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Judicial Europeanization. The case of *Zambrano* in Ireland

Abstract: The Court of Justice of the European Union is an important motor of integration, and is said to be particularly strong in those cases, where the Council shows an inability to act. What is the relevance of the Court to Social Europe? Europeanization studies analyse how member states change due to European integration. Judicial Europeanization is a topic that is under-explored in the literature. Using a case-study approach, this paper analyses the *Zambrano* case, one of the most notable recent cases of judicial activism of the CJEU with regard to EU citizenship rights. Though the literature often assumes that member states only reluctantly embrace the requirements of case law, the Irish government immediately held its administration to implement the required changes. Analysing this case in greater detail and comparing it to the responses of several other member states promises to shed some light on the under-explored question of how Europeanization through case law proceeds, and what the Court may contribute to social Europe.

INTRODUCTION

Member-state governments have largely resisted the European integration of welfare-state policies. Yet, this does not mean that member states can decide autonomously on the allocation of rights and entitlements as they face constraints imposed by European law. In particular the introduction of EU citizenship by the Treaty of Maastricht has led to a substantial body of case law by the Court of Justice of the European Union (CJEU), guided by the notion that citizenship 'is destined to be the fundamental status of nationals of the Member States' (Grzelczyk C-184/99 # 31). With this case law, rights previously limited to the status of workers have increasingly been extended to non-economically active citizens. In this regard, Martinsen and Vollaard (2014) point to the growing fears of 'welfare tourism'.

Yet, in European integration studies, the impact of case law on member states' policies is largely ignored. Compared to the significant attention to the transposition and implementation of directives, there are few analyses concerning the implications of case law. Often it is assumed that member states are reluctant to respond to a judgment if they are not directly targeted by it and if (**← p. 769)** there is no noticeable political mobilization supporting policy change. In her book Lisa Conant (2002) argues that justice is 'contained' in this way. In a recent paper on the 2004 citizenship directive, Wasserfallen holds that far-reaching case law only matters when being codified in secondary law – as in the citizenship directive, which extended access to social benefits for EU nationals following the *Grzelczyk* ruling.

> "In salient policy fields, activist Court decisions cannot by themselves effectively influence Europeans' everyday lives" (Wasserfallen 2010: 1142).

Against such a negligible effect of case law stand assessments that see the case law of the Court undermining the European social model (Scharpf 2002) and the continental model of capitalism (Höpner and Schäfer 2010). May member states simply ignore the partly far-reaching case law on citizenship rights? Do they only respond under pressure by the Commission? Or does case law directly transform the underlying institutional structure of member states as these are obedient compliers?

In the following, I begin by summarizing the positions in the literature on the power of courts, and the transformative impact of case law. Not much is known about judicial Europeanization. Given that the design of welfare services differs largely across member states, hampering comparisons, empirically I focus on residence rights of third-country nationals (TCNs). There is every reason to expect that if member states respond positively to case law establishing residence rights of TCNs, including the potential access to welfare state services, they will do so as well with view to case law concerning EU citizens only. With the *Zambrano* case, there is an important example of judicial activism: The Court significantly broadened residence rights of TCNs in a national (purely internal) situation where EU law normally does not apply. Extending the reach of EU law turns the case into an activist one. Given that all member states are

potentially affected, should make it easy to analyse reactions of judicial Europeanization that are normally difficult to observe. Moreover, the *Zambrano* case is particularly interesting as Ireland was quick and vocal in responding positively. With this proactive Irish stance, the case promises to provide for divergent member-state responses, allowing to analyse the conditions under which member states comply with case law.

The case can be seen as a least-likely case (Gerring 2007) of member-state compliance. Interfering with member states' residence laws is highly sovereignty-disregarding. Individual actors as addressees face difficulties enforcing their rights, which should be particularly true for TCNs. As a least-likely case, we can expect that if case law leads to social rights here, it is generally an important policy influence.

