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The Citizenship of Personal Circumstances in Europe

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Abstract

The EU's is a curiously atypical legal system which construes the on-going shift from citizenship to personhood in global constitutional law in quite an atypical way. The advent of the person boasts, globally, a powerful ability to remedy the harsh edges of the arbitrary exclusionary legal fiction of citizenship by embracing those who do not qualify to benefit from it. In the EU, however, the turn of constitutionalism to personhood plays quite the opposite role: it disables the protections of EU citizenship. This curious turn, which this paper aims to document and discuss, has two consequences. Firstly, it annihilates citizenship as a meaningful legal status in the EU, since its declared benefits and protections can always be overridden by personal circumstances of the holder: precisely what citizenship, at its inception, was supposed to make impossible. Secondly, it deprives of protections of citizenship precisely those who need it the most, since they become invisible in the eyes of the powers that be. As a result citizenship in Europe is turning into a 'citizenship of personal circumstances' – a figure of inescapable individualism imposed on those in need, who are thereby detached from other citizenry and branded out as not good enough in the eyes of the Union – leaving little space to the grand ideals of the past.

Keywords

EU citizenship, personhood, non-discrimination, division of powers, EU federalism

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Introduction*

Approached from the citizenship point of view, the EU's is a curiously atypical legal system which construes the on-going shift from citizenship to personhood in global constitutional law¹ in such a way that the advent of the person, while boasting, globally, a powerful ability to remedy the harsh edges of the arbitrary exclusionary legal fiction of citizenship by embracing those who do not qualify to benefit from it, plays quite the opposite role: it disables the protections of EU citizenship. In other words: while, globally, what can be loosely termed 'personhood' comes to the rescue when citizenship cannot help, thus creating *de facto* citizens where the *de jure* legal status is not extended, in the hands of the Court of Justice of the European Union (ECJ), quite spectacularly, personhood serves as a tool of rationalizing the *de facto* exclusion from the rights and protections of EU citizenship. This curious turn, which this paper aims to document and discuss, has two consequences. Firstly, it annihilates citizenship as a meaningful legal status in the European Union,² since its declared benefits and protections can always be overridden by personal circumstances of the holder: precisely what citizenship, at its inception, was supposed to make impossible.³ Secondly, it deprives of protections of citizenship precisely those who need it the most, since they become invisible in the eyes of the powers that be.⁴ As a result citizenship in Europe is becoming a 'citizenship of personal circumstances' – a figure of inescapable individualism imposed on those in need,⁵ who are thereby detached from other citizenry and branded out as not good enough in the eyes of the Union – leaving little space to the grand ideals of the past.

The global thinning of citizenship explained

'Citizenship' for the purposes of this contribution is defined in traditional legal-political terms, following the classical expression of Rogers Brubaker as 'an object and an instrument of closure'.⁶ Citizenship is thus the chalk of the line between the 'outs' and the 'ins'; an indispensable element of the legal 'world-making':⁷ having asked for one's citizenship, we are usually clear about whether that person counts in full in the eyes of our law. Not being in possession of the local citizenship, whether

* Chair in EU Constitutional Law, University of Groningen; Visiting Fellow Europainstitut Bern (Spring 2017). I am grateful to Robert Schütze, Christoph Schönberger and Daniel Thym, and also to Gráinne de Búrca, Daniela Caruso and other participants of the EU Law Professors Seminar at Boston College Law School in November 2016. The assistance of Vlad Belev, Ryan Chavez, Anna Gnap and Jacquelyn Veraldi is kindly acknowledged. Special thanks to Petr Agha, who hosted me in Prague: this paper was written during my tenure as Franz Weyr Fellow at Centre for Law and Public Affairs (CeLAPA), Institute of State and Law of the Academy of Sciences of the Czech Republic (Fall 2016).

¹ Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 Intl J Const L 9. cf. Dora Kostakopoulou, *The Future Governance of Citizenship* CUP 2008). For analyses of the European perspective see Loïc Azoulay, 'L'autonomie de l'individu européen et la question du statut' (2013) EUI Working Paper LAW 2013/14 <<http://hdl.handle.net/1814/29098>>; Loïc Azoulay, Etienne Pataut and Ségolène Barbou des Places (eds), *Ideas of the Person and Personhood in European Union Law* (Hart Publishing 2016).

² Let alone the 'fundamental status' the ECJ has proclaimed it to be: Case C-184/99 *Grzelczyk v centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* EU:C:2001:458, [2001] ECR I-06193, para 31. See also, e.g. Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493, [2002] ECR I-07091; Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* EU:C:2011:124, [2011] ECR I-01177, para 41.

³ Pedro Caro de Sousa, 'Quest for the Holy Grail' (2014) 20 ELJ 499; Dimitry Kochenov, 'Neo-Mediaeval Permutations of Personhood in Europe', in Loïc Azoulay et al. (eds), *Ideas of the Person and Personhood in European Union Law* (Hart Publishing 2016).

⁴ Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 CMLRev 937; Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 1.

⁵ See also Alexander Somek, 'Europe: Political, Not Cosmopolitan' (2014) 20 ELJ 142.

⁶ W Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (HUP 1992) 34.

⁷ Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 Hastings Law Journal 814, 838.

admitted willingly or not, has always been tinted with a slight touch of presumed barbarity.⁸ By definition, the world outside of the Union borders is worse than our world: in the EU, the prospect of being expelled into that wild wider reality outside our borders came to be protected by law better than living at home undisturbed:⁹ the apotheosis of parochial thinking lying nevertheless at the essence of citizenship as a legal status. It is thus unavoidable and fundamental, that citizenship, above all, is a legal status: Pierre Bourdieu is right that the law is very effective in pre-empting the recognition of what lies outwith the realm of the reality it has mandated and created,¹⁰ branding as non-existent any fact of social reality not overlapping with the legal truth,¹¹ however harsh is the world shaped by the latter.¹² The necessarily arbitrary nature of how the line between the citizens and the non-citizens is drawn in any society has not escaped the attention of commentators.¹³ Indeed, next to the production and reproduction of exclusion, the in-built arbitrariness arose as the second key feature of the status of citizenship.

Citizenship, as a legal status of attachment to public authority,¹⁴ is always distributed uniquely by the authority itself. It does not depend on any sentiments and feeling of the citizenry, of course: as a Dutchman having spent a lot of time in the US I can perceive of myself as an ideal American (and even be accepted by my American-born friends as such), but this fact – just as not caring about my Dutch subjecthood or the monarch that much¹⁵ – has no bearing on the legal status I hold. This status entails the enjoyment of a set of citizenship rights including, but not limited in the majority of jurisdictions, to the right to stay and work in the territory under the jurisdiction of the authority in question, including the right not to be deported;¹⁶ political rights; and the entitlement to non-discrimination among citizens, *i.e.* the holders of a formal legal status of citizenship under a particular authority. Non-discrimination is of special importance in this context: while it is frequently positioned as a right, it is also, unquestionably, implied in the status as such. Remove the formal requirement of equality before the law and characterizing the resulting legal arrangement as a citizenship one would be most difficult to say the least: citizenship being premised on, precisely, the creation of a legal abstraction out of the actual people with all the differences that being a person implies, will fail to emerge if any other differences between the citizens, beyond the formal legal status they hold, became an indispensable precondition informing their duties and entitlements.¹⁷

That the legal fiction so necessary for any modern constitutional system to survive is essentially arbitrary in nature is exceedingly difficult to ignore in a world where the whole ethos of the law is about asking for good reasons behind this or that element of the legal reality proclaimed by the powers that be. Indeed, constant questioning of authority's mantras is what reinforces modern democracy¹⁸ and, at the level of

⁸ James Tully, *On Global Citizenship: James Tully in Dialogue* (Bloomsbury Academic 2014).

