were a disadvantage which qualified as a restriction on free movement rights.¹⁰⁹ These inconveniences were elaborated on by the Court: “every time the child crosses the border between Denmark and Germany, he will bear a

¹⁰¹ Case C-148/02 *García Avello* [2003] ECLI:EU:C:2003:539, para. 26

¹⁰² Nika Bačić Selanec, ‘*A Realist Account of European Union Citizenship*’ (Doctoral Dissertation, University of Zagreb 2019), p. 318

¹⁰³ Case C-148/02 *García Avello* [2003] ECLI:EU:C:2003:539, para. 27

¹⁰⁴ *ibid.*, paras. 35 - 36

¹⁰⁵ *ibid.*, para. 29

¹⁰⁶ Nika Bačić Selanec, ‘*A Realist Account of European Union Citizenship*’ (Doctoral Dissertation, University of Zagreb 2019), p. 320

¹⁰⁷ *ibid.*, p. 323

¹⁰⁸ Case C- C-353/06 *Grunkin and Paul* [2008] ECLI:EU:C:2008:559, para. 39

¹⁰⁹ *ibid.*, paras. 21 - 23

different name which will cause great inconveniences”¹¹⁰ and “a difference in surnames is likely to give rise to doubts as to the person’s identity and the authenticity of the documents submitted, or the veracity of their content”.¹¹¹

The dual citizenship argument was rejected in *McCarthy*. Moreover, the Court reinterpreted the ‘surname cases’ and clarified that the link to EU law in *Garcia Avello* and *Grunkin and Paul* was not dual nationality of EU citizens but ‘serious inconveniences’ which restricted free movement rights.¹¹² Taking into consideration the arguments offered by the Court, Mrs McCarthy's dual citizenship seems not to establish a connecting factor to EU law. The applied measures did not have the effect of depriving her of the genuine enjoyment of the substance of EU citizenship rights or of impeding the exercise of her free movement rights.¹¹³ Accordingly, in such a context, this factor is not sufficient, in itself, to find the situation as covered by Article 21 TFEU.¹¹⁴

3.2.3. Market-Oriented Fundamental Rights Protection

The situation in *McCarthy* was also different from the one in the *Carpenter*¹¹⁵ case. Mr Carpenter, a national of the United Kingdom, was married to Mary Carpenter, a national of the Philippines, who faced deportation. Mr Carpenter provided cross-border services while his wife took care of their children in the United Kingdom, so the Court sought to protect Mr Carpenter's freedom to provide services. Deportation of his wife would pose an impediment to the exercise of his fundamental freedom to provide services.¹¹⁶ Separation of Mr and Mrs Carpenter would have the effect of deterring Mr Carpenter from exercising his freedom to provide services, therefore undermining its effectiveness.¹¹⁷ A national measure interfering with the conditions under which Mr Carpenter exercises his freedom to provide services has to be in line with his right to respect for family life.¹¹⁸ The Court’s reasons to take into account the fundamental rights dimension of this case reveal a purely economic paradigm and confirm that active citizens (like Mr Carpenter, who provided cross-border services) are

¹¹⁰ *ibid.*, para. 32

¹¹¹ *ibid.*, para. 28

¹¹² Koen Lenaerts, ‘*EU citizenship and the European Court of Justice's ‘stone-by-stone’ approach*’ (2015) vol. 1, n. 1, *International Comparative Jurisprudence*, p. 4. See also Stanislas Adam and Peter Van Elsuwege, ‘*Citizenship rights and the federal balance between the European Union and its Member States: comment on Dereci*’ (2012) vol. 37 n. 2 *European Law Journal*, p. 183

¹¹³ Case C-434/09 *McCarthy* [2011] ECLI:EU:C:2011:277, para. 54

¹¹⁴ *ibid.*, para. 55

¹¹⁵ Case C-60/00 *Carpenter* [2002] ECLI:EU:C:2002:434

¹¹⁶ *ibid.*, paras. 38 - 39

¹¹⁷ *ibid.*, para. 39

¹¹⁸ *ibid.*, para. 41

entitled to fundamental rights protection, while non-active citizens are disqualified from fundamental rights assessment.

In *McCarthy*, there were no relevant factors which could trigger the protection of EU law as the impediments on her right to move were “purely hypothetical”.¹¹⁹ Mrs McCarthy's right to respect for her family life was completely irrelevant to the Court because she was a passive, non-active EU citizen. Her situation was purely internal and thus confined to internal laws of the United Kingdom. Although AG Kokott did tackle the issue of reverse discrimination in her opinion in the case,¹²⁰ the judgment of the Court did not address this issue at all. AG Kokott concluded that a static EU citizen such as Mrs McCarthy is not discriminated against compared to mobile EU citizens because she does not fulfil the remaining conditions for the acquisition of longer-term rights of residence that are to be met by Union citizens.¹²¹ Those include workers, self-employed persons and self-sufficient persons. The overall message is clear. The Court's approach to EU citizenship allows for reverse discrimination to emerge. Fundamental rights protection depends on one's ability to point to a link with EU law, or one's ability to be lucky enough to trigger the protection of EU law. The question I will continue to analyse is - can the Court change its position by using the status of EU citizenship as a tool for applying the EU set of fundamental rights in situations where cross-border movement is non-existent?