THE CJEU AS A MOTOR OF INTEGRATION - POTENTIAL AND LIMITS

In the literature, implications of activist case law are contested. Several scholars have pointed out that both power and impact of the CJEU are much less significant than appears at first sight. Generally, courts are ambiguously (**← p. 770)** powerful actors, given their essential passiveness. They rely on being called upon – and they rely on their rulings being implemented: 'threats of noncompliance and legislative override induce courts to alter their decisions to mollify those political interests responsible for compliance and legislation' (Carrubba et al. 2008: 449). Lisa Conant (2002) has argued that justice is in fact 'contained', leading to a situation where member states may comply with single rulings but mostly fail to draw the necessary general conclusions. Far-reaching case law is only influential, she argues, if there is sufficient political mobilization and support. As mentioned, Wasserfallen (2010) similarly argues that case law needs to be followed up by secondary legislation in order to have a bearing on member states. But case law changes as well as Obermaier has shown. In the area of patient mobility the Court has 'fine-tuned' its rulings over a line of cases, adapting it to the institutional conditions of member states. The implications of case law evolve over time, and fine-tuning keeps these manageable for member states (Obermaier

2008: 746, 751). Similarly, Davies (2012) has recently argued for the need to re-assess the 'activism' of the CJEU, which is largely caused by the activism of lower courts sending in references.

Against these views of a restrained Court being well-embedded in the political process stands the partly severe criticism of the Court's judicial activism. In particular, Scharpf has alluded to the bias towards negative integration and liberal rights arising from the power of the Court that member states cannot control (Scharpf 2002; Scharpf 2009). In this respect, it is important to call attention to the crucial role of the integrated court system that is established via the preliminary procedure where member-state courts make inquiries about the implications of EU law for the national level and apply it independently. As Weiler (1981: 300) and Alter (1998) have emphasized this means that member states can neither control nor oppose contentious case law which is brought home via domestic courts. Research on preliminary rulings has shown that lower courts often pose very specific questions to the CJEU and indicate their preferred answer (Nyikos 2006). This cooperation with lower national courts is important for the CJEU, as they provide it with case load and integrate European law into the judicial systems of the member states (Dyevre 2010: 323).

In this vein, member-state governments are no longer the gatekeepers to the supranational level with the EU being a multi-level system. Yet in how far is the national level responsive to European case law? Do member states' administrations follow up on case law – and generalize its effects? Do national legislators implement reforms pushed forward by case law? Do national courts obey the rulings and include them in their reasoning in domestic cases? The impact of case law is ridden with prerequisites. To simply ignore it is difficult once the Commission applies for fines for non-compliance.

In an attempt to come to grips with the question of when member states follow or ignore CJEU rulings, Michael Blauberger (2013) has distinguished the responses of 'contained compliance' and 'anticipatory obedience.' Crucial is the question whether member states or litigants have to bear the cost of legal uncertainty that is part of ongoing case-law development. For legal uncertainty (**← p. 771)** 'Time

constraints, the population of similar cases and each party's worst case scenario for an eventual ECJ ruling' (Blauberger 2013: 2) matter. Member states are more likely to respond with anticipatory obedience if ongoing case-law development implies costs: '… when legal uncertainty undermines political planning capacity or even involves great financial risks, and when the spectrum of potential litigants becomes too vast, Member state governments anticipate future legal challenges by adjusting domestic regulation' (Blauberger 2013: 16).

In sum, even when case law implications are not generalized via secondary law, member states may adapt their policies. But what can we expect for welfare policies? This is an area where the potential number of cases is high. This would mean that member states may opt towards anticipatory obedience. At the same time, individual actors are relatively weak actors, and it is them and not member states that have to bear the cost of legal uncertainty. It is therefore plausible to expect contained compliance. Before analysing the *Zambrano* case, I summarize what is known about the Court's activism and member states' responses in the next section.

THE COURT'S ACTIVISM ON CITIZENSHIP

When EU citizenship rights were introduced in the Maastricht Treaty they had a merely symbolical character. Yet, their interpretation by the Court has developed into providing comprehensive citizen rights by giving economically inactive EU citizens rights that were previously restricted to workers. As this development of case law has already been analysed, it is not necessary to recount its different stages (Wind 2009; Wollenschläger 2011). Enough to say that non-discrimination governs the relations of EU citizens, making it difficult for member states to privilege their own nationals in their national welfare system.