⁹ Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* EU:C:2011:277, [2011] ECR I-03375; Sara Iglesias Sánchez, 'A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017).

¹⁰ Bourdieu (n 6).

¹¹ Jack M Balkin, 'The Proliferation of Legal Truth' (2003) 26 *Harvard Journal of Law & Public Policy* 9.

¹² Jack M Balkin, 'Agreements with Hell and Other Objects of Our Faith' (1997) 65 *Fordham L. Rev.* 1703.

¹³ Ayelet Shachar, *Birthright Lottery* (HUP 2009).

¹⁴ The formal level of the authority does not matter, usually: Rainer Bauböck, 'Global Justice, Freedom of Movement and Democratic Citizenship' (2009) 51 *Archives européennes de sociologie* 1.

¹⁵ Dimitry Kochenov, 'Mevrouw de Jong Gaat Eten' (2011) *EUI Working Paper RSCAS 2011/06* <<http://hdl.handle.net/1814/15774>>.

¹⁶ Bridget Anderson, Matthew J Gibney and Emanuela Paoletti, 'Citizenship, Deportation and the Boundaries of Belonging' (2011) 15 *Citizenship Studies* 547.

¹⁷ Christian Joppke, *Citizenship and Immigration* (Polity, 2010), 96–110, (and the literature cited therein).

¹⁸ Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification' (2010) 4 *LEHR* 142.

the law, makes the Rule of Law possible.¹⁹ After the advent of the ‘culture of justification’ coming to replace ‘the culture of authority’²⁰ arbitrariness is not quite the answer even in the world of the likes of Trump and May. Defending arbitrariness by allusions to the necessary nature of the outcomes it produces in a democracy – i.e. a body politic – cannot convince since it simply substitutes one arbitrariness (the body of those with a citizenship status) with another (the body of those who are politically involved and should have a citizenship status to participate).

Consequently, and most logically, too, as we look back, the key trend in the citizenship evolution over the last decades has been to underplay citizenship’s former glory by reaching beyond the arbitrariness of the legal fiction lying at its base. This process had two key facets, which were profoundly interrelated. It consisted, firstly, of the extension of the rights formerly reserved for citizens only also to those who would not have the formal legal status as well as ensuring that all those in possession of the formal legal status could in fact enjoy citizenship rights, even women, minorities and naturalized citizens. As a consequence, the border line between citizenship rights and human rights came to be rethought under pressure, *inter alia*, from the rise of human rights ideology²¹ and the evolution of the basic relationship between the authority and the population under its control, citizens and non-citizens included.²²

Secondly, we can witness a gradual extension of the status – either *de jure* or *de facto* – to the groups of those who were previously randomly excluded. Such extension happened both in the courts of law²³ and via legislative developments. Most importantly, the revision of nationality laws to make these more inclusive and tolerant of multiple nationalities facilitated a move away from the previous paradigm of exclusive allegiances.²⁴

¹⁹ Gianluigi Palombella, *È possibile la legalità globale?* (Il Mulino 2012); Gianluigi Palombella, ‘The Rule of Law and its Core’ in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009).

²⁰ Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (CUP 2013).

²¹ Günter Frankenberg, ‘Human Rights and the Belief in a Just World’ (2014) 12 Intl J Const L 35.

²² Yasemin Soysal, *Limits of Citizenship* (University of Chicago Press 1994). It comes as no surprise that residence – especially long-term residence in the territory of a particular state – came to acquire a special significance in this context: Davies, Gareth, “‘Any Place I Hang My Hat?’” or: Residence is the New Nationality’ (2005) 11 ELJ 43, 55; Daniel Thym, ‘Residence as *de facto* Citizenship? Protection of Long-term Residence under Article 8 ECHR’, in Ruth Rubio-Marín (ed.), *Human Rights and Immigration* (OUP, 2014).

²³ While the law used to be precisely so categorical, the rise of Art. 8 ECHR jurisprudence prohibiting, in numerous cases, deportations to the country of citizenship, has created something akin to a *de facto* nationality, altering the legal reality to a great degree. See, for one of the first notable examples, the Concurring Opinion of Judge Martens in *Beldjoudi (Beldjoudi v France)* (1992) Series A no 191-B; *Jeunesse v Netherlands* App no 12738/10 (ECtHR 3 October 2014). This trend, although markedly counter-orthodox in citizenship matters, and deeply empowering at the individual level has been criticized in the literature (e.g. Daniel Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’ (2008) 57 Intl & Comp. L.Q. 87. Cf. Thym (n 22)) and is not yet a mainstream position of the European Court of Justice: Stanislas Adam and Peter Van Elswege, ‘EU Citizenship and the European Federal Challenge through the Prism of Family Reunification’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017).

The trend definitely adds to the picture of the on-going contestation of the normative foundations of citizenship and is observable also in the practice of the UN Human Rights Committee (UNHRC), which is in tune with the ECtHR practice: UNHRC, ‘Stewart v Canada’ 1996 Communication No 538/1993 (‘no one shall be arbitrarily deprived of the right to enter his own country’ (quoting Art. 12(4) of the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (March 23, 1976)). See also UNHRC, ‘General Comment 27, Freedom of Movement (Article 12)’ 2 November 1999 U.N. Doc. CCPR/C/21/Rev.1/Add.9. According to the Committee, the scope of ‘his own country’ in the sense of Art. 12 ICCPR is broader than ‘his country of nationality’ (at para 20).

²⁴ Peter J Spiro, *At Home in Two Countries: The Past and Future of Dual Citizenship* (NYUP 2015); Peter J Spiro, ‘Dual Citizenship as Human Right’ (2010) 8 Intl J. Const. L. 111. Again, exceptions are obviously there, even in the European Union, but the global trend towards multiple nationality toleration around the world is as clear as day, as Professor Spiro has masterfully proven. For a critical analysis of exceptional cases in the EU, see Dimitry Kochenov, ‘Double Nationality in the EU: An Argument for Tolerance’ (2011) 17 ELJ 323.

The consequence of this quest against arbitrariness leaping into the territory of citizenship, which is, in itself, an arch-example of arbitrariness in action, is the unavoidable thinning of citizenship as a legal status associated with an entitlement to rights, as well as the radical decrease in citizenship duties.²⁵ This is not surprising at all: striving to make less arbitrary and less exclusionary the legal fiction whose aim, precisely, is to justify arbitrary exclusion from territory, society and, not infrequently, dignity (through the denial of equality before the law), can only result in a legal fiction which is a less meaningful one. This is how we came to the advent of the ‘citizenship-lite’ in Christian Joppke’s thoughtful analysis.²⁶ The high point of this development is the turn in constitutional theory to the figure of the person as opposed to a citizen, a no small feat in constitutional law.²⁷ Let us trace the key steps of this development.