4. USING EU CITIZENSHIP TO ELIMINATE REVERSE DISCRIMINATION: WHAT EU CAN LEARN FROM THE US

The main purpose of the purely internal rule developed by the Court of Justice is to keep the balance of powers between the Union and the Member States in the boundaries defined by the Treaties, considered as “the constitutional charter of the EU”.¹²² As it was laid out in the previous chapters, the status of EU citizenship indeed does have a transformative potential to shift the market-based logic in a direction towards respect for human dignity and fundamental rights. Protecting fundamental rights stands in the sole centre of equality and in principle it should be granted to everyone under the same conditions. EU citizenship based on human

¹¹⁹ Koen Lenaerts, ‘*EU citizenship and the European Court of Justice's 'stone-by-stone' approach*’ (2015) vol. 1, n. 1 International Comparative Jurisprudence, p. 5

¹²⁰ Opinion of AG Kokott in Case C-434/09 *McCarthy* [2011] ECLI:EU:C:2010:718, paras. 39-43

¹²¹ *ibid.*, para. 43

¹²² The Treaty was referred to as “the basic constitutional charter” for the first time in Case 294/83 *Les Verts* [1986] ECLI:EU:C:1986:166, para. 23

dignity rather than on market values does seem like a desirable route to follow in order to truly achieve equality. Nevertheless, it cannot be used in a way which completely disregards constitutional barriers, such as the principle of conferral. The Court's jurisprudence should aim to interpret EU citizenship rights in conformity with protection of human dignity of individuals possessing the status and at the same time remain in line with the constitutional framework of the EU.

In relation to this, American experience with the so-called 'incorporation doctrine' could be valuable to help understand how a change in fundamental rights protection might affect EU federalism, or the balance of powers between the Union and its Member States.¹²³ American constitutional doctrine of incorporation, in essence, demonstrates how can the requirement to uphold individual rights, which is in the Constitution originally addressed only to the federal government, also become binding on the constituent states through different judicial interpretations of a constitutional guarantee of due process for individuals. In that sense, the similarities between the hypothetical usage of EU citizenship rights as a tool for broadening EU competence and incorporation doctrine in the US are "striking".¹²⁴ Keeping in mind that the dividing line between national and EU law protection of fundamental rights is still fairly unclear, even described as "puzzling," the US context can shed some light on this issue from a federal perspective.¹²⁵ In that context, this chapter aims to provide an analysis of the incorporation doctrine in the US and its implications. The first part focuses on the Fourteenth Amendment to the US Constitution as a legal basis for incorporation. The second part examines relevant case law to explain the selective approach to incorporation as well as the reach of this approach. The third part lays out how the incorporation doctrine affected US federalism.

4.1. The Fourteenth Amendment to the US Constitution as a Basis for Incorporation

American constitutional doctrine of incorporation, developed by the US Supreme Court during the twentieth century, holds that most of the rights contained in the Bill of Rights,¹²⁶

¹²³ See Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2010] ECLI:EU:C:2010:560, para. 172

¹²⁴ Martijn van den Brink, 'The Origins and the Potential Federalising Effects of the Substance of Rights Test' in Dmitry Kochenov (ed) *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017), p. 102

¹²⁵ Stanislas Adam and Peter Van Elsuwege, 'Citizenship rights and the federal balance between the European Union and its Member States: comment on Dereci' (2012) vol. 37, n. 2 *European Law Journal*, pp. 185 - 186

¹²⁶ The first ten amendments to the US Constitution

which originally applied only to the federal government, also become binding on the states by virtue of the Fourteenth Amendment's due process clause.¹²⁷ Before the ratification of the Fourteenth Amendment, Bill of Rights was understood as posing limitations only on the federal authority.¹²⁸ The Supreme Court established this precedent in case *Barron v. Baltimore* when it ruled that the Fifth Amendment is not applicable to the states but only the federal government.¹²⁹ The ratification of the Fourteenth Amendment changed this legal landscape.

The Fourteenth Amendment and its due process clause¹³⁰ were part of the reconstruction amendments to the Constitution adopted after the end of American Civil War (1861 – 1865).¹³¹ The reconstruction upgrade of the Constitution was adopted to both establish equality of all American people (regardless of their skin colour) and to distribute the triumphant set of values to former seceded states.¹³² The main goal was “to build an egalitarian society on the ashes of slavery”.¹³³ The Constitution became “a vehicle through which members of vulnerable minorities could stake a claim to substantive freedom and seek protection against misconduct by all levels of government”.¹³⁴ The Fourteenth Amendment is the only amendment to the US constitution which is directly addressed to the States (not the federal government) and due to its role in expansion of judicial protection of fundamental rights and liberties in mid-twentieth century onwards it has been described as “a central – if not ‘the central’ – provision in US constitutional jurisprudence”.¹³⁵

¹²⁷ See https://www.law.cornell.edu/wex/incorporation_doctrine last accessed 15 April 2021

¹²⁸ See Lee J. Strang, ‘*Incorporation Doctrine’s Federalism Costs: A Cautionary Note for the European Union*’ (2018) vol. 20, n. 2 – 3 *European Journal of Law Reform*, p. 131

¹²⁹ *Barron v. Baltimore* 32 U.S. 243 (1833)

¹³⁰ US Constitution, Amendment XIV (1). The due process clause is formulated as “nor shall any State deprive any person of life, liberty, or property, without due process of law”

¹³¹ See <https://www.history.com/topics/american-civil-war/reconstruction> last accessed 15 April 2021

¹³² See Eric Foner, ‘*The Second Founding: How the Civil War and Reconstruction Remade the Constitution*’ (W. W. Norton & Company 2019). Also see

<https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm>. last accessed 15 April 2021. The ‘Confederate States of America’ opposed the abolition of slavery promoted by the newly elected President Lincoln and because of that they seceded from the US. See

<https://www.britannica.com/topic/Confederate-States-of-America> last accessed 28 May 2021

¹³³ Eric Foner, ‘*The Second Founding: How the Civil War and Reconstruction Remade the Constitution*’ (W. W. Norton & Company 2019), *preface*, p. 19

¹³⁴ Eric Foner, ‘*The Strange Career of the Reconstruction Amendments*’ (1999) vol. 108, n. 2 *The Yale Law Journal*, p. 2006

¹³⁵ Paul Finkelman, ‘*The Historical Context of the Fourteenth Amendment*’ (2004) vol. 13, n. 2 *Temple Political & Civil Rights Law Review*, p. 389

Before the emergence of incorporation case law based on the due process clause, the Supreme Court first ruled on the privileges or immunities clause¹³⁶ of the Fourteenth Amendment. In the landmark *Slaughter-House* ruling,¹³⁷ the Supreme Court rejected the possibility of incorporation of the Bill of Rights through the aforementioned clause. To this day, this ruling is heavily criticized.¹³⁸

The 1873 *Slaughter-House* cases concerned a piece of legislation adopted by the state of Louisiana which aimed to protect the public health of the city of New Orleans from contamination caused by unregulated slaughtering of livestock. The concerned statute established a state-owned Slaughter-House company with exclusive rights to perform slaughtering of livestock while butchers had to pay a certain fee to use the state facilities in order to do their job. The butchers of New Orleans claimed, inter alia, that the state of Louisiana violated the privileges or immunities clause of the Fourteenth Amendment. The Supreme Court rejected the arguments by concluding that the privileges or immunities clause protects only those rights which “owe their existence to the federal government”.¹³⁹ The majority drew a “sharp distinction” between federal and state rights of citizens, relying on the wording of the clause which referred to privileges or immunities of ‘the citizens of the United States’.¹⁴⁰ Secondly, the ruling addressed the federal argument – “the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people” would be radically changed by imposing the federal standard of fundamental rights protection on the States.¹⁴¹ In that capacity, the Supreme Court found the wording of the privileges or immunities clause to be insufficient as a legal basis for incorporation in “absence of language which expresses such a purpose too clearly to admit of doubt”.¹⁴²

The Supreme Court rejected the privileges or immunities clause as a basis for incorporation but afterwards it accepted incorporation of the Bill of Rights through the due process clause of the Fourteenth Amendment. In *Gitlow v. New York*,¹⁴³ the Supreme Court

¹³⁶ U.S. Constitution, Amendment XIV (1). The wording states: “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”

¹³⁷ *Slaughter-House* 83 U.S. 36 (1872)

¹³⁸ For further analysis of the *Slaughter-House* cases and the controversies surrounding it see Kermit Roosevelt III, ‘What If *Slaughter-House* Had Been Decided Differently?’ (2011) vol. 45, n.1 *Indiana Law Review*, pp. 61 - 88

¹³⁹ *Slaughter-House* 83 U.S. 36 (1872), p. 79

¹⁴⁰ *McDonald v. Chicago* 561 U.S. 742 (2010), pp. 6 - 7

¹⁴¹ *Slaughter-House* 83 U.S. 36 (1872), p. 78

¹⁴² *ibid.*

¹⁴³ *Gitlow v. New York* 268 U.S. 652 (1925)

held that the States must protect the freedom of speech protected by the First Amendment. This decision established a precedent for future case law based on the due process clause.

4.2. Incorporation Case Law

This subchapter will study elements of incorporation case law which are most relevant to support the argument of this paper. The starting point of the analysis is the landmark case *Gitlow v. New York*. The second point will focus on the main dilemma of ‘selective’ approach to incorporation – which rights should be incorporated and based on which criteria. Thirdly, the reach of incorporation case law will be addressed.

4.2.1 Activating the ‘Due Process’ Clause

The case which laid foundation for incorporation doctrine is the aforementioned freedom of speech case *Gitlow v. New York* that was decided in 1925. The facts concerned criminal charges against Benjamin Gitlow, a socialist politician who was charged for violating criminal anarchy law of the state of New York. Gitlow published and distributed pamphlets which expressed his socialist beliefs, including the ‘Left Wing Manifesto’.¹⁴⁴ According to the state of New York, this content advocated for a revolutionary overthrow of the government, directly prohibited by the State’s criminal anarchy law.

The ruling of the Supreme Court declared that the first amendment rights which guarantee freedom of speech and freedom of press “are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States”.¹⁴⁵ For the present case, this shift in fundamental rights protection meant that Gitlow could enforce his rights to freedom of speech and freedom of press against the state of New York. The Court would then assess his criminal proceedings in light of his fundamental rights protected by the First Amendment to the US Constitution. After examining the New York criminal anarchy law in the frame of freedom of speech and freedom of press, the Supreme Court ruled that the First Amendment does not protect those individuals whose publications advocate the overthrow of government by force.¹⁴⁶ The outcome of the case was therefore not controversial but the constitutional doctrine introduced in the judgment would later on largely affect the development of the US legal system. In *Gitlow v. New York*, like in

¹⁴⁴ For a more detailed account see <https://law.jrank.org/pages/7160/Gitlow-v-New-York.html> last accessed 15 April 2021

¹⁴⁵ *Gitlow v. New York*, 268 U.S. 652 (1925), p. 666

¹⁴⁶ *ibid.*, p. 668

other major constitutional cases, the Supreme Court prudently established a game-changing legal principle, but did not use the newly established competence.¹⁴⁷ The case which marks the judicial genesis of incorporation was decided in a non-conflicting and far-sighted manner. Despite its relevance, the ruling did not offer extensive argumentation.¹⁴⁸ It merely stipulated that the due process clause of the Fourteenth Amendment protects certain fundamental rights from violations by the States. The principle of incorporation was therefore established. The case did not clarify whether the Court opted for selective or total incorporation.¹⁴⁹ The consequent case law that built upon the precedent established in *Gitlow v. New York* accepted the doctrine of selective incorporation, a view that only certain rights protected by the Bill of Rights are applicable against the States.¹⁵⁰

4.2.2. Selective Incorporation: Which Rights?

The doctrine of selective incorporation empowers the courts to decide which rights protected by the Bill of Rights can be enforced against the States.¹⁵¹ The question which arises is what are the criteria for deciding which rights are enforceable against the States and which are not. The ‘double jeopardy cases’ *Palko v. Connecticut*¹⁵² and *Benton v. Maryland*¹⁵³ are suitable cases to explain the evolution of case law regarding this dilemma.

The Fifth Amendment to the US Constitution protects individuals from double jeopardy.¹⁵⁴ In the 1935 case *Palko v. Connecticut* the Supreme Court rejected incorporation of the double jeopardy clause of the Fifth Amendment. The case involved Frank Palko, a man from Connecticut who robbed a music store and shot and killed two police officers who cornered him while fleeing from the scene of crime. Palko was first charged with first-degree murder but was convicted of second-degree murder and punished with life imprisonment. The

¹⁴⁷ For a further description of this method of constitutional adjudication see András Jakab, ‘*The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States*’ in Carlos Closa, Dmitry Kochenov (eds) ‘*Reinforcing Rule of Law Oversight in the European Union*’ (Cambridge University Press 2016), p. 203

¹⁴⁸ See Lee J. Strang, ‘*Incorporation Doctrine’s Federalism Costs: A Cautionary Note for the European Union*’ (2018) vol. 20, n. 2 – 3 *European Journal of Law Reform*, p. 134

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*, pp. 134 - 135

¹⁵¹ See Jerold H. Israel, ‘*Selective Incorporation Revisited*’ (1982) vol. 71, n.1 *The Georgetown Law Journal*, pp. 253-338

¹⁵² *Palko v. Connecticut* 302 U.S. 319 (1937)

¹⁵³ *Benton v. Maryland*, 395 U.S. 784 (1969)

¹⁵⁴ The principle of ‘ne bis in idem’. In US Constitution, Amendment V the principle is articulated as “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”. See <https://www.nolo.com/legal-encyclopedia/the-prohibition-against-double-jeopardy.html> last accessed 28 May 2021

prosecution appealed and won a new trial in which Palko was convicted of first-degree murder and sentenced to death. At the Supreme Court Palko argued that Connecticut violated his ‘double jeopardy’ rights which are among the rights that are incorporated through the due process clause of the Fourteenth Amendment and thus applicable against the States. More precisely, he argued that “what is forbidden by the Fifth is forbidden by the Fourteenth also” and convicting a defendant twice is “a denial of life or liberty without due process of law”.¹⁵⁵ To sum up, the same standard of fundamental rights protection that is imposed on the federal government should be complied with by the States since the due process clause made the Bill of Rights enforceable against the States.¹⁵⁶

The ruling explicitly rejected this position. The majority held that there was no “general rule” which would stipulate that “whatever would be a violation of the Bill of Rights by the federal government is equally unlawful by the force of the Fourteenth amendment”.¹⁵⁷ Moreover, the decision tried to clarify the criterion for selective incorporation. The Supreme Court’s reflection on the case concludes that protection against double jeopardy has “value and importance” but it is “not of the very essence of a scheme of ordered liberty”.¹⁵⁸ The protection of double jeopardy found in the Fifth Amendment does not express “a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”.¹⁵⁹ The majority opinion held that Connecticut did not intend to accumulate trials against the accused “out of cruelty” – the State merely intended to secure “a trial free of substantial legal errors”.¹⁶⁰ The Supreme Court went on to examine whether the double jeopardy rights are fundamental to the concept of due process.¹⁶¹ The absorption of certain rights protected by the Bill of Rights through the Fourteenth Amendment’s due process clause depends on whether “liberty and justice would exist if these were sacrificed”.¹⁶² The fundamental rights protection standard for the States should be different than the one for the federal government and therefore violations of certain rights by the States do not undermine the entire constitutional system.¹⁶³ The ruling in *Palko* therefore allowed the States to impose

¹⁵⁵ *Palko v. Connecticut* 302 U.S. 319 (1937), p. 322

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*, p. 323

¹⁵⁸ *ibid.*, p. 325

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*, p. 328

¹⁶¹ *ibid.*, p. 323

¹⁶² *ibid.*, p. 326

¹⁶³ *ibid.*, p. 328

their own standards on double jeopardy violations as long as these did not violate the ‘test of fundamental fairness’.¹⁶⁴

The 1969 decision in *Benton v. Maryland* overruled such a holding. John Benton was accused of burglary and larceny. He was acquitted for larceny and convicted of burglary. After the trial it was established that the jurors in the case were sworn in based on a provision that was ruled unconstitutional by the Supreme Court. Benton accepted the option of having a second trial in which he was convicted of both burglary and larceny. The case reached the Supreme Court and the ruling rejected the conclusion that was reached in *Palko v. Connecticut*. *Benton v. Maryland* “swept away the obstruction on the road to imposition of the federal double jeopardy standards upon the States”.¹⁶⁵ The majority held that the protection against double jeopardy “represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment”.¹⁶⁶ The Supreme Court emphasized that protection against double jeopardy traces back to Greek and Roman times, as well as to common law of England, and “it is fundamental to the American scheme of justice”.¹⁶⁷ *Palko* has been overruled because the settled case law which emerged after *Palko* indicated that its “roots had thus been cut away years ago”.¹⁶⁸ One of these cases which were decided after *Palko* was the case *Duncan v. Louisiana*¹⁶⁹ which expressed the idea that “once it is decided that a particular Bill of Rights guarantee is “fundamental to the American scheme of justice, the same constitutional standards apply against both the State and Federal Governments”.¹⁷⁰ Therefore, it is not the question whether a right is considered as fundamental in any civilized legal system but whether it should be considered fundamental in the American scheme of justice.¹⁷¹ The ‘fundamental fairness’ criterion was therefore relaxed in favour of incorporation of the double jeopardy clause. In other words, the protection against double jeopardy was, in essence, considered fundamental to the US legal system, whereas its denial could undermine the American scheme of justice.

The majority in *Benton v. Maryland* thus incorporated the Fifth Amendment right through the Fourteenth Amendment’s due process clause. The gradual evolution in case law

¹⁶⁴ Richard G. Larsen, ‘State Double Jeopardy After *Benton v. Maryland*’ (1970) vol. 1, n.1 Loyola University Chicago Law Journal, p. 99

¹⁶⁵ *ibid.*

¹⁶⁶ *Benton v. Maryland* 395 U.S. 784 (1969), p. 794

¹⁶⁷ *ibid.*, pp. 795 - 796

¹⁶⁸ *ibid.*, p. 795

¹⁶⁹ *Duncan v. Louisiana* 391 U.S. 145 (1968). The case incorporated a Sixth Amendment right to a jury trial.

¹⁷⁰ *Benton v. Maryland* 395 U.S. 784 (1969), p. 795

¹⁷¹ *Duncan v. Louisiana* 391 U.S. 145 (1968), p. 149

established the following postulate – once a right contained in the Bill of Rights is defined as a right which is fundamental to the US legal order, the same standard applies both to the federal authorities and to the States.

The doctrine of selective incorporation accepted by the Supreme Court holds that “most of the provisions of the Bill of Rights apply with full force to both the federal government and the States”.¹⁷² A right that is so fundamental to American scheme of ordered liberty or “deeply rooted in American history and tradition”¹⁷³ should be fully respected by the federal government and the States. Although the Supreme Court did not accept the total incorporation theory, the theory of selective incorporation which was embraced allowed the Supreme Court to incorporate almost every right guaranteed by the Bill of Rights.¹⁷⁴

4.2.3. The Reach of Incorporation Case Law

Selective incorporation hence resulted in “near-total” incorporation of the Bill of Rights.¹⁷⁵ Other rights which have been incorporated include free exercise of religion,¹⁷⁶ freedom of the press,¹⁷⁷ right against self-incrimination,¹⁷⁸ right to a speedy trial,¹⁷⁹ right to an impartial jury,¹⁸⁰ protection against cruel and unusual punishments,¹⁸¹ etc. The Ninth Amendment which relates to retained rights of people not enumerated in the Constitution and the Tenth Amendment which contains the principle of retained powers of the States were not incorporated due to their content which simply does not require incorporation.¹⁸²

In the 2010 case *McDonald v. Chicago*, Supreme Court ruled on incorporation of the Second Amendment right to keep and bear arms. That constitutional right is regarded as highly controversial and is severely criticized in the US society.¹⁸³ The ruling itself refers to

¹⁷² *McDonald v. Chicago* 561 U.S. 742 (2010), Opinion of Justice Alito, p. 1

¹⁷³ *Washington v. Glucksberg* 521 U. S. 702, 721 (1997), p. 720 - 721

¹⁷⁴ *McDonald v. Chicago* 561 U.S. 742 (2010), Opinion of Justice Alito, p. 16. As described in *McDonald v. Chicago* 561 U.S. 742 (2010), Opinion of Justice Alito, p. 17, rights which have not been incorporated through the Due Process Clause are: „the Sixth Amendment’s right to a unanimous jury verdict, the Third Amendment’s protection of quartering of soldiers, the Fifth Amendment’s grand jury indictment requirement, the Seventh Amendment right to a jury trial in civil cases and the Eighth Amendment’s prohibition on excessive fines.”

¹⁷⁵ Lee J.Strang, ‘*Incorporation Doctrine’s Federalism Costs: A Cautionary Note for the European Union*’ (2018) vol. 20, n. 2 – 3 *European Journal of Law Reform*, p. 135

¹⁷⁶ *Cantwell v. Connecticut* 310 U.S. 296 (1940)

¹⁷⁷ *Near v. Minnesota* 283 U.S. 697 (1931)

¹⁷⁸ *Malloy v. Hogan* 378 U.S. 1 (1964)

¹⁷⁹ *Klopfer v. North Carolina* 386 U.S. 213 (1967)

¹⁸⁰ *Parker v. Gladden* 385 U.S. 363 (1966)

¹⁸¹ *Robinson v. California* 370 U.S. 660 (1962)

¹⁸² https://www.law.cornell.edu/wex/incorporation_doctrine last accessed 15 April 2021

¹⁸³ See <https://www.washingtonpost.com/news/made-by-history/wp/2018/02/22/what-the-second-amendment-really-meant-to-the-founders/> last accessed 15 April 2021

the right as having “controversial public safety implications”.¹⁸⁴ The majority of five out of nine justices decided that the right to keep and bear arms is incorporated through the due process clause. The Supreme Court first went to determine whether the right is fundamental to American scheme of ordered liberty or whether it is deeply rooted in history and tradition of the American nation.¹⁸⁵ The answer to both was affirmative.¹⁸⁶ Therefore this Second Amendment right is qualified to be absorbed by the Fourteenth Amendment and thus fully applicable against the States. By following the logic of previous incorporation cases, *McDonald v. Chicago* cemented the fact that even selective approach which is formally accepted by the Supreme Court managed to pave the way to almost total incorporation of the Bill of Rights.