After expanding citizenship rights, the Court's case law has broadened access to these rights to TCNs. In 2004, the Court decided in *Zhu and Chen* (C-200/02) that (Chinese) parents living in the UK could

partake in the citizenship rights of their (Irish-born) daughter, whose EU citizenship rights would be foregone if the parents were not allowed to live with her. The birth in Northern Ireland had been planned deliberately by the parents to profit from the Irish *ius soli* citizenship rule at the time, which gave them residence rights as family members of an EU citizen in the UK.

Metock (C-127/08) demonstrates the speed of case-law development. Only in *Akrich* (C-109/01) the CJEU had argued that the right of a TCN family member to accompany a Union citizen depended on prior legal residence. In *Metock,* a preliminary ruling from Ireland, the CJEU lifted this requirement. Against interventions of ten member states, the Court argued that it was upon the Community and not the member states to regulate conditions of lawful residence of TCN nationals joining EU citizens that used their free-movement rights. However, member states were free to control abuse through marriages of convenience (← **p. 772)**.

The case of *Metock* is highly interesting because it is one of the few cases where the national consequences of case law have been discussed in the literature. Following *Akrich*, Denmark, the UK, the Netherlands and Finland had formulated prior lawful residence as a precondition for family reunification (Thorp 2009: 5). After *Metock* conditions for family re-unification were eased in Denmark and the number of individuals being granted family reunification tripled in 2009 compared to 2008 (Martinsen 2011: 958). Also Italy and Ireland swiftly adapted their legal and administrative practices (Fernhout and Wever 2011: 15). Finland revoked the requirement of prior legal residence (ibid: 54f), as did the UK (Costello 2009). UK courts even applied the *Metock* rule to non-dependent family members (Fernhout and Wever 2011: 62). In Germany, administrative instructions of the federal government of 29 July 2009 referred to *Metock* and lifted general requirements such as a basic knowledge of German for these persons (ibid.: 15). Thus, contrary to what one would expect, member-state administrations complied.

Italy is an interesting case as it decided to extend the benefits of family reunification with TCN family members to its own nationals (Fernhout and Wever 2011: 57f), in order not to treat them worse

than EU citizens (called 'reverse discrimination of nationals'). Thereby, Italy has submitted more than other member states to the far-reaching implications of CJEU case law on migration. In contrast, the Dutch government has pushed for legislative changes to stop privileging EU nationals (Fernhout and Wever 2011: 59). The reverse discrimination of nationals sets incentives for taking the 'Malmö route' or the 'Dublin hop,' with Danish resp. UK families moving for a limited time to qualify as EU citizens (Martinsen 2011: 957) and to profit from family unification. This raises questions concerning the required time to be spent abroad. A preliminary ruling request of the Council of State of the Netherlands in October 2012 (C-456/12) asks whether family reunification must be granted also to frontier workers and recipients of services in other member states. AG Sharpston has affirmed this in her opinion. Should the Court follow, this would imply large changes to member states' migration regimes.

Summing up, the CJEU has enlarged citizenship rights, equal access to social services as well as rights of TCN family members over the past years. The CJEU has repeatedly deviated from its earlier case law and from existing secondary law. The cursory evidence from member states' reactions shows that these are well prepared to comply with case-law requirements. But we have little explanation for why they do so. Because of this, I will now turn to the very interesting case of *Zambrano*, focussing on the Irish reaction. By extending the reach of citizenship to 'purely internal' situations where EU law normally lacks application, this is an example of a particular activist case law. Here one would expect slow reactions as member states can hope for fine-tuning of the Court, curtailing the demands over time. Moreover, TCNs are weak litigants, with no risk of indemnity for member states in case of wrong decisions. Therefore, if we do find domestic responses to *Zambrano* we can expect case law to have a (**← p. 773)** noticeable impact on the welfare state in general. In the following, I start by discussing the case-law development and then turn to member states' reactions, with a specific focus on Ireland.

THE ZAMBRANO CASE AND ITS 'FINE-TUNING'

The *Zambrano* case (C-34/09, 8 March 2011) was a reference from a Belgian court concerning Mr and Mrs Zambrano, a Columbian couple, who had lived in Belgium first without a refugee status and then with registered residence. Mr Zambrano had worked since 2001 for extended periods without a work permit, but paying social security. In 2003 and 2005 two children were born that acquired Belgian nationality possible under the then valdid Belgian Nationality Code. After December 2006, parents who could apply for another nationality for their child (what the Zambranos could have done), did no longer have this option (Opinion AG Sharpston, # 17). The children's Belgian nationality notwithstanding, the authorities refused regularization to the parents. When Mr Zambrano lost his job, his application for unemployment benefits was denied on grounds of his missing work permit, eventually leading to the case. The Brussels court posed several questions to the CJEU, concerning the right of residence and work of Mr Zambrano. Nine governments joined with own observations (Austria, Belgium, Denmark, France, Germany, Greece, Ireland, the Netherlands, Poland), all arguing along with the Commission that this was a purely internal case lacking a trans-border element and not falling under EU law. The allocation to the Grand Chamber underlined the legal relevance of the case. Against all interventions, Advocate General (AG) Eleanor Sharpston sided with Mr Zambrano, pointing out several possible legal justifications for his rights. Her far-reaching interpretation of European Union rights entitlements raised considerable attention. Notably, she argued against the purely internal view and for a prohibition of the reverse discrimination of nationals to follow directly out of the Treaty – implying a major step of case-law development. Were EU law to have such breadth, member states' regulatory authority would be severely curtailed.

Following the AG, the Court gave Mr Zambrano the right of residence and work. Otherwise, his children would be deprived of the benefits of their union citizenship. Yet, the Court did not detail which parts of the AG's very activist reasoning it followed. Thus, internal situations fell under EU law, but the scope remained unclear (Van den Brink 2012: 286).

The case of *McCarthy* (C-434/09, 5 May 2011) was decided soon after. As a British citizen, holding also Irish citizenship, Mrs McCarthy had never left Northern Ireland where she lived from social assistance. After getting married to a Jamaican with no residence permit in the UK, Mrs McCarthy applied for an Irish passport in the attempt to secure residence for her husband. The UK, Denmark, Estonia, Ireland, and the Netherlands intervened. The third chamber of the Court denied McCarthy's claim, as she had never exercised her free-movement rights and she would not be forced to leave the EU. (← **p. 774)**

The 'fine-tuning' of *Zambrano* continued with the cases *Dereci* and others (C-256/11, 15 November 2011). These five joined cases were handed to the CJEU by the Austrian administrative court, and decided like *Zambrano* by the Grand Chamber. In all cases of different factual circumstances, Austria had not entitled TCN spouses of Austrian citizens with the right of residence or had denied it to grown-up, but economically dependent children of TCN Austrian residents. Again several member states joined (Austria, Denmark, Germany, Ireland, Greece, the Netherlands, Poland) questioning the relevance of EU law to these purely internal situations. This case was an important one for member states, as a transfer of the *Zambrano* argument to all TCN family members would have significant quantitative migratory consequences. The Court again emphasized the genuine enjoyment of the EU citizenship, which, however only sets in if 'the territory of the Union as a whole' had to be left. Therefore, no right of residence in Austria could be established on grounds of EU citizenship rights.

Iida (C-40/11, 8 November 2012) concerned a referral of a German court, held by the third chamber, and joined by eight governments. Mr Iida, a Japanese national working in Germany, aimed to acquire residence rights via the joined custody of his German daughter living with her mother in Austria, which was denied.

O and S Maahanmuuttovirasto (C-356/11 & C-357/11, 6 December 2012) asked whether the *Zambrano* principles cover a situation where the TCN mother of an EU child remarries and has children with a TCN father who is economically dependent. These two cases decided by the second chamber were

referred by a Finnish court and joined by six governments. The Court ruled that Art. 20 TFEU did not deny member states the right to refuse a residence permit but that the referring court had to ascertain that 'the genuine enjoyment' of EU citizenship rights of the children was not violated, taking also into account the provisions of the family reunification directive 2088/86/EC. Thus, the *Zambrano* reasoning was again not extended but given to the domestic court to decide.

Finally, in May 2013 *Ymeraga* (C-87/12) was decided, involving the parents and adult brothers of a naturalized Kosovar in Luxembourg. Again, the Court denied that a residence status in the EU could be built on the EU citizenship of this one family member.