The gradual extension of the scope of those enjoying the rights of citizenship among the actual bearers of the status is a well-known story of women, the indigenous peoples and other minorities. The gradual extension of those enjoying the status of citizenship in full is, again, the story of the ‘coloureds’ ‘unfit for citizenship’, of migrants and of the colonial subjects. Once it became unacceptable not to extend the rights of citizenship to settled minority categories, not allowing them to pass on citizenship became obviously problematized, just as the right of other minorities to enjoy access to the status as such.²⁸

As the gap between the scope of nominal citizens and the scope of citizens with citizenship rights was drastically diminishing (women got the right to vote and pass on the citizenship status to their descendants, for instance²⁹), coupled with the extension of the status of citizenship to the formerly excluded minority groups (think of the extension of the full Australian citizenship to the aboriginals, for instance³⁰), the ideological distinction between citizens and non-citizens in a society expectedly came to be problematized and contested, bringing about the increasing extension of rights, coupled with a grant of a (theoretical) possibility to acquire citizenship status to any settled resident of any modern liberal democratic state: the majority of jurisdictions today do not know formerly commonplace disqualifications related to race and religion, for instance.

In other words, while the proclamation of equal rights of citizenship at the inception of citizenship was precisely the ideological tool to facilitate *de facto* socio-economic exclusion of huge chunks of society and the legitimation of authority in charge of the preservation of the *status quo* as T.H. Marshall explained,³¹ and was thus not even remotely overlapping with the actual reality on the ground, where citizenship actually endowed with rights was the privilege of a radical minority in a society – usually white males able to pass the property census³² – the two key trends outlined above – the gradual extension of rights and the extension of the status – brought the actual reality on the ground closer to the initial rhetorical ideal, also empowering further contestations of exclusions within the ambit of citizenship – think about the sexual citizenship story, for instance,³³ or the on-going animal citizenship debate.³⁴

²⁵ Dimitry Kochenov, ‘EU Citizenship without Duties’ (2014) 20 ELJ 482.

²⁶ Christian Joppke, ‘The Inevitable Lightning of Citizenship’ (2010) 51 European Journal of Sociology 37.

²⁷ Bosniak (n 1).

²⁸ Sherally Munshi, ‘Immigration, Imperialism, and the Legacies of Indian Exclusion’ (2016) 28 YJLH 51.

²⁹ Michael Goldhaber, *A People’s History of the European Court of Human Rights* (Rutgers University Press 2007) 15–26.

³⁰ David Mercer, ‘“Citizen Minus”?: Indigenous Australians and the Citizenship Question’ (2003) 7 Citizenship Studies 421.

³¹ TH Marshall, ‘Citizenship and Social Class’ in TH Marshall, *Citizenship and Social Class* (Pluto Press 1992).

³² Women, although formally holding a citizenship status, were excluded not only from political rights, but also from the possibility to keep their status after marrying a foreigner or a stateless person or passing it on their children. cf. for US law examples, Patrick Weil, *The Sovereign Citizen* (Penn Press, 2012).

³³ Ūlādzislaū Belavusaū, ‘EU Sexual Citizenship: Sex beyond the Internal Market’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) (and the literature cited therein).

³⁴ Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (OUP 2011); William A Edmundson, ‘Do Animals Need Citizenship?’ (2015) 13 Intl J Const L 749.

This, in turn, led to the relative – and necessarily welcome, given its harshly arbitrary and exclusionary beginnings – trivialization of the status of citizenship as well as a more faithful correspondence between the actual society under the authority in question and citizenry under the same authority. Once the rigidity of the citizens–non-citizens divide in terms of the corresponding rights and entitlements is questioned, abuses of power using this divide as the chief legal tool are made difficult. History knows plentiful examples of such unfortunate deployment of the citizenship status. Think, for instance, of Nuremberg laws excluding Germany’s Jewry from the status to justify their formal exclusion from the key rights of citizenship.³⁵ South-African *apartheid* ‘homelands’, designed to distribute fake citizenships of non-recognized all-black puppet states, like Bophuthatswana and Transkei³⁶ to grant minorities ‘full rights abroad’³⁷ are equally good examples. More recently, Latvian and Estonian policy of humiliation of Russian, Ukrainian and Jewish minorities, based precisely on the same strategy of the denial of citizenship to supply a justification of exclusion from key rights did not work equally well: under pressure from the international institutions the majority of formerly ‘citizenship’ rights came to be extended to the minorities as ‘human’ rights.³⁸ Not yet the right to vote, the right to a name³⁹ or the right to speak the mother tongue at work,⁴⁰ but the trend is clear: ‘they are not citizens’ is not an automatically enforced valid pretext anymore to abuse settled resident populations – at least it does not come unquestioned.

Crucially and inseparably from the story of the status and rights, the same evolution affected citizenship duties, too. Traditionally the main vehicle of transposition of the purely legal truths into the reality of day-to-day lives through coercion, mass schooling and conscription, duties of citizenship are undergoing an astonishingly speedy recess in the majority of the liberal democratic jurisdictions around the globe, as ‘forging a good citizen’, *i.e.* punishing those deviating from the legal truth enforced by teachers, the army and the police (and, crucially, the complacency of the well-meaning law-abiding masses⁴¹), is not any more a defensible task of the state. In the majority of the liberal democratic jurisdictions there is no conscription,⁴² no more citizenship-based taxation,⁴³ and no more harassment of dual nationals,⁴⁴ to give

³⁵ Kristen Rundle, ‘The Impossibility of an Exterminatory Legality: Law and the Holocaust’ (2009) 59 UTLJ 65, 69–76.

³⁶ At some point Wikipedia had the irony of mentioning Nelson Mandela among the ‘notable citizens’ of this ‘state’, which is not, *per se*, legalistically incorrect.

³⁷ See, e.g. South African, Bantu Homelands Citizenship Act, 1970, which instituted the denaturalisation of the black majority during the *apartheid*. cf. John Dugard, ‘South Africa’s Independent Homelands: An Exercise in Denationalization’ (1980) 10 Denv. J. Intl’ L. & Pol’y 11.

³⁸ Pritt Järve, ‘Sovetskoje nasledije i sovremennaja ètnopolitika stran Baltii’, in Vladim Poleshchuk and Valery Stepanov (eds) *Ètnopolitika stran Baltii* (Nauka 2013); Dimitry Kochenov and Aleksejs Dimitrovs, ‘EU Citizenship for Latvian Non-Citizens: A Concrete Proposal’ (2016) 38 Hous. J. Intl L. 1.

³⁹ UNHRC, ‘Raihan v. Latvia’ 2010 Communication No 1621/2007; on the problematic stance of the European international courts *vis-à-vis* this right, see Adam Łazowski, Eglė Dagilytė and Panagiotis Stasinopoulos, ‘The Importance of Being Earnest: Spelling of Names, EU Citizenship and Fundamental Rights’ (2015) 11 CYELP 1.

⁴⁰ Dimitry Kochenov, Vladim Poleshchuk and Aleksejs Dimitrovs, ‘Do Professional Linguistic Requirements Discriminate? A Legal Analysis: Estonia and Latvia in the Spotlight’ (2011) 10 European Yearbook of Minority Issues 137.

⁴¹ Patricia Szobar, ‘Telling *Sexual Stories* in the *Nazi Courts of Law*: Race Defilement in Germany, 1933 to 1945’ (2002) 11 JHS 131, pointing out that the persecution of the ‘Arian-Jewish’ couples relied entirely on the information provided by the good willing citizens. Countless similar examples from a variety of jurisdictions could be provided.

⁴² The countries still keeping conscription stick out as highly atypical and experience very specific threats, perceived or real. Think about Estonia, Greece, Israel and Ukraine.

⁴³ With a marked exception of the US filing income taxes all around the world is residence-, not citizenship-based. cf. J Richard Harvey, ‘Worldwide Taxation of United States Citizens Living Abroad– Impact of FATCA and Two Proposals’ (2014) 4 George Mason JICL 319; Taylor Denson, ‘Goodbye, Uncle Sam? How the Foreign Account Tax Compliance Act Is Causing a Drastic Increase in the Number of Americans Renouncing Their Citizenship’ (2015) 52 Hous. L. Rev. 967.

