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Why Did the Citizenship Jurisprudence Change?

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I. SETTING THE SCENE

THE OVERALL AIM of this volume is twofold. First, it tries to deconstruct legal, political and social forces that affect the European citizenship jurisprudence generally. Second, and more particularly, it seeks to explain and contextualise the Court's shift towards a restrictive approach to free movement rights of European citizens. So far, literature has singled out two structural elements and three contextual factors, which could make the latter shift intelligible: the role of the legislator in the European Union (EU) and the role of law writ large, as well as the financial, the constitutional (Brexit) and the migration crisis.[1] The latter especially increased the pressure on the European Court of Justice (the Court) to prioritise the general interests of the Member States over the colliding interests of individual European citizens. In this chapter, we do not question this explanation or the legal claim that the citizenship jurisprudence has become more restrictive.[2] Instead, we raise the question whether two institutional factors, namely internal reorganisation and the professional composition of the Court contributed to this process of transformation alongside the external factors already identified.[3]

To answer this question, we further unpack the shift toward the restrictive approach in greater detail and situate it more precisely in time. While existing scholarship provides a detailed map of the valid citizenship law and convincing

[1] For discussion on the factors see SK Schmidt, and F Strumia in this volume, and especially the chapter by S Reynolds.

[2] For discussion of restrictive shift in this volume see P Minderhoud and S Mantu, *cf* the chapter by F Wollenschläger, essentially suggesting the Court is only posturing a turn, or that, even if there is a turn, one does not yet know whether it concerns economically non-actives.

[3] By internal organisation we mean allocation of cases and decision-making in chambers rather than in the Grand Chamber. Professional composition refers to professional, career and legal background of sitting judges and their personal characteristics, such as nationality and gender. Professional composition and career trajectories have been identified as factors that importantly contributed to the Court's legitimacy and stability of its jurisprudence.

explanations (or justifications) for the Court's change of heart, there remains a general lack of understanding of how internal and external factors interact over time and what is their combined effect on the content of the jurisprudence. To gauge this effect, we engage with the mechanisms of jurisprudential change, aka tools, which the Court (or any court) has at its disposal to develop, modify, clarify and legitimate its law-making action. These, rather than cases (judgments), become the units of systematic qualitative and quantitative analysis. We separately scrutinise the Court's approach to interpretation, the use of public policy arguments and reliance on past decisions, which are widely considered as rights-opening/pro individual. Our study focuses on:

1. The *use* of the teleological method of interpretation of relevant Treaty Articles and Directive 2004/38.
2. The *use* of the argument of the protection of public finances.
3. The change of a reference frame, meaning that references to more recent rights-limiting precedents[4] are replacing the references to the foundational jurisprudence.[5]

With regard to the internal factors that we select, the decision-making in chambers and the membership in the Grand Chamber are often mentioned as major culprits for the inconsistencies in the Court's jurisprudence, its uninformative reasoning style and its neglectful handling of precedents.[6] The professional composition of the Court matters: it greatly influences the characteristics of the case law,[7] even if one rejects legal realism and the so-called breakfast jurisprudence.[8] The focus on only two internal factors might seem excessively narrow hence the findings inconclusive. However, we do not wish to make strong claims about causality but rather point at the mutually reinforcing factors that might drive European citizenship case law.

We analyse 38 opinions of the Advocates General and 38 corresponding judgments of the Court,[9] which deal with the rights of individual European citizens,

[4] ECJ, Case C-140/12 *Brey*, EU:C:2013:565; Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland*, EU:C:2016:436; Case C-299/14 *García-Nieto*, EU:C:2016:114.

[5] ECJ, Case C-85/96 *Martínez Sala*, EU:C:1998:217; Case C-184/99 *Grzelczyk*, EU:C:2001:458; Case C-224/98 *D'Hoop*, EU:C:2002:432; Case C-413/99 *Baumbast and R*, EU:C:2002:493; and Case C-209/03 *Bidar*, EU:C:2005:169. *Martínez Sala* and *Baumbast* were given classic status also by being included in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford, Hart Publishing, 2010).

[6] JL Dunoff and MA Pollack, 'Comparative International Judicial Practices: A Manifesto' (European Society of International Law 11th Annual Conference); M de S-O-l'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford, Oxford University Press, 2009).

[7] D Chalmers, 'Judicial Performance, Membership, and Design at the Court of Justice' in M Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford, Oxford University Press, 2015).