In sum, this line of cases matches well the argument of Obermaier on fine-tuning of jurisprudence. The original *Zambrano* case, seen together with the far-reaching argument of AG Sharpston and the scarce reasoning that the Court itself provided, seemed to seriously constrain member states' migration regimes. Yet between March 2011 and May 2013 the CJEU circumscribed the impact of *Zambrano* to cases where EU citizen minors would be forced to leave the Union, if TCN family members had no residence. The Court confirmed that EU citizenship does not encompass a right to live in a particular member state with all family members as it is up to the member states granting these rights. In the light of the speed of this fine-tuning and given that the cost (**← p. 775)** of legal uncertainty falls mainly on TCNs and not on member states, we would expect little impact of *Zambrano*.

MEMBER STATES' REACTIONS

TCNs are rather weak political actors with few rights. Governments do not have to fear liability claims when restrictively handling their rights. Yet, they may fear political costs when human rights issues are salient. Active NGOs may strengthen the political impact of TCNs, and deportation proceedings are costly so that governments may want legal certainty for their action. Member states are not all affected in the same way by the *Zambrano* judgment. There have to be EU citizen minors that have to leave the EU, if

their TNC family members hold no residence status. Most affected are those member states giving *ius soli* nationality, i.e. in line with the place of birth (Honohan 2010). Only Ireland had a pure *ius soli* regime until 2004. Member states' citizenship regimes are quite complex as they include different situations of *ius soli* and *ius sanguinis*. Below, the Irish case is discussed in some details, and contrasted with information of other western member states that are particularly targeted by migration: the UK, France, Germany, Belgium and the Netherlands. In how far does case law have an important impact on the development of social Europe?

The Irish reaction

Ireland was most affected by the *Zambrano* ruling. In its observation to the case, the government already warned of 'floodgates' being opened, were the Court to grant EU citizenship rights in this purely internal situation (AG Sharpston, # 114). 'Counsel for Ireland painted a dramatic picture of the wave of immigration by TCN's that would inevitably result if Mr Ruiz Zambrano were held to enjoy a right of residence derived from his children's Belgian nationality' (# 112). Thus, it is all the more surprising that Ireland responded immediately. One day after the ruling on March 8 2011, the government changed and the new Minister for Justice Alan Shatter (Fine Gael party) announced to reassess all cases (app. 120) before the courts, where deportation was at issue, and to even look into cases where deportation had already taken place. The minister stated he disagreed with parts of the previous government's immigration policy.[1] The predecessor from Fianna Fáil party, Brendan Smith, had deported 416 migrants during the six weeks of his office, the highest rate of deportations ever. Possibly, this had already been under the impression of the opinion of AG Sharpston in the *Zambrano* case, delivered in October 2010.[2] In order to understand the Irish reaction it is necessary to give some background on the development of citizenship rights in Ireland (Handoll 2012). (← **p. 776)**

Citizenship law in Ireland

Citizenship law in Ireland is closely linked to the divided country and the wish to grant citizenship rights across the whole island. Being a common law country, case law has shaped the citizenship regime, with landmark judgments bringing changes. The Minister for Justice, Equality and Law Reform has a wide margin of discretion under the Nationality and Citizenship Act, subject to judicial review (Handoll 2012: 17-19). In the case *Fajujonu v. Minister for Justice* (1989), involving a couple who had lived illegally in Ireland for eight years and given birth to a daughter with Irish citizenship, the Supreme Court ruled that the government could deport the family only under exceptional circumstances. This led to migrants seeking to give birth in Ireland to receive residence rights (Handoll 2012: 8).[3] Some numbers were given in the *Bode* judgment: 'The Minister granted leave to remain in the State, on the basis of parentage of an Irish born child, to approximately 10,500 foreign nationals between 1996 and February 2003.' [4] Importantly, in the late 1990s with the rise of the 'celtic tiger' immigration into Ireland grew with work permits issued to citizens outside the European Economic Area up from 5,750 in 1999 to 40,504 in 2002 (Mancini and Finlay 2008: 577).

In 2003, the Supreme Court delivered a restrictive ruling that there was no unconditional right of the child to the company of parents with an illegal residence status (Handoll 2012: 8).[5] As a consequence, the Minister handled the residence procedure more restrictively. In April 2004, the government submitted a proposal for a constitutional change in order to abolish the pure *ius soli* right that passed a referendum in June. Interestingly, the opinion of Advocate General Tizzano in the *Zhu Chen* case (C-200/02) in May 2004 played a role in the contentious political discussions on the regime change (De Somer 2012: 16; Mancini and Finlay 2008: 582). AG Tizzano stated:

> 'The fact is that the problem, if problem there be, lies in the criterion used by the Irish legislation for granting nationality, the ius soli, which lends itself to the emergence of situations like the one at issue in this case' (# 124).

As the Supreme Court case of 2003 had made the Irish regime more restrictive, the Irish law had more far-reaching consequences in other member states than at home. Since the changed constitution in 2005, children only qualify for citizenship if a parent is Irish, or British in Northern Ireland, or has been a legal resident three out of four years before the birth (Handoll 2012: 9, 11). This limited the impact of *Zambrano*. At the same time, the Department of Justice introduced the "Irish Born Child 05 Scheme" as a transitional regime to allow parents of Irish children without a residence status to apply for residence. In the *Bode* judgment of 2007, the following numbers were given: "A total of 17,917 applications under the scheme were received and processed. A total of 16,693 applicants were given leave to remain under the scheme and 1,119 were refused".[6] As this scheme operated under more favourable requirements than normal residence procedures, many of those potentially benefiting from *Zambrano* fell under it. Yet also this scheme did not grant rights to both parents. Generally only the mother could stay along with her Irish children, possibly joined by siblings with no EU residence rights.[7] (← **p. 777**)

The impact of the Zambrano ruling

Did *Zambrano* make a difference? While the figures of the "Irish Born Child 05 Scheme" were only reported in the mentioned court case, the quantitative implications of *Zambrano* were continuously discussed in the Dail (lower chamber) and in the Irish press. In October 2012, the Irish Times reported that 2,100 applications had been received after Zambrano, with 1,184 persons being allowed to remain in Ireland, 84 cases being refused and about 800 not yet settled.[8] In January 2013 the Minister informed that of 784 outstanding cases, 134 cases in line at the High Court had been settled politically. The Minister stated the *Zambrano*-criteria:

> 'each applicant parent must be a TCN who is residing in the State with their Irish born minor citizen child or children, they must be playing a significant role in the upbringing of their Irish born minor citizen child or children and the applicant parent's immigration circumstances must be such that if a decision was taken to refuse him or her a right of residency, the Irish born minor citizen child or children would be at risk of being expelled from the State and, by extension, the EU and, as such, they would not be able to enjoy the substance of their rights as an Irish and EU citizen.'[9]

Why did the government react proactively, though it intervened against *Zambrano*, *McCarthy*, and *Dereci*? There was certainly a political rationale for a policy break with the predecessor in government. Moreover, it appears that the government overestimated the implications of *Zambrano* until its later 'fine-tuning'.[10] In claiming his new approach, the minister also justified it with cost-avoidance of unnecessary court cases to 'the Irish taxpayer.'[11] Given that in late 2011 the government faced over EUR 100m in legal costs for 2000 cases where it was fighting deportation injunctions granted by the High Court[12], it becomes apparent that it pursued a mixed strategy – trying to avert unnecessary court cases, while not being too liberal. Cases also took relatively long to settle. Nevertheless, the *Zambrano* ruling favoured many individuals (about 1200), but few when compared to the nationally induced numbers of almost 16,700 cases.

Important in this respect is that there is a support structure informing TCNs about their rights. The Immigrant Council of Ireland acts as an advocate for migrants and their families offering information and help. It stepped up its activities in the aftermath of the judgment and noted a considerable increase in demand of its services.[13] Moreover, the Irish Human Rights Commission often joins cases as amicus curae.[14] There is alsothe Irish Immigrant Support Centre (nasc). While these organizations inform about rights, they do not have sufficient resources to mobilize TCNs in order to initiate extensive case law.

As the government reacted immediately, it was not acting under the pressure of domestic courts taking up the *Zambrano* reasoning. But in how far did domestic courts follow *Zambrano* and pose longer-term constraints? The (← **p. 778)** *Zambrano* judgment was cited 18 times (16 times by the High Court and twice by the Supreme Court) from January 2011 to March 2013 in cases concerning residence rights

of TCNs with dependent Irish citizens (the early cases only referring to the Opinion of GA Sharpston).[15] In these cases, *Zambrano* was causally linked to a right of residence or to judicial review in four cases. In at least seven of the cases, it was explicitly stated that *Zambrano* did not apply. Yet this did not always mean that no residence was granted. For instance, in September 2012, the High Court clarified that the parent could only rely on *Zambrano* if his or her deportation caused the child to leave the EU. Nevertheless, an interlocutory injunction was granted as the deportation of the father would deprive the child of its constitutional right to enjoy the company and care of its parents.[16] This case shows that *Zambrano* does not necessarily embrace more extensive rights than the Irish constitution. And it may also reflect a preference on the part of domestic courts of granting individual rights on the basis of the national constitution rather than on the basis of the EU Treaty. It appears that both courts do not easily establish a link to *Zambrano*, if this can be avoided, and that *Zambrano* requires clear dependence, which has to be proven between the child and the father. Thus, the Supreme Court denied residence to a father who had rarely been with his family and was imprisoned in the UK for drug dealing.[17]

Altogether, the experience with *Zambrano* in Ireland is a complicated one. Of all member states, Ireland was most deeply affected. There was considerable political and media attention with 22 articles on *Zambrano* and its effects in four newspapers. But the Irish Born Child 05 Scheme meant that many cases were already settled, weakening the impact of *Zambrano*. As for the government, it acted ambiguously by being proactive while aiming to constrain rights. In many cases, then, *Zambrano* did not add so much to the legal status quo, certainly not as much as had been hoped based on the opinion of AG Sharpston. For the genuine enjoyment of EU citizenship one parent suffices while the Irish constitution may grant the right to be with both parents.

Reactions in other member states

It is not possible here to give similar detail on other countries. But a cursory look can give indications as to whether the Irish case is exceptional. To do that, it should be useful to recapitulate when countries are affected: *Zambrano* does not apply to cases, where EU citizens have used free-movement rights and want to be joined by their TCN family members. Such reunions are granted by EU law. The *Zambrano* case only affects member states, when their own citizens claim the right to live with a TCN family member and this right is not given domestically. Next to member states with far-reaching *ius soli* provisions, all families with a domestic and a TCN spouse can be concerned, where children have citizenship, and where the TCN spouse may claim rights from *Zambrano* – in particular after a separation from the EU spouse. (← **p. 779**)

When checking for press reports on *Zambrano*, Ireland's 22 articles compare to one article in six papers in Belgium, one in 40 German papers, two in 13 in Austria, and three in 18 different papers in the UK – revealing the marginal attention in other member states.[18] No figures are available on residence rights granted after *Zambrano*. We can only approach the question indirectly, regarding whether the case was taken up in courts or by administrations. The following table shows how often *Zambrano* is cited in domestic courts; the numbers being comparable to the Irish ones in Belgium, Germany, and the UK.

Table: Overview of Zambrano citations in domestic court cases (until May 2013)[19]

	Belgium	**Germany**	**UK**	**France**	**Ireland**
No. citing Zambrano	17	22	27	5	18
Positive impact on decision of Zambrano	3	4	5	1	4

Though *Zambrano* originated in Belgium, the country was hardly concerned with the ruling since its citizenship law had changed. The administration 'from the outset interpreted the Zambrano case as exclusively related to the status of dependent minors, hence our lesser concern – as such, we were relieved to see this confirmed by the McCarthy ruling' (De Somer 2012: 15). In Germany, the small numbers in the courts contrast remarkably to a comment just after the ruling, where Prof Thym of Konstanz University expected a few thousand cases to be affected.[20] In the UK, the administration adapted its handling of cases immediately to the new legal background,[21] even before an official policy was devised in November 2012 (Sibley et al. 2013: 46). Yet it is not clear whether the administration has handled applications generously. As in other countries, UK courts were of the opinion that one parent's residence was sufficient for the child to be able to stay. In one case, the court based the residence not on *Zambrano* but on British constitutional principles.[22] In France, the few cases may be explained by a circular of September 2010 issued after the *Metock* judgment that already gave TCN parents of an EU child residence status (Fernhout and Wever 2011: 73).

Though not included in the above overview also The Netherlands are an interesting case. Its government has taken a very restrictive approach to the consequences of the *Zambrano* case, even denying a residence permit to a parent if there were grandparents in the country who could theoretically take care of the child. The Judicial Division of the Council of State passed two judgments in March 2012 elucidating the guidelines how the 'genuine enjoyment' (**← p. 780)** can be safeguarded, disagreeing that grandparents could step in. Yet it emphasized that it was sufficient if there was one parent with a residence permit, even if medical or psychological problems of this parent inhibited caring for the child, as relevant public institutions would give assistance (De Hart et al. 2012: 61f). The Dutch case thus shows that very few rights may follow from *Zambrano* if governments are reluctant – but also that courts do pose some constraints.

CONCLUSION

From what we know about judicial Europeanization, we would not have expected much change from the *Zambrano* ruling. There were few costs of legal uncertainty for member states, which could have waited simply for the fine-tuning of the Court that was to be expected. Reactions to *Zambrano* but also to *Metock* are therefore puzzling. There do not seem to be striking differences among the member states, reacting in a strange mixture of response and opposition. As far as we can see, administrations do respond to far-reaching case law such as *Metock* and *Zambrano*. There are real implications for social Europe, also beyond the case and the concerned member state. However, this does not seem to result from member states embracing case-law development politically. Governments have intervened steadily at the CJEU in large numbers. They have also signalled that the citizenship directive requires changes. In the case of *Zambrano* interventions were successful by avoiding a broadening of the case law to other family members and the Court fine-tuned its case law. Lower courts also do not appear enthusiastic. They apply *Zambrano*, but not extensively, seeing only the right of one parent to stay. If they are more generous, there is a tendency to base their decisions not on CJEU case law but on national constitutional principles. Thus, national administrations' compliance does not seem to be driven by lower courts. Administrations operating in a rule of law system may not differentiate whether they adapt to a national high court ruling or to one of the CJEU. Most likely, there is also the wish to avoid further court cases and case law. The implications of CJEU rulings are thus real, and more far-reaching than the political science literature suggests. There does not seem to be a 'justice contained,' even in the case of TCNs where political mobilization is restricted and where costs of legal uncertainty are comparatively low. At the same time, these case-law implications are hardly noticed in the public sphere as they are very much absorbed in the practices of administrations and courts, so that the consequences of even activist case law become routine. Yet, there clearly is an effectiveness of legal integration as Martinsen and Vollaard (2014) query. This is particularly striking in

cases where member states opt against a reverse discrimination of nationals, like Italy, and broaden the rights attained by EU nationals to nationals.

Though the Irish reaction to *Zambrano* seems striking at first sight, it does not appear so different after all, given the extent to which Ireland was affected. (**← p. 781)** After a change in government, *Zambrano* could be used politically to demonstrate a more liberal approach to migrants. Altogether differences among member states seem to be only minor. While the administrations appear to operate in a multi-level system, not differentiating between European and national high court decisions to follow, governments and even lower courts seem rather to contest such far-reaching case law of the CJEU. It is hardly possible to quantify the impact of this case law. Also governments intervening before the CJEU cannot give exact numbers. As governments intervene when they see their prerogatives violated, they are likely to exaggerate. We saw that Ireland spoke of "floodgates," and then *Zambrano* (and its fine-tuning) gave residence to about 1,200 cases against 16,700 under the national scheme. These figures are not known for other member states. In a system of cooperative federalism where the same administration enacts national and supranational decisions such attributions are bound to be rare. We should not forget that also for secondary European law we know much more about transposition processes than about actual outcomes of EU policies. In a multi-level EU, the effects of different levels can hardly be distinguished. Clearly, however, the analysis of the reactions to the *Zambrano* ruling shows that CJEU case law crucially affects social Europe. Its impact may be difficult to trace, but it is real. It remains to be seen whether this poses the danger that member states react to increasing access to welfare by cutting down on social benefits, or on access of TCNs in general (cf. Scharpf 2009; Wiesbrock 2012: 93).

So far, literature did not provide sufficient indications as to what factors are at work in judicial Europeanization. The evidence of this article reveals that anticipatory obedience may be more widespread than costs of legal uncertainty suggest. Further research should focus on administrative reactions to EU

case law, asking whether there are differences across policy fields or member states as to automatic administrative responses.

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