⁴⁴ Peter Spiro, *At Home in Two Countries* (NYU Press, 2016). Again, exceptions are obviously there, even in the European Union, but the global trend towards multiple nationality toleration around the world is as clear as day, as Professor Spiro has masterfully proven. For a critical analysis of exceptional cases in the EU, see Dimitry Kochenov, ‘Double Nationality in the EU: An Argument for Tolerance’ (2011) 17 ELJ 323.

just a few examples. As long as the duties and the civic virtues promoted by any state are necessarily designed to quash the recognition of minority (and sometimes even majority, like was the case with women all around the world and the blacks in South Africa) groups in society,⁴⁵ any arguments for their goodness and necessity all but fail to tell the whole truth, stopping at the retelling of the ideological mantras of the unity of *demos* and political community, as polished as they are comfortable, and ignoring the functions of such duties in the actual societies on the ground.⁴⁶

Turning to the conceptualization of citizenship through the ‘acts of citizenship’ is most appropriate in this context: the majority of those behind the constitutional moments are precisely the ones failing to buy what the authority is preaching: those *not* accepting the power of the duties narrative, *i.e.* the ‘activist’ citizens in Engin Isin’s terms⁴⁷ – from Dr. Martin Luther King and President Vaclav Havel to Colonel von Stauffenberg the list of such figures can be extended *ab infinitum*. It is thus a most welcome development that citizenship is not centered on duties anymore, thus becoming less totalitarian, more inclusive and forward-looking.⁴⁸ It is not, thus, – in theory at least – based on idealized masculinities, given that the main duty has always been to kill for the authority that happened to draft you.⁴⁹ 19th century scholars would find it most surprising and counter-intuitive that full citizenship, including a package of rights associated therewith is attainable without conscription and sacrifice, let alone extended to the legally ‘unfit’ who cannot be conscripted at all, like women or minorities, for instance.⁵⁰ With the waning away of the need to rationalize discrimination and *de facto* inequalities within the *de jure* status of equals, which seems to be the key function, which the duties of citizenship have traditionally been endowed with, the modern state certainly lost some of the stakes in the grand citizenship narrative of *égalité, liberté* and *fraternité* for the very select few on the pre-set terms of goodness which have to be shared by all at the gun point.

The advent of personhood as a *de facto* alternative to citizenship thinking

The residue of pre-human rights thinking predating the tectonic shifts in the understanding and practice of citizenship is still around, however, and could explain, *inter alia*, the backlash the world seems to be experiencing in the field of the regulation of access to the status of citizenship: naturalizations are more and more dependent on the elaborate *rites de passage* in the form of ‘culture’ and ‘values’ tests, which settled foreigners are required to pass to acquire the formal status of citizenship.⁵¹ The assumption behind such tests is as problematic as it is commonplace: the culture from across the border is a barbarian non-equivalent of our own.⁵² Putting this assumption to practice is even more difficult, however, than embracing it rationally, as the core value of any liberal democracy today is tolerance. Tolerance is what

⁴⁵ A similar argument has been made in the context of constitutionalism as such: James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP 1995).

⁴⁶ For an example of such idealizing, see, *e.g.* Richard Bellamy, ‘A Duty Free Europe? What’s Wrong with Kochenov’s Account of EU Citizenship Rights’ (2015) 21 *ELJ* 558 (and the literature cited therein).

⁴⁷ Engin Isin, ‘Citizenship in Flux: The Figure of the Activist Citizen’ (2009) 29 *Subjectivity* 367.

⁴⁸ For a more systematic treatment, see, Dimitry Kochenov, ‘EU Citizenship without Duties’ (2014) 20 *ELJ* 482.

⁴⁹ Jamie R Abrams, ‘Examining Entrenched Masculinities in the Republican Government Tradition’ (2011) 114 *West Virginia Law Review* 165; Claire Snyder, *Citizen-Soldiers and Manly Warriors: Military Service and Gender in the Civic Republican Tradition* (Rawman and Littlefield 1999). In the European context, see, Belavusau (n 33).

⁵⁰ Taney CJ has famously used the legal inability of the blacks in the US to assume the duties of citizenship (based on a statute reserving the membership in the militias to white males) as a justification for not extending rights to them: *Dred Scott* 60 US 393, 420–421 (1857).

⁵¹ Ricky van Oers, Eva Ersbøll and Dora Kostakopoulou (eds), *A Re-definition of Belonging?* (Koninklijke Brill 2010).

⁵² However nasty, this assumption seems to be ‘natural’: Melvin J Lerner, ‘The Justice Motive: Some Hypotheses As to Its Origins and Forms’ (1977) 45 *Journal of Personality* 1, esp. at 29. For the whole picture, see, Melvin J Lerner and Susan Clayton, *Justice and Self-Interest* (CUP 2011).

all the ‘specificity testing’ is necessarily bound to come down to.⁵³ In this sense testing the specificity of the highly unique Danish culture and of an even more unique Swiss one amounts, in fact, to testing one and the same thing. What such tests supposedly are testing, then, is whether someone is ready to concede that she is a second-rate human being since she is used to having her croissant plain, as opposed to with cream in the morning and be punished by sitting a test about the croissant with cream losing her time to remedy her inherent barbarian lack of dignity before naturalization becomes a fact attested by proper documentation. Whether she eats it with cream or not after naturalization is no one’s concern in a tolerant society. Most problematically however, the ‘integration tests’ which keep on proliferating, fully reflect the core thinking behind citizenship anywhere in the world: the presumption of virtually irremediable difference between societies serving as a pretext to disqualify those with a different formal legal attachment from key legal entitlements and recognition.

Exclusion being the core normative foundation of citizenship, it is not a surprise that the status of citizenship enjoyed a more and more wobbly pedestal of glory, as of late, in constitutional theory, rivaled by its more physical and biological double: the person.⁵⁴ Once the legal figure of a citizen gives way to a legal recognition of a physical reality of an ordinary human, constitutionalism cannot any more be the same. And this is exactly the move we are increasingly witnessing, which is very strongly attuned, logically, to the several lines of developments outlined above.

The core issue of importance here is very basic and has to do with the traditional approaches to the core aspects of legitimacy in a political community: the justification of violence and of the obligation to submit to violence of the public authority as a necessary element of being ‘free’ going back to Jean Bodin⁵⁵ and rooted in the Christian soteriology of the day.⁵⁶ If only citizens and no one else are counted as the constituents of the collective whence legitimacy emanates – call it *demos*, the nation, political community – then the picture of what the state and, necessarily, the law is about will be quite different, necessarily, compared with a situation when humans are counted, non-citizens included. Indeed, why not put humans, persons, at the basis of *demos*, the nation, political community? While legal and social truths are bound to overlap for the law to be effective⁵⁷ – and knowing the bio-power of the contemporary state in shaping the life itself to the whims of fashion of the day⁵⁸ – making citizens is still much easier and less problematic than acknowledging humans.

Making a citizen is an ideology-inspired legal exercise, implying a choice among the available bodies who could be useful or not for the achievement of the goals of the authority at any given time, whatever these are. Those bodies which are less useful are simply excluded and do not exist in the eyes of the law. Exclusions can run along any lines: geography of origin, race, religion, education, language, time; you name it, and a legal-historical example will be found. The citizenship’s capacity to exclude is its core function, which means that, in the ‘golden days’ of citizenship – the mythical days of the concept’s unquestioned authority – the exclusion at the level of the *legal status* could only rarely be questioned: equality is *among* citizens, remember? As a consequence, working with citizens the authority enjoys an

⁵³ This presents traditional accounts of citizenship in a radically new light: Linda Bosniak, ‘Citizenship Denationalized’ (2000) 7 *Indiana Journal of Global Legal Studies* 447. See also Mikko Kuisma, ‘Rights or Privileges? The Challenge of Globalization to the Values of Citizenship’ (2008) 12 *Citizenship Studies* 613; Martin Wolf, ‘Will the Nation-State Survive Globalization?’ (2001) 81 *Foreign Affairs* 178; Kim Rubinstein and Daniel Adler, ‘International Citizenship: The Future of Nationality in a Globalised World’ (2000) 7 *Indiana Journal of Global Legal Studies* 519; Ronnie D Lipschutz, ‘Members Only? Citizenship and Civic Virtue in a Time of Globalization’ (1999) 36 *International Politics* 203.

⁵⁴ Bosniak (n 1).

⁵⁵ cf. JH Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (CUP 1963), discussed in detail in Keechang Kim, *Aliens in Mediaeval Law* (CUP 2000) 193.

⁵⁶ Kim (n 55) 193.

⁵⁷ Bourdieu (n 6).

⁵⁸ Mark L Flear, ‘Developing Euro Biocitizens through Migration for Healthcare Services’ (2007) 14 *Maastricht Journal of European & Comparative Law* 239.

almost universal *carte blanche*: you create ethnic electorates,⁵⁹ you assign the status of those who are not white enough to your liking to the ‘ancestral homelands’ referred to above,⁶⁰ you declare those you send away as ideologically⁶¹ or racially deficient as non-citizens.⁶² The long history of fragrant discriminations is rich and diverse. Under the citizenship paradigm the core question before looking at rights, entitlements, duties and equality claims is *who* is a citizen in this society? Those who are not citizens are entitled to nothing and this is legally and politically right, even if frequently also morally unjust.

Not the same at all with the persons: recognizing the person as a figure of importance for the purposes of constitutional law, as a component part of the *demos*, however humble this relative innovation can seem, in fact revolutionizes the legal understanding of our society since it opens the status assignment decisions which cannot in the majority of cases be contested under the citizenship paradigm, up for criticism and legal contestation. Moreover, it also flips the sequence of the status-rights interactions. The core question here is *why* this person is not entitled to a particular right? A simple ‘she is not a citizen’ answer will no longer suffice under the personhood paradigm: a substantive analysis will clearly be required. It goes without saying that the distinction between the ‘status’ and ‘rights’ taken by lawyers for granted is profoundly artificial and is not on all occasions justifiable.

Once humanity and personhood, not the formal legal status of citizenship, emerges as the key factor in the rights assignment play, the relevance of the formal status of citizenship as such is profoundly reinvented, if not outright diminished, as we have seen in the Article 8 jurisprudence of the European Court of Human Rights for instance.⁶³ Those who are French *in fact* by the way how their lives are lived and how their social world is constructed, even if not recognized as *de jure* French, even bearing foreign citizenships, will stay in France protected by the ECHR.⁶⁴ The recognition of rights attached to personhood can thus lead even to the protection of what used to be the sacred core of the citizenship rights, like the residence in the territory of a state, among the non-citizens. Under this logic a place in the nation is not ‘deserved’ by passing humiliating tests of the knowledge of the non-existent cultural uniqueness or a random act of birth in particular circumstances, but by *being part of a society*. The threat of the loss of rights, then, assessed in the context of a concrete life project, will be the key factor of importance for the courts to consider, not the legal status of citizenship. Moreover, the harsh consequences of the loss of rights can even prevent the state from denaturalizing a person,⁶⁵ or depriving a non-citizen of the core citizenship rights acquired *de facto* through the engagement with the society she lives in.⁶⁶ Such a blending of legal and social reality would be unheard of before the 21st century.⁶⁷ The two logics – citizenship and personhood – finding themselves in a stark opposition to each other.

⁵⁹ Richard C Visek, ‘Creating Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia’ (1997) 38 Harv. Int’l L.J. 315.

⁶⁰ Dugard (n 37).

⁶¹ Lesley Chamberlain, *The Philosophy Steamer: Lenin and the Exile of the Intelligentsia* (Atlantic Books 2006).

⁶² Rundle (n 35).

⁶³ Adam and Van Elsuwege (n 23). But see, Thym (n 23)

⁶⁴ Beldjoudi (n 23); Jeunesse (n 23); see also the discussion in n 23 *supra*. Cf., for a meticulous overview of the contemporary ECtHR practice, Thym (n 22).

⁶⁵ The European Court of Justice case of *Rottmann* is the best example, probably: Case C-135/08 *Janko Rottman v Freistaat Bayern* EU:C:2010:104, [2010] ECR I-01449. The absolute majority of commentators have ignored the fundamental point granting this case overwhelming importance: it is a decision about the status which is based on the rights this status is associated with, an impossibility in the classical citizenship world, as the border line between the legal and social reality, which is the fundamental starting point of pretty much all citizenship theorizing, simply disappeared in the court’s reasoning, illustrating the shift we are discussing very well.

⁶⁶ E.g. Adam and Van Elsuwege (n 23). See, also n 23 *supra*.

⁶⁷ Betty de Hart, ‘Regulating mixed marriages through acquisition and loss of citizenship’, (2015) 662 AAPSS 170; Betty de Hart, ‘The Morality of Maria Toet: Gender, Citizenship and the Construction of the Nation-State’ (2006) 32 Journal of Ethnic and Migration Studies 49.

The cleavage runs between either taking legal or, which is quite a different matter, social facts as a starting point, thus providing a choice between parallel realities and their respective truths. This is the legal recognition of social facts in the growing array of contexts that pushes personhood as such, not necessarily connected to the formal status of citizenship, to prominence, with the far-reaching implications for the relevance of the classical normative picture of citizenship which we know from political theory textbooks.

The rise of the citizenship circumstances in the EU

The European Union, while officially – and even theoretically⁶⁸ – heralding a break with at least some of the classical functions of citizenship, has indeed achieved a most radical break with this tradition, but the question of whether it is to the better or to the worse remains open. The recognition of personhood as opposed to citizenship only, while it can no doubt be empowering, can also provide a vehicle for the dismantlement of important protections normally associated with the citizenship status, especially the equality before the law. In fact, EU law as designed and as practiced, i.e. far from the realm of exceptions, plays the role which runs counter the normative foundations traditionally regarded as underpinning the citizenship concept, but also, crucially for this paper, departs from the personhood approach in a remarkable way, by turning such a departure *against* the extension of rights.

Such (no doubt well-meaning⁶⁹) intrusion into the illusory, if not deceptive, as demonstrated above, garden of normative coherence is to the better, but also to the worse: besides opening up to Europeans new categories of rights outside the realm of their own states,⁷⁰ it has also questioned the essential elements of national citizenship, including the preferential relationship between the citizen and the state and, crucially, both aspects of Rogers Brubaker's now classical definition of citizenship. This paper began with citizenship as 'an instrument and an object of closure'.⁷¹ The EU dismantled it by demanding inclusion of other EU citizens into the national community guided by the principle of non-discrimination on the basis of nationality, thus 'abolishing'⁷² the legal relevance of Member State nationalities in a huge array of crucial areas of human activity where EU law applies. The EU has also removed, to a great degree, the Member States' ability to regulate migration of EU citizens, with a very clear outcome for the relevance and function of the nationalities of the Member States to go beyond providing a bridge to the *ius tractum* status of EU citizenship,⁷³ i.e. serving as the means to *acquire* the supranational status. Thirdly, and crucially, EU law deactivated what is usually perceived of as one of the last remaining purely *citizenship* – as opposed to human – rights: the right not to be deported.⁷⁴ With no right to stay at home guaranteed under EU, which pushes you to move states to save your rights or your family,⁷⁵

⁶⁸ Kostakopoulou (n 1).

⁶⁹ On the positive potential, see, eg. Dora Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13 ELJ 623; Francis G Jacobs, 'Citizenship of the European Union—A Legal Analysis' (2007) 13 ELJ 591; Ferdinand Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 ELJ 34.

⁷⁰ Dimitry Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2009) 15 Colum. J. Eur. L. 169.

⁷¹ Brubaker (n 5), 34.

⁷² Davies (n 22).

⁷³ Kochenov (n. 70).

⁷⁴ B Anderson, M J Gibney and E Paoletti (n 16), 'Citizenship, Deportation and the Boundaries of Belonging' (2011) 15 *Citizenship Studies* 547.

⁷⁵ Niamh. Nic Shuibhne, '(Some of) the Kids Are All Right' (2012) 49 CMLRev. 349; Sara Iglesias Sánchez, 'A Citizenship Right to Stay? A Right Not to Move in a Union Based on Free Movement', in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017) 371.

combined with the European Arrest Warrant taking precedence, if need be,⁷⁶ over national constitutional protections, EU citizenship, quite astonishingly, it may seem, does not carry with it a notion of a home⁷⁷ and possibly even forecloses – extreme circumstances aside – the national-level legal attempts to come to safeguard such a notion.⁷⁸ As a consequence, on the one hand, the standard normative correlation between national citizens and the societies in the Member States came under strong pressure: the ability of the French state to distribute the token of Frenchness, the French passport, in this context cannot possibly hide the fact that France does not control who is *de facto* French for pretty much all the purposes,⁷⁹ with the implications for the essence of the *demos* and the legitimisation/justification of political power at both national and European level (especially given the exclusion of the European not-quite-foreigners from the national-level franchise⁸⁰). On the other hand, the ability of anyone to stay within the realm of his or her national legal system protected by it from expulsion to a foreign land is equally shattered. EU law, attentive as ever to personal CVs, perceived ‘links to the host state society’⁸¹ and travel itineraries thus does not only reward the movers regarded as useful in the context of the internal market, but also ‘un-protects’ the static citizens even at the national level. Ironically, this happens precisely at the time when the importance of *de facto* citizenship’s recognition is growing exponentially, acquiring a radically new *positive* significance in the world of personhood constitutionalism, as seen above.

I am not saying that deciding to crack states open in this way is a bad thing. For once, it has exposed plenty of untenable assumptions usually taken for granted which underlie and solidify the essence of the notion of citizenship and, by extension, the national community from the exclusivity and fragility of the national culture to the meaningfulness of the allegations that social security systems are conditioned on *demos* uniformity⁸² and, most importantly, the correlation between the functioning of democracy and citizenship as opposed to personhood *sensu stricto*. Are such assumptions worth fighting for? Certainly, EU law’s cracking open of states is overwhelmingly empowering for those people who are willing and ready to benefit from what is on offer – from a Lithuanian serving coffee in Wales to an Irish farmer acquiring land in Romania, or a Scottish physicist working on the CERN’s accelerator complex. Enforcing old assumptions would unquestionably imply trimming the life chances of such people.⁸³

What I am saying is that both aspects of the most accepted definition of citizenship in the literature today fail to find reflection in what the nationalities of the Member States have become after the advent of EU citizenship, which could probably provide one of the explanations for the gradual undermining of the latter which we are facing coming both from the level of the national law, especially in the UK, and this is long before Brexit,⁸⁴ and also at the supranational level, where the ECJ seems to be minded to water

⁷⁶ At least as the official story goes: e.g. Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107, [2013]EU:C:2013:107.

⁷⁷ Eg: C-434/09 *McCarthy* ECLI:EU:C:2011:277, C-256/11 *Dereci* ECLI:EU:C:2011:734, C-86/12 *Aloka* ECLI:EU:C:2013:645.

⁷⁸ Unless, ironically, the home is presumed by law to be abroad: C-86/12 *Aloka* ECLI:EU:C:2013:645; C-182/15 *Petruhhin* ECLI:EU:C:2016:630.

⁷⁹ The exceptions include political rights at the national level and holding high offices.

⁸⁰ Federico Fabbrini, ‘The Political Side of EU Citizenship in the Context of EU Federalism’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017); Jo Shaw, *The Transformation of Citizenship in the European Union* (CUP 2007).

⁸¹ Charlotte O’Brien, ‘Real Links, Abstract Rights and False Alarms’ (2008) 33 *ELRev.* 643.

⁸² Michael Keating, ‘Social Citizenship, Solidarity and Welfare in Regionalised and Plurinational States’ (2009) 13 *Citizenship Studies* 501.

⁸³ The UK seems to be *en route* to doing precisely that: Dimitry Kochenov, ‘EU Citizenship and withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?’, in Carlos Closa (ed), *Troubled Membership: Dealing with Secession from a Member State and Withdrawal from the Union* (CUP 2017) (forthcoming).

⁸⁴ Jo Shaw, Nina Miller and Maria Fletcher, *Getting to Grips with EU Citizenship: Understanding the Friction between UK Immigration Law and EU Free Movement Law* (Edinburgh Law School Citizenship Studies 2013).

down the core of the supranational legal status,⁸⁵ turning it, step by step, into a structural irrelevance in the context of the European law edifice. In Niamh Níc Shuibhne's analysis⁸⁶ which does not leave the realm of EU law, such backlash was only to be expected and is in fact nothing but a faithful adherence to the federalist principles.⁸⁷ While this conclusion can be convincingly criticised, as Eleanor Spaventa has shown,⁸⁸ it is beyond any doubt that the backlash can be explained in a sound way by looking at the overwhelming impact of EU law on what citizenship of the Member States is now about.

The main problem with citizenship in the EU at the moment, it seems, is not confined to pushing the Member States to rethink which communities of people they are in charge of and should perceive of themselves as serving. It goes even deeper, since the 'replacement' citizenship at the EU level – never mind the 'shall not replace'⁸⁹ language of the Treaty, which can only make legalistic, 'who issues the passport?' kind of sense, failing to capture the essence of the deeper on-going processes discussed in the preceding parts. While EU citizenship has the potential to 'take over', *de facto*, from the nationalities of the Member States, it seems to be based on entirely different principles, compared with any other citizenship in contemporary world. It is a citizenship conditioned on a market endorsement and the performance of ethically questionable acts, like venturing out across the invisible inter-state borders within the internal market.⁹⁰ Is this the idea of a good life worth living shared by the absolute majority of Europeans?

Rather than a celebration of the abstract humanity of the bearer through the extension of rights based on a formal legal status aimed at ignoring the actual differences between the holders, EU citizenship, on the contrary, virtually never protects the weak and the needy based on their humanity and legal status,⁹¹ but uniquely connects such protection with the perceived cross-border or economic aspects of the lives in question. In this sense, this is a citizenship where a turn to personhood *results in the limitation rather than the extension of the amount of rights* associated with the status. Importantly, one cannot wholeheartedly claim that this only happens at one level of governance, leaving the level of the Member States *sensu stricto* unaffected. This 'citizenship of personal circumstances' has in fact legally dislodged in many respects ideologically sound national-level statuses, which are, precisely, *not* dependent on the

⁸⁵ O'Brien (n 4) Eleanor Spaventa, 'Earned Citizenship – Understanding Union Citizenship through Its Scope', in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017); Ūtadzislaū Belavusaū and Dimitry Kochenov, 'Kirchberg Dispensing the Punishment: Inflicting "Civil Death" on Prisoners in *Onuekwere* and *MG*' (2016) 41 *EL Rev.*

⁸⁶ Niamh Níc Shuibhne, 'Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?', in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017).

⁸⁷ Christoph Schönberger, 'European Citizenship as Federal Citizenship – Some Citizenship Lessons of Comparative Federalism' (2007) 19 *European Review of Public Law* 63; Gerald Neuman 'Fédéralisme et citoyenneté aux Etats Unis et dans l'Union européenne' (2003) 21 *Critique Internationale* 151.

⁸⁸ Spaventa (n 85).

⁸⁹ Art. 20(1) TFEU makes the following clarification: 'Citizenship of the Union shall be additional to and not replace national citizenship'.

⁹⁰ Not all borders count, of course, as the ECJ explained: Case C-212/06 *Government of Communauté française and Gouvernement wallon v Gouvernement flamand* EU:C:2008:178, [2008] ECR I-01683. See also Opinion of AG Sharpston, EU:C:2007:398, [2007] paras 143-144. cf. Peter Van Elsuwege and Stanislas Adam, 'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur *l'Assurances soins flamande*' (2008) 44 *Cahiers de droit européen* 655.

⁹¹ O'Brien (n 4); Caro de Sousa (n 3). Holding the formal status of EU citizenship remains essential, however, for acquiring virtually any supranational rights in Europe, as the third country nationals are essentially confined to the pre-EEC Treaty reality, where the EU as a 'single working and living space', to borrow from Golynger, does not exist at all: Oxana Golynger, 'European Union as a Single Working-Living Space' in Andrew Halpin and Volker Roeben (eds), *Theorising the Global Legal Migration* (Hart Publishing 2009), 151. cf.: Dimitry Kochenov and Martijn van den Brink, 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU' in Daniel Thym, Margarite Zoetwij Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill/Nijhoff 2015) 66.

performance of ideologised ethically and morally contingent acts, like contributing to the internal market in any way whatsoever.

The supranational-level citizenship undermining the national ones cannot, thus, withstand even the most basic criticism based on human dignity and human worth: these cannot depend on a used bus ticket: either you move in space or not is necessarily irrelevant from a moral or ethical perspective. Most reasonable suggestions voiced in the literature to disconnect the logics of citizenship from the market-inspired reading of the jurisdictional boundaries between the legal orders in Europe by either making the internal market logic irrelevant for the enjoyment of citizenship rights,⁹² or, by giving the right *not* to move full recognition among the entitlements of EU citizenship deserving legal protection,⁹³ remained unanswered calls in a highly ideological context of European integration where the foundational ideal of the good, however ethically vacant non-obvious – i.e. the binding requirement to move about, is predetermined and seemingly immune from contestation.⁹⁴ It is a citizenship without respect designed to bring down those whom the internal market does not need and thus perceives of as disposable and unworthy of protection, recognition and respect.⁹⁵ EU citizenship, in failing to endow with protections all those who possess the formal legal status, looking instead at the particular acts they engage in, instead, is the anti-thesis of what citizenship is about.⁹⁶ The worth of the legal truth of status assignment here frequently remains almost entirely inconsequential.

This being said, this is all about giving recognition to the person, of course, as opposed to the classical reality the departure from which was discussed in the preceding parts. The interesting thing with EU citizenship, however, is that the departure from the classical legalistic understanding of citizenship is actually used to the effect of *depriving* persons of rights under this pretext, rather than empowering them, which is the general constitutional trend outside the EU's constitutional context, as described above. Instead of using the logic of the shift from the purely legal to social reality to extend additional protections to those whom the legalistic framework renders invisible, EU citizenship deploys the same to the opposing end: to preempt the extension of rights. In this sense EU citizenship is a negative departure from the abstract citizenship ideal, looking beyond the strictly legal truth of the supranational-level status only to undermine the latter's effects should the dogmatic ideal of a 'good market citizen',⁹⁷ which is by definition deprived of any moral or ethical *contenu* whatsoever, not be satisfied.⁹⁸ This unexpected development demonstrates the attractiveness of the formal legalistic world of clearly formulated and meticulously enforced legal truths which citizenship has precisely been drifting away from over the last decennia, turning modern constitutionalism towards the person. How did the EU land with such an atypically modern and at the same time astonishingly mediaeval citizenship on its hands,⁹⁹ which is both in line with and, simultaneously, in contradiction with the global trends?

⁹² Eleanor Sharpston, 'Citizenship and Fundamental Rights – Pandora's Box or a Natural Step towards Maturity?' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System* (Hart Publishing 2012). cf. Sara Iglesias Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?' (2014) 20 *ELJ* 464; D Kochenov and R Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 *EL Rev* 369.

⁹³ Iglesias Sánchez (n 9).

⁹⁴ Gareth Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in Dimitry Kochenov, Gráinne de Búrca, and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015); Somek (n 5).

⁹⁵ Caro de Sousa (n 3); O'Brien (n 4); O'Brien (n 4); Dimitry Kochenov, 'Citizenship Without Respect: The EU's Troubled Equality Ideal' (2010) Jean Monnet Working Paper 08/10 <http://ssrn.com/abstract=1793274> accessed 9 February 2017; Gustav Peebles, "'A Very Eden of the Innate Rights of Man'" A Marxist Look at the European Union Treaties and Case Law' (1997) 22 *Law and Social Inquiry* 581.

⁹⁶ Kochenov (n 3).

⁹⁷ For an overview of the relevant case-law of the ECJ, see Loïc Azoulai, 'Transfiguring European Citizenship: From Member State Territory to Union Territory' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017).

⁹⁸ Caro de Sousa (n 3).

⁹⁹ Kochenov (n 3).

Undermining rights through attention to CVs

As the integration project matured, Europe's main strength became its chief weakness. Conceived as a market to serve the ideals grander than simple economic prosperity, thus intended to benefit each and every European through becoming part of our 'legal heritage', as the Court has amply noted in *van Gend*,¹⁰⁰ European law failed to move on with the times. Conceived once upon a time as a stepping stone to peace, and a bunch of other valuable ideals, now reflected in Article 2 TEU (but also colonialism¹⁰¹ and building a unified European nuclear force¹⁰²) the Union gradually lowered its ambition: the means for greater progress, which was the market, fell on itself to take the chief place among the Union's ends.¹⁰³ This subtle taming of ambition, while sellable to an inattentive observer as a sign of respect vis-à-vis the Member States' sovereignty is in fact something else, it seems.