[8] S Danzigera, J Levavb and L Avnaim-Pessoa, 'Extraneous Factors in Judicial Decisions' (2011) 108 *Proceedings of the National Academy of Science* 6889.

[9] Most cases under scrutiny address the question whether and under what circumstances those European citizens can be granted or refused rights. The usual formulation in the judgments and the

and more particularly with their claims for social advantages, including social benefits and social assistance.[10] This selection is based on the consideration that a jurisprudential shift can be identified more accurately by including the so-called headline cases, as well as cases which do not attract immediate scholarly or public attention. Our qualitative and quantitative analysis indicates that a considerable shift from the rights-opening to the rights-closing approach occurred in 2011 with *Ziolkowski and Szeja* and *Brey*, prior to *Dano*,[11] *García-Nieto*,[12] *Alimanovic*,[13] and *Commission v United Kingdom*.[14] On this basis we divide 38 cases in two groups: the group of 18 cases decided before the Court's judgment in *Ziolkowski and Szeja* and the group of 20 cases decided after that, and examine their common features against the external context in which they are situated and against the internal shifts in the organisation (the chamber system) and the professional composition of the Court. Additionally, we examine the group of most recent cases, decided since *Dano* in 2014, in our sample, which contains 11 cases, separately.

Our examination relies on literature suggesting that courts are not isolated from their environment and respond to it by adapting their jurisprudence to the changing global political and societal structures.[15] Likewise, internal struggles leave the Court with 'unfinished' judgments,[16] unclear legal compromises, and diverging interpretations of existing legal sources, including previous case law.[17]

Our findings suggest that since 2011, citizenship cases concerning claims of individual citizens in matters of residence and social advantages have increasingly been decided by the chambers of five sitting judges. By contrast, the professional membership of the Court has not changed considerably. The same could not be said about the professional background of Advocates General that delivered the opinions in the examined cases. Since 2011, the percentage of opinions delivered by Advocates General coming from academia and legal practice has decreased

opinions is whether someone would become a burden on the social assistance in any of the manifold variations (unreasonable burden, burden on the public finances). The term stems from pre-Maastricht legislation of the 1990s on free movement of economically non-active Member State nationals. It appears in all preambles of this legislation, whereas the Articles of the same legislation speak of a burden on the social assistance system. The dualism of unreasonable burden and burden was reiterated in Directive 2004/38/EC (presumably on purpose), however, the reference point of what the burden is placed on was synchronised, and is now narrower, referring only to the social assistance system in the preamble and Articles of Directive 2004/38/EC [2004] OJ L158/77.

[10] On file with the authors.

[11] ECJ, Joined cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, EU:C:2011:866, *Brey* (n 4), Case C-333/13 *Elisabeta Dano and Florin Dano*, EU:C:2014:2358.

[12] *García-Nieto* (n 4).

[13] ECJ, Case C-67/14 *Alimanovic*, EU:C:2015:210.

[14] *Commission v United Kingdom* (n 4).

[15] KJ Alter, LR Helfer and MR Madsen, 'How Context Shapes the Authority of International Courts' (2016) 79 *Law & Contemporary Problems* 1.

[16] M Jacob, Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business (Cambridge, Cambridge University Press, 2014).

[17] D Sarmiento, 'Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice' in M Claes et al (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Cambridge, Intersentia, 2012) 13.

while the percentage of opinions delivered by Advocates General with previous dominant career in politics or civil service has increased. Our findings also show a greater reliance (in the form of explicit references) on the opinions of the Advocates General, especially in chamber judgments. By contrast, the Court has not adopted an increasingly minimalist reasoning, nor has it shown a significantly greater deference to national courts. It has, however, delivered a much higher proportion of highly abstract answers to preliminary references after 2011.

These findings are illustrative of an institution with a fragmented vision of European citizenship, which is nonetheless unwilling to cede its broad jurisdiction and participation in the evolving 'new policy' in the distribution of resources between nationals and non-nationals, economically active and not economically active migrant European citizens. On the one hand, this would be difficult to attribute to the changing professional composition of the Court. On the other, the allocation of cases to the Reporting Judges and the Advocates General with background in national civil service and politics could explain a greater sensitivity of the Court to the national interests related to the questions of migration and welfare hence the restrictive turn. Given that the influence of the individual Reporting Judge on her colleagues in the chamber cