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# Proportionality (Single Market & FR)

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# EU Citizenship

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# Recapitulation



# What do we know about EU Law?

- Structure
- Principles



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  - Direct effect



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    - Vertical
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    - Over domestic law
    - Constitutional law
    - International law



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    - Constitutional Courts x CJEU





# What do we know about EU Law?

- Structure
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    - Constitutional Courts x CJEU
      - REACTION: HR AGENDA



# What do we know about EU Law?

- Structure
- Principles
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    - Vertical
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  - Supremacy
    - Over domestic law
    - Constitutional law
    - International law
  - State liability
  - Effet utile
  - Autonomous interpretation



# What do we know about EU Law?

- EU Law & HR
  - Where
  - When
  - Limits



# What do we know about EU Law?

- EU Law & HR
  - Where
    - Discrimination
    - ECJ case law
    - General principles of Community Law
    - International treaties
    - EU Treaties
    - Charter
    - (ECHR)
  - When
  - Limits



# What do we know about EU Law?

- *Fundamental Rights in Treaties:*
  - Article 2 TEU
    - ‘The Union is founded on [...] the rule of law and respect for human rights [...]. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance [...] and equality between women and men prevail.’
  - Article 3.3 TEU
    - Social market economy
    - Combating social exclusion & discrimination
    - Equal treatment
    - Protecting the rights of children
  - Article 4 TEU
    - Sources of FR



# What do we know about EU Law?

- *Fundamental Rights in Treaties:*
- **Article 7 TEU**
  - Council may suspend voting rights
  - Serious & persistent breach of A2 TEU
- **Article 19 TEU:**
  - effective legal protection & independence of the judiciary
- **Article 49 TEU: accession to the EU**
- **Articles 7-10 TFEU:**
  - integration clauses
- **Article 18 TFEU:**
  - principle of non-discrimination based on nationality
- **Article 19 TFEU:**
  - general principle of non-discrimination
- **Article 157 TFEU:**
  - principle of equal pay



# What do we know about EU Law?

- EU Law & HR
  - Where
  - When
    - Infringement of EU law by institutions (Stauder)
    - Actions of MS
      - Implementation of secondary law
      - Deviation from free movement (ERT: must be interpreted and applied in such a way that they respect principles ...." )
      - Justification of the restriction of the free movement (Laval, Omega, Schmidberger)
    - Autonomous application of EU FR (Zambrano)
  - Limits



# Human Rights: from Premacy to Supremacy of EU Law?

- Nold
  - Explains the indirect relationship between national rights and European rights.
  - Distribution of fuels – do the EC rules require companies to meet certain volume of sales requirements to qualify as a direct wholesaler with a right to direct purchase from a selling agency?
    - Denial of the status based on reduced sales = violations of the **fundamental right to freely practice the trade and profession**
- NO VIOLATION FOUND





# Human Rights: from Premacy to Supremacy of EU Law?

- Nold
  - *Fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States. Similarly, international treaties for the protection of HR on which the MSs have collaborated or of which are signatories, can supply guidelines which should be followed within the framework of [European] law.*



# EU Autonomous approach to HR

- Bound by common constitutional traditions
  - Minimum standard
  - Maximum standard
  - Union standard
- ECJ never considered itself materially bound by ECtHR interpretation
- BUT: Lisbon Treaty, Article 6.3

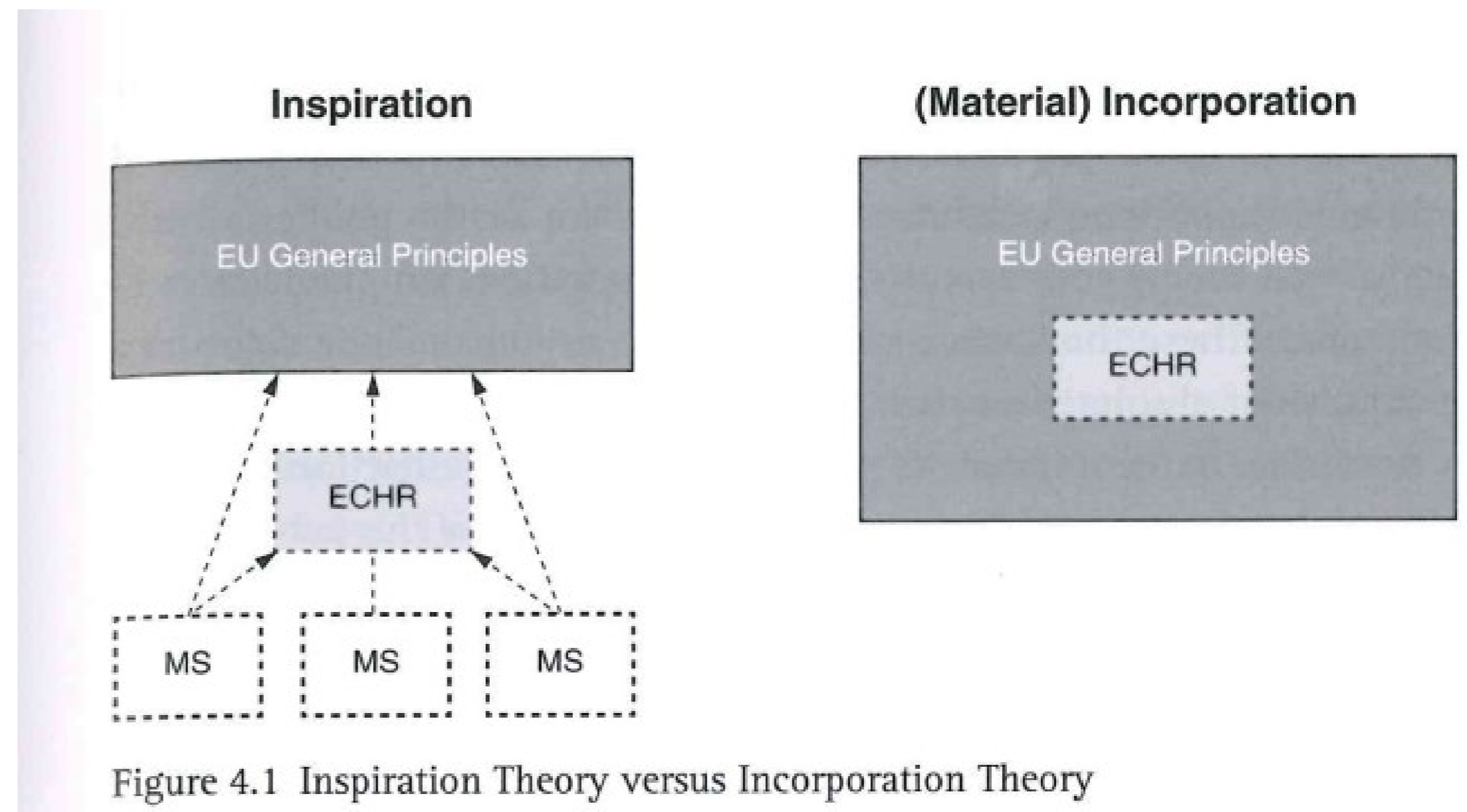


Figure 4.1 Inspiration Theory versus Incorporation Theory



# Cases



# C-159/90 Grogan

- Type of proceedings?
- Parties?
- Facts?



# C-159/90 Grogan

- Type of proceedings?
  - Preliminary ruling
  - Question issued by Irish High Court
- Parties?
  - Society for the Protection of Unborn Children Ireland and Stephen Grogan & 14 officers
- Facts?
  - Distribution of information in Ireland on identity and location of abortion clinics in other MS



# C-159/90 Grogan

- Rights?
  - Abortion in Ireland is prohibited, equal protection of right of unborn child and of mother
  - Assistance to travel abroad in order to obtain abortion: prohibited by Constitution
  - Question issued by Irish High Court
- Question raised?
  - Interpretation of Community law: is organized activity a service?
  - If there is no approximation of the organized activity/abortion, can MS prohibit the distribution of specific information on the clinics in other MSs?
  - Does Community law recognize a right to distribute the information in MS A on abortion in MS B, which is lawful in MS B, but unlawful in MS A?



# C-159/90 Grogan

- Reply

- Interpretation of Community law: is organized activity such as legal abortion a service?
  - A60: provided for remuneration, and not governed by provisions of free movement of goods, persons, capital
  - Activities of professionals are services, including abortion. **YES.** No consideration to its morality
- If there is no approximation of the organized activity/abortion, can MS prohibit the distribution of specific information on the clinics in other MSs?
- Does Community law recognize a right to distribute the information in MS A on abortion in MS B, which is lawful in MS B, but unlawful in MS A?
  - Is it contrary to Community law if MS where abortion is illegal forbids students from distributing information on abortion clinics in other MS?
  - Freedom to provide services
  - X distribution of information
  - the information constitutes a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics established in another Member State



# C-159/90 Grogan

- Reply
- Breach of fundamental rights?
  - ...where national legislation falls within the field of application of Community law the Court, when requested to give a preliminary ruling, must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights — as laid down in particular in the European Convention on Human Rights — the observance of which the Court ensures. However, the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law.





# C-368/95 Familiapress

- Type of proceedings?
  - Preliminary ruling
  - Question issued by Commercial Court, Vienna
- Parties?
  - Austrian newspaper publisher Familiapress vs Heinrich Bauer Verlag, German publisher who sold newspapers with crossword games (weekly magazine Laura draw for prizes) in Austria .
- Facts?
  - Distribution and selling of crossword puzzles in newspapers is illegal in Austria.  
Vienna CC: Is prohibition of sale of periodicals contrary to intra-Community trade?



# C-368/95 Familiapress

- Rights
  - Free movement of goods across MS
- Questions?
  - Does article 30 of the Treaty preclude such national legislation that prohibits one undertaking established in MS B to sell newspapers (legal in MS B) in MS A?
  - *Is there anything different when you compare the case to Grogan?*



# C-368/95 Familiapress

- ECJ's Reply
  - any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitutes a measure having an effect equivalent to a quantitative restriction
  - **in the absence of harmonization of legislation, obstacles to free movement of goods** which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) **constitute measures of equivalent effect prohibited by Article 30 ...**
  - By contrast, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment, so long as those provisions apply to **all relevant traders operating within the national territory**



# C-368/95 Familiapress

- ECJ's Reply
  - The Court finds that, even though the relevant national legislation is directed against a method of sales promotion, in this case it bears on the actual content of the products
  - ... Moreover, since it requires traders established in other Member States to alter the contents of the periodical, the prohibition at issue impairs access of the product concerned to the market of the Member State of importation and consequently hinders free movement of goods.
  - In the explanatory memorandum of the relevant bill, the Austrian Government pointed out in particular that, given the relatively low selling price of periodicals, especially of daily newspapers, there was a risk, in spite of the limits to prizes set by Article 9a(2)(8) of the UWG, that consumers would attach more importance to the chance of winning than to the quality of the publication



# C-368/95 Familiapress

- ECJ's Reply
  - 18 Maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods. Such diversity helps to safeguard freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order
  - BUT: Proportionality!!
  - Games such as those at issue in the main proceedings are not, however, comparable to the lotteries the features of which were considered in Schindler.
  - Furthermore, it is to be noted that where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in the light of the general principles of law and in particular of fundamental rights [ERT]





# C-368/95 Familiapress

- ECJ'Reply
  - A prohibition on selling publications which offer the chance to take part in prize games competitions may detract from freedom of expression. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms does, however, permit derogations from that freedom for the purposes of maintaining press diversity, in so far as they are **prescribed by law and are necessary in a democratic society**
  - 27 ... it must therefore be determined whether a national prohibition such as that in issue in the main proceedings is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression
  - -> TASK FOR NATIONAL COURT (what is the market and what is proportional restriction)
  - Article 30 of the EC Treaty is to be interpreted as not precluding application of legislation of a Member State the effect of which is to prohibit the distribution...



# C-112/00 Schmidberger

- Type of proceedings?
  - Preliminary ruling
  - Question issued by Higher Court, Innsbruck
- Parties?
  - Schmidberger (German company) and Republic of Austria.
- Facts?
  - Austria granted a permission to environmental group to organise a demonstration at Brenner motorway, with effect of its complete closure for 30 hours
  - Schmidberger uses the motorway for transportation of timber and steel between Italy and Germany
  - Impossible to change routes in order to avoid loss? Not proven



# C-112/00 Schmidberger

- Rights/Issues
  - Free movement of goods vs
  - Freedom of expression + freedom of assembly
  - *Which obligation has preference? (Both IL)*
  - *And how to solve the state liability?*





# C-112/00 Schmidberger

- Reply
  - 1. Was there a restriction of free movement of goods and a breach of Community law?
  - 2. May there be established state liability?
- *Restriction of free market? YES. A30 seeks to eliminate all barriers of single market (quantitative restrictions on imports)*
  - Article 30 does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State
- *Can the restriction be justified?*
  - 70... whether the principle of the free movement of goods guaranteed by the Treaty prevails over those fundamental rights.
  - According to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures.
  - Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.



# C-112/00 Schmidberger

- Reply
  - Both FF and FR can be restricted [78-79]
  - The imposition of stricter conditions concerning both the site — for example by the side of the Brenner motorway — and the duration — limited to a few hours only — of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope.
- the fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the Treaty, read together with Article 5 thereof.



# C-112/00 Schmidberger

- WIN for HR!
- BUT! Compare the case with Viking Line C-438/05
- “If[...] the national court came to the conclusion that, in liable to be adversely affected by there flagging of the *Rosella* are in fact jeopardised or under serious threat, it would then have to ascertain whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.” (para. 84)
- Very strict proportionality review
- Little margin of discretion for Trade Unions



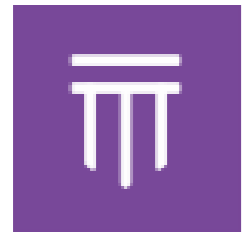
# C-112/00 Schmidberger

- Omega (laser games, German company)
  - *Supplier of sensory tags: UK company*
  - *German policy order a prohibition of laser games as a danger to public order. Omega argues that the ban is contrary to free movement of services*
  - *ECJ: yes, but it can be justified (human dignity)*
- Joseman (access to Dutch coffee shops)
  - Are activities in Dutch coffee shops services? (AG – NO)
  - ECJ: sale of soft drugs no, but other products yes. Justification needs to be examined against public order.
  - Discriminatory, but justifiable

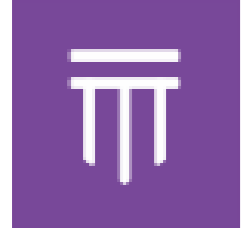


# Conclusion

- No prior hierarchy, but...
- Internal Market rules construct the normative framework for the assessment of FR -> this is different for the ECHR
- Certain FR play a particularly important role in the context of the EU
  - Rights to privacy and data protection

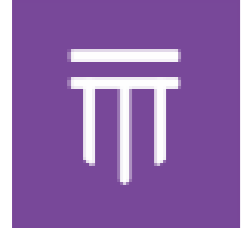


# EU Citizenship



# EU Citizenship

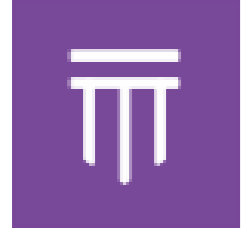
- What is EU citizenship?
- A 20/1 TEU
- *Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship*
- CJEU
- *Citizenship of the Union is intended to be the fundamental status of nationals of the Member states*



# EU Citizenship Rights

- Legal Framework
  - **Market access rights** for economically active citizens (*Treaty: workers, self-employed, service providers and recipients*)
  - **Migration rights:** since April 2006 Directive 2005/38 on the free movement of persons, both economically active and non-active UNION citizens and TCN
  - **Article 18 to 24 TFEU**
    - *Right to move and reside freely*
    - *Electoral rights, equal treatment of EP and ME*
    - *Diplomatic protection in TC*
    - *Petition to EP and Ombudsman*
    - *New: citizen's initiative (1 mil citizens from significant amount of MS)*





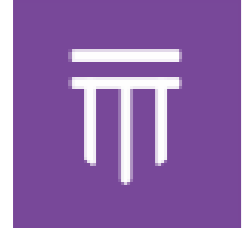
# EU Citizenship Rights

- Other sources
  - *A 6 TEU*
  - *EU Charter*
  - *General principles of EU law*
  - *ECHR/IL*
  - *National constitutions*
  - *National and EU legislation*
  - *Are we beyond market citizenship?*
- **Charter: 51/1:** requires link with free movement (derogation or restriction to free movement initiates citizenship rights)
  - Carpenter
- **Right to reside: A20 TFEU**
  - Zambrano



# Ruiz Zambrano C-34/09

- Reverse discrimination problem – rights derived from European citizenship
- Mr Zambrano, Columbian national
- Belgian authorities refused to grant him unemployment benefits, arguing that the relevant working period he relied on (2001-2006) had been completed in violation of Belgian legislation
  - His application for asylum was refused, he stayed in Belgium on the basis of non-refoulement decision
  - = no working permit for him or his wife
  - His 2 children were born in Belgium, and acquired Belgian nationality
  - Zambrano argued **derived right of residence**



# Ruiz Zambrano C-34/09

- Children never lived outside of Belgium =/ never exercised their freedom of movement
- What does it mean for the applicability of Article 20 TFEU?



# Ruiz Zambrano C-34/09

## *Article 20*

### *(ex Article 17 TEC)*

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:
  - (a) the right to move and reside freely within the territory of the Member States;
  - (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
  - (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
  - (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

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# Ruiz Zambrano C-34/09

- Static citizens v citizens v external element
- CJEU does not mention Fundamental rights
- Instead, argues that the refusal to grant a **right of residence** to a third country national with **dependent minor children** in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has the effect of **depriving citizens of the Union of the genuine enjoyment of the substance of the rights** conferred by virtue of this status
- New interpretation of the enjoyment of such rights, which were previously linked to cross-border element in the person's situation



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