When the market is the means to achieve something greater, the limitations it imposes on the national authority are justifiable: as the official story goes, the Member States lost political and economic upper hand in the name of liberty – an insurance policy against totalitarian twists – and prosperity – a social Europe where tomorrow is better than today – which is to come through unity. Much has changed, however, since the first version of the story had been written. Prosperity is not on the horizon anymore, at least not for everyone,¹⁰⁴ liberty is none of the Union's business: the Union is not effective at all us against Polish-Hungarian-style 'illiberal democracies' as we are discovering,¹⁰⁵ some commotion in high places notwithstanding.¹⁰⁶

Instead of the optimism of a new beginning championed by the élites of the past, Union law is now a binding and directly effective tool to tame us, European citizens, in the name of a highly specific version of the market it cherishes. In the name of the internal coherence of the market we are shielded from European human rights standards,¹⁰⁷ in the name of its smooth operation the market is 'apolitical.'¹⁰⁸

¹⁰⁰ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1 [1963] ECR 1; see, also, Francis G Jacobs (ed), *EU Law and the Individual* (North Holland 1976); Ole Due, 'The Law-Making of the European Court of Justice Considered in Particular from the Perspective of Individuals and Undertakings' (1994) 63 Nord. J. Intl L. 123.

¹⁰¹ Peo Hansen and Stefan Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (Bloomsbury Academic 2015).

¹⁰² Grégoire Mallard, *Fallout: Nuclear Diplomacy in an Age of Global Fracture* (University of Chicago Press 2014).

¹⁰³ Dimitry Kochenov, 'The Citizenship Paradigm' (2013) 15 Cambridge Yearbook of European Legal Studies 197; Peebles (n 93).

¹⁰⁴ Agustín José Menéndez, 'The Existential Crisis of the European Union' (2013) 14 German Law Journal 453.

¹⁰⁵ Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 CMLRev 59; Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016).

¹⁰⁶ Peter Oliver and Justine Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 54 JCMS 1075; Dimitry Kochenov and Laurent Pech, 'Better Late than Never? On the Commission's Rule of Law Framework and Its First Activation' (2016) 54 JCMS 1062.

¹⁰⁷ Opinion 2/13 *Accession to ECHR (No. 2)* EU:C:2014:2454, [2014]. Daniel Halberstam, "'It's the Autonomy, Stupid!'" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 German Law Journal 105; and Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?' (2015) 38 Fordham Intl L.J. 955. See also Opinion 2/94 *Accession to ECHR (No. 1)* EU:C:1996:140, [1996] ECR I-1759. The CFI makes this situation even worse, since as long as EU citizenship is not endowed with a formal legal capacity to shape the scope of EU law by the ECJ, the CFI, by precisely *not* extending the rights to the most vulnerable who would be invisible in the context of the internal market, reinforced the sense of deprivation and injustice in the context where the Court's case-law on the issue is 'convoluted and unconvincing': Gareth Davies, 'A Right to Stay at Home: A Basis for European Family Rights', in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017) 468, at 483.

¹⁰⁸ Michael A Wilkinson, 'Politicising Europe's Justice Deficit: Some Preliminaries' in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 111.

This is good for us, we are told, because the Treaties say so¹⁰⁹ and because politics, as much as the Treaties allow for it, is by definition the politics of means, not the politics of ends: the direction of European Unity is set in stone and not negotiable politically within the framework of the institutions the Treaties have created.¹¹⁰

Speaking of utopias, Sir Isaiah Berlin diagnosed that ‘in a society in which the same goals are universally accepted, problems can be only of means, all soluble by technological methods. That is a society in which the inner life of man, the moral and spiritual and aesthetic imagination, no longer speaks at all’.¹¹¹ Our supranational legal heritage lays claim to our imagination and fails, to which the rise of all kinds of extremist movements testifies. For the first time in its history the Union is routinely perceived as a potentially powerful agent of injustice not only by nationalists and outcast lunatics, but also by its own servants and facilitators, professors of EU law; Gráinne de Búrca is absolutely right pointing out that the EU can be perceived as ‘patent injustice.’¹¹² Perceptions have changed, probably, because the market without a ‘mantle of ideals’ is not a pretty sight:¹¹³ the citizenship it is responsible for, having *de facto* overpowered the core elements of the nationalities of the Member States in a number of respects frequently punishes, instead of protecting. This is done with a most meticulous attention to detail: the ‘good citizenship’, which the Union cherishes,¹¹⁴ rests on the intimate personal connection with the idea of the internal market and cross-border movement: virtually the only measure of someone’s worthiness in the eyes of the supranational law.

The Union could try redeeming itself through making its law at least sensitive to human suffering: Sir Isaiah’s ‘first public obligation’. This can be done, at the very least, through allowing the *van Gend* ‘legal heritage’ of the citizens to play a more significant role in the system than the market logic, the latter emerging as particularly problematic in the citizenship context as long as it shapes the formal status of citizenship which can be deactivated by the failure to engage with the market sufficiently, as explained above, forming the worst and the least humane blend of the legal truth and social reality paradigms of personhood in law. In a constitutional system – even where democracy as such is out of reach¹¹⁵ – rights cannot be acquired by engaging in ethically and morally irrelevant acts; mothers are not punished when disability of their children prevents them from work;¹¹⁶ and tax-breaks do not depend on the nationality of your former wife.¹¹⁷ The core problem with EU citizenship today is precisely that the principle behind the application of the law directly penetrating countless lives is rather farcical and thus inexplicable at all from a rational humane perspective. Moreover, violence is done in the name of the perceived Member States’ sensitivities, where in fact, this is the (often absurd) dull market-inspired sophistry that is at play: ‘when he grows up, he might want to move across the non-existent border’.¹¹⁸ Approached from this perspective the Union merely boasts a questionable legal status, which is hardly worthy of the glorious ‘citizenship’ denomination: the *Ruiz Zambrano* detour¹¹⁹ was all too brief and we

¹⁰⁹ For an analysis, see Andrew Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’ (2009) 29 OJLS 549.

¹¹⁰ Davies (n94).

¹¹¹ Isaiah Berlin, *The Crooked Timber of Humanity* (Knopf 1991) 15.

¹¹² Gráinne de Búrca, ‘Conclusion’, in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds) *Europe’s Justice Deficit?* (Hart Publishing 2015).

¹¹³ JHH Weiler, ‘Bread and Circus’ (1998) 4 Colum. J. Eur. L. 223, 231.

¹¹⁴ Kochenov (n4); Azoulai (n97).

¹¹⁵ But see, Keon Lenaerts and Jose A Gutiérrez-Fons arguing the opposite: ‘Epilogue on EU Citizenship: Hopes and Fears’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017).

¹¹⁶ Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* EU:C:2011:277, [2011] ECR I-03375; Nic Shuibhne (n 75)

¹¹⁷ Case C-403/03 *Egon Schempp v Finanzamt München V* EU:C:2005:446, [2005] ECR I-6421.

¹¹⁸ cf. Case C-148/02 *Carlos Garcia Avello v Belgian State* EU:C:2003:539, [2003] ECR I-11613.

¹¹⁹ Sébastien Platon, ‘Le champ d’application des droits du citoyen européen après les arrêts [*Ruiz*] *Zambrano*, *McCarthy* et *Dereci*: De la boîte de Pandore au labyrinthe du Minotaure’ (2012) 48 RTD eur. 21; Dimitry Kochenov, ‘A Real European

seem to be back to square one, to Joseph Weiler's poignant criticism of the classical status quo: the Union '*precisamente omette di compiere la transizione concettuale da una libera circolazione basata sul mercato ad una libertà basata sulla cittadinanza*',¹²⁰ piling upon ethically questionable idea of the good the dubious and discriminating 'citizenship of personal circumstances'.

Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe' (2011) 18 Colum. J. Eur. L. 56.

¹²⁰JHH Weiler, 'Europa: "*Nous coalisons des Etats nous n'unissons pas des hommes*"' in Marta Cartabia and Andrea Simoncini (eds), *La sostenibilità della democrazia nel XXI secolo* (Il Mulino 2009) 82.