4.3. Incorporation Doctrine’s Effects on US Federalism

After outlining the key elements of case law on incorporation, it is necessary to examine the implications this doctrine had on US federalism. As it was explained throughout this chapter, incorporation of the Bill of Rights through the Fourteenth Amendment profoundly changed the system of fundamental rights protection in the US by imposing the federal standard of fundamental rights protection on the States. This development in US law is positive because it narrowed the States’ power to blatantly violate the common standards of protecting fundamental rights of individuals. In other words, if the majority in *Palko* had reached the decision which was confirmed years later in *Benton*, Mr Palko would not have been sentenced to death and eventually electrocuted.

However, the possibility of enforcing a large fund of fundamental rights protected by the federal constitution against the States meant that control over a significant range of areas which were originally State law is now taken over by the federal entity. One of the main arguments against the doctrine of incorporation was exactly the ‘federal argument’ which posits that imposing federal standard on the States will hurt the principle of federalism and halt State experimentation.¹⁸⁷

¹⁸⁴ *McDonald v. Chicago* 561 U.S. 742 (2010), Opinion of Justice Alito, p. 36

¹⁸⁵ *ibid.*, p. 19

¹⁸⁶ The ruling relied on the previous case *District of Columbia v. Heller* 554 U.S. 570 (2008) which decided that the right to keep and bear arms was immanent to the notion of self-defense as well as rooted in American history and tradition. See *McDonald v. Chicago* 561 U.S. 742 (2010), Opinion of Justice Alito, pp. 19 - 45

¹⁸⁷ *McDonald v. Chicago* 561 U.S. 742 (2010), Opinion of Justice Alito, p. 36

Federalism stands in the centre of US constitutional law. Moreover, it is “a crucial structural principle of the U.S. Constitution,”¹⁸⁸ described as a “cornerstone of the Constitution”.¹⁸⁹ The principle of federalism relates to the distribution of powers between the federal entity and the comprising states, with each reserving their sovereignty in certain areas. Generally, there are two theoretical models of federalism depending on the relationship between the federal and state areas of competence.¹⁹⁰ Dual federalism implies a federal structure functioning as a dichotomous system which clearly separates state authority from federal authority.¹⁹¹ On the contrary, cooperative federalism rejects mutually exclusive division of competences and accepts overlapping spheres of authority between federal and state components.¹⁹² The effects which the doctrine of incorporation had on the US legal system correspond to the vision of federalism supported by the Supreme Court in its case law during mid-twentieth century – a conception of cooperative federalism which “does not identify discrete spheres of power”.¹⁹³

One of the main arguments against incorporation was the claim that enforcing federal fundamental rights protection standards on the States restricts state experimentation .¹⁹⁴ As Justice Alito articulated in the majority opinion in *McDonald v. Chicago*, incorporation “does limit state their ability to devise solutions to social problems that suit local needs and values”.¹⁹⁵ In fact, incorporation always restricts experimentation and local variations in a federal context.¹⁹⁶ However, it does not eliminate them.¹⁹⁷ Restricting state regulatory choices in practice simply means that the choices are transferred from the States to the federal government.¹⁹⁸ On an institutional level, the authority to regulate is shifted from legislative

¹⁸⁸ See Lee J.Strang, ‘*Incorporation Doctrine’s Federalism Costs A Cautionary Note for the European Union*’ (2018) vol. 20, n. 2 – 3 *European Journal of Law Reform*, p. 130

¹⁸⁹ John McGinnis and Ilya Somin, ‘*Federalism Vs. States’ Rights: A Defense of Judicial Review in a Federal System*’ (2004) vol. 99, n.1 *Northwestern University Law Review*, p. 89

¹⁹⁰ Robert Schütze, ‘*From Dual to Cooperative Federalism: The Changing Structure of European Law*’ (Oxford University Press 2009), p. 4 - 5

¹⁹¹ *ibid.*, p. 5

¹⁹² *ibid.*

¹⁹³ See Lee J.Strang, ‘*Incorporation Doctrine’s Federalism Costs: A Cautionary Note for the European Union*’ (2018) vol. 20, n. 2 – 3 *European Journal of Law Reform*, p. 136

¹⁹⁴ *McDonald v. Chicago* 561 U.S. 742 (2010), Opinion of Justice Alito, p. 37

¹⁹⁵ *ibid.*, p. 38

¹⁹⁶ *ibid.*, p. 44

¹⁹⁷ *ibid.*, p. 38

¹⁹⁸ *McDonald v. Chicago* 561 U.S. 742 (2010), Opinion of Justice Breyer, dissenting, p. 2

bodies to courts.¹⁹⁹ To a certain extent, this relocation also enables concentration of powers in Congress due to Congress's power to enforce the Bill of Rights against the States.²⁰⁰

Incorporating the Bill of Rights against the States significantly "altered the constitutional relationship between the States and the federal government".²⁰¹ Broadening the federal standard of fundamental rights protection strengthened equality of US citizens whose fundamental rights were violated. In the same time, its implications affected the core principle of American constitutional order in a significant manner.

Before major incorporation cases were decided, US citizens were able to invoke the guarantees enshrined in the Bill of Rights only against the federal authorities. Incorporating most of the Bill of Rights into the Fourteenth Amendment brought a large portion of human rights protection under the control of federal government, creating a significant shift in the balance of powers. The inter-state movement was no longer a factual requirement for the States to be obliged to apply the Bill of Rights by their national courts. The States no more had wide discretion in defining their own standards of fundamental rights protection, owing to the fact that their legislative choices were largely limited by the federal Constitution.

5. REVERSE DISCRIMINATION AS A PROBLEM OF NATIONAL LEGAL ORDERS

The previous chapter provided an analysis of the US constitutional doctrine of incorporation and its federalising effects. The main reason for the comparative approach was to support the position that the usage of EU citizenship as a legal basis for protecting fundamental rights of static EU citizens would be similar to the incorporation doctrine and difficult to reconcile with the current constitutional architecture of the EU. The Supreme Court developed a constitutional doctrine which served as a judicial tool to expand the application of the Bill of Rights against the States. The doctrinal shift was introduced in *Gitlow v. New York* and it was incrementally developed in subsequent case law. Incorporation doctrine held that the due process clause of the Fourteenth Amendment absorbed only those rights that are fundamental to the American legal system and its tradition. The Court of Justice similarly introduced the vague concept of 'deprivation of genuine enjoyment of

¹⁹⁹ *ibid.*

²⁰⁰ As described in Lee J. Strang, 'Incorporation Doctrine's Federalism Costs: A Cautionary Note for the European Union' (2018) vol. 20, n. 2 – 3 *European Journal of Law Reform*, p. 139

²⁰¹ *McDonald v. Chicago* 561 U.S. 742 (2010), Opinion of Justice Breyer, dissenting, p. 11

substance of EU citizenship rights’ in *Ruiz Zambrano*. The main constitutional significance of that ruling is the emergence of EU citizenship as a status that can protect EU citizens from Member State action even in purely internal situations. The abstract formulation ‘substance of EU citizenship rights’ empowers the Court to gradually identify what is ‘the substance of rights’ attached to the status of EU citizenship. The Court can rule on a case-by-case basis to decide which rights form the content of the sole ‘substance’ of EU citizenship, which is a framework quite similar to the one of selective incorporation. In that respect, EU citizenship definitely has the potential to tackle the issues of inequality in the EU. After all, the status of EU citizenship is envisaged as the fundamental status of Member State nationals.

At the same time, the fundamental rights dimension of EU citizenship seems much more complex than it was with the incorporation. As it was argued in the previous chapter, a change in fundamental rights protection in the US through the doctrine of incorporation significantly altered the distribution of powers between the federal government and the States. In the EU context, a shift of that kind is hardly possible solely through the status of EU citizenship. As things are currently standing, the intended role for the protection of fundamental rights in the EU constitutional framework is not to expand the scope of EU law. Of course, a similar argument could have been made in the US regarding the doctrine of incorporation. Nevertheless, the Fourteenth Amendment, as the ‘Reconstruction amendment’ addressed directly to the States, which sought to unite a nation torn by structural misconceptions of civil rights resulting in a civil war, gave the Supreme Court a solid legal basis for further federalisation. The conception of ‘liberty’ as a fundamental value inherent to due process of law and as such protected by the federal Constitution triggered the application of the Bill of Rights against the States and fostered stronger federalisation. The legal setting in the EU is somewhat different. The scope of application of the EU Charter as defined in Art 51 of the Charter explicitly disqualifies the prospect of such “federal evolution” in EU law.²⁰² Moreover, Art 6 (1) TEU also precludes the transformation of the Charter into a federal catalyst by emphasizing once more that the Charter “shall not extend in any way the competences of the Union as defined in the Treaties”.²⁰³ The principle of conferral which governs the limits of EU competences cannot be ignored in this respect because the competence to protect fundamental rights in purely internal situations is left to the Member

²⁰² Xavier Groussot, Laurent Pech, Gunnar Thor .Petursson, ‘*The Reach of EU Fundamental Rights on Member State Action after Lisbon*’ in Sybe de Vries, Ulf Bernitz, Stephen Weatherill (eds) ‘*The Protection of Fundamental Rights in the EU after Lisbo*’ (Hart Publishing 2013), p. 99

²⁰³ Art 6 (1) TEU

States. The borders of EU law fundamental rights protection therefore could not be pushed significantly without the formal consensus of the constituent powers of the EU.²⁰⁴ More precisely, the competences of the EU, as a top constitutional issue regulated by the Treaties, could be increased only through the ordinary revision procedure and only if all Member States ratify the proposed revision.²⁰⁵ In that setting, it would be hard to interpret EU citizenship as a status which entails certain fundamental rights that could be invoked even in purely internal situations.

Without disregarding that conclusion, it should nonetheless be emphasized that reverse discrimination should not be tolerated in any sense. Reverse discrimination occurs when EU law and national law interact, leaving a static group of citizens of a Member State in a less favourable position than the dynamic group of citizens. The whole legal situation may be perceived as if national law causes inequality and, consequently, it is national law that should fix it.²⁰⁶ That perspective would allow EU citizens who are left without EU law protection in purely internal situations to seek protection in front of their national courts on the basis of their constitutional principle of equality.²⁰⁷

5.1. National law and ECHR

All EU Member States should adhere to principles of equality and respect for rule of law.²⁰⁸ That is evidently not the case. The very existence of reverse discrimination is a clear indication that Member States do not adhere to those principles. It would be hard to justify any interpretation of the principle of equality that substantially legitimizes this type of inequality. The EU Member States do not have to comply with the EU law standard of fundamental rights protection outside the scope of EU law. However, all EU Member States are parties to the ECHR and national judiciaries should apply its standards of fundamental rights protection.²⁰⁹

²⁰⁴ Stanislas Adam and Peter Van Elsuwege, 'Citizenship rights and the federal balance between the European Union and its Member States: comment on Dereci' (2012) vol. 37, n. 2 European Law Review, pp. 185 – 186

²⁰⁵ Art 48 TEU

²⁰⁶ Nathan Cambien, 'The scope of EU Law in recent ECJ case law: reversing 'reverse discrimination' or aggravating inequalities?' (2012) n. 47 Cuadernos Europeos de Deusto, p. 145

²⁰⁷ *ibid.*, p. 146 - 147

²⁰⁸ See Monica Claes, 'Editorial Note: How Common are the Values of the European Union?' (2019) vol. 15, n. 1 Croatian Yearbook of European Law and Policy, p. VII

²⁰⁹ In Case C-127/08 *Metock* [2008] ECLI:EU:C:2008:449, paras. 78 - 79, the Court of Justice reiterated the purely internal rule and went on to say that all the Member States are parties to the ECHR and should apply its standards of fundamental rights protection in areas of their exclusive competence.

Of course, lower courts and top courts of the Member States are not the end of the road. A possibility of lodging an application to ECtHR might currently be the most effective tool for preserving equality of citizens in respective Member States.²¹⁰ As AG Kokott stated in her opinion in *McCarthy*, EU citizens who find themselves in purely internal situations should invoke their ECHR rights in front of the national courts and, if necessary, at the ECtHR.²¹¹ In her opinion, she acknowledges the difficulties arising from enforcement of the purely internal rule, but clearly states that this fundamental rights violation is not a matter of EU law. ECtHR, on the other hand, would have the competence to adjudicate whether a contested national measure is compatible with ECHR or not. In *Dereci*, the Court also instructed the national court to respect their obligation for protecting the right to respect for private and family life under ECHR law due to the fact of inapplicability of EU law in the case.²¹² Current situation seems to indicate that national, EU and ECHR levels of fundamental rights protection “are partially overlapping and partially exclusive”.²¹³ That setting does not offer an efficient protection of fundamental rights which should be in the centre of EU law, but it does provide options for those who are ignored by EU law to find an avenue to protect their individual rights.²¹⁴

6. CONCLUSION

This paper addressed the issues of inequality of EU citizens caused by their inability to point to a link with EU law. Reverse discrimination is directly stemming from the purely internal rule which is substantively incompatible with the notion of dignity-based citizenship. The Court’s case law did not evolve from the assumption that EU citizenship should be driven by a purely economic aim. Instead, the Court’s vision of EU citizenship moved in the direction of a status which is fundamental and can offer protection beyond the market rationale in form of the test of ‘deprivation of substance of EU citizenship rights’. The subsequent case law interpreted this development in EU law quite restrictively, rejecting to

²¹⁰ See Dominik Hanf, ‘Reverse Discrimination in EU Law: constitutional aberration, constitutional necessity or judicial choice’ (2011) vol. 18, n. 1 - 2 Maastricht Journal of European and Comparative Law, p. 55

²¹¹ Opinion of AG Kokott in Case C-434/09 *McCarthy* [2011] ECLI:EU:C:2010:718, para. 60

²¹² Case C-256/11 *Dereci* [2011] ECLI:EU:C:2011:734, paras. 72 - 73

²¹³ Erik Kotlárík, ‘The EU Citizenship in Purely Internal Situations and Reverse Discrimination’ (2013), available at SSRN: <https://ssrn.com/abstract=2279861> or <http://dx.doi.org/10.2139/ssrn.2279861> , p. 9 last accessed 15 April 2021

²¹⁴ *ibid.*

broaden the conception of fundamental rights protection under the premise of equality of EU citizens.

In the central part of the paper, a parallel was drawn with the constitutional doctrine of incorporation developed by the US Supreme Court. The comparative analysis of the incorporation case law backed up the position of the Court of Justice on fundamental rights protection and EU citizenship which is embodied in the application of the purely internal rule. Unlike in the US where the Fourteenth Amendment paved the way for applying fundamental rights inherent in due process against the States, in the EU the Charter explicitly rejects this option. The limitations posed in the Charter and also in the TEU are an expression of the principle of conferral, the basic principle governing the EU as a community of limited powers. Consequently, the protection of fundamental rights in EU law is confined to implementation of legislative acts of the EU institutions and cross-border movement between the Member States. Fundamental rights protection in purely internal situations amounts to ‘retained powers of the Member States,’²¹⁵ which form an integral part of their sovereignty even after the Lisbon Treaty. In that light, under current constitutional setting which qualifies the competence of fundamental rights protection in purely internal situations as a retained competence of the Member States, the scope of EU law could not be expanded by constructing a basis for European incorporation only through EU citizenship. For fighting against inequality caused by the application of the purely internal rule, the proper legal forums are national courts and ECtHR.

Nonetheless, the Court of Justice should continue insisting on EU citizenship as a fundamental status of Member State nationals. As AG Sharpston explained in her extensive opinion in *Ruiz Zambrano*, “developments in EU citizenship case law will sooner or later give the Court an opportunity to decide whether the Union is on cusp of constitutional change”.²¹⁶ But, for this change to emerge two factors are necessary: “both an evolution in the case law and an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU”.²¹⁷ A systemic question of such constitutional importance should be resolved by amending the EU primary law (the Treaties and the Charter) to establish a common framework for fundamental rights protection which transcends the existing scope of EU law. Because reverse discrimination is contrary to

²¹⁵ Art 4 (1) TEU

²¹⁶ Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2010] ECLI:EU:C:2010:560, para. 172

²¹⁷ *ibid.*, para. 173

the basic values upon which the Union is founded on, political action on EU level designed to effectively end reverse discrimination is more than welcome. After all, ignoring this type of inequality in long term is both damaging to preserving the EU as “not simply a free trade market but also a community of people,”²¹⁸ and a hindrance to achieving an ever closer Union based on true equality.

²¹⁸ Willem Maas, *Creating European Citizens* (Rowman and Littlefield 2007), preface, p. 8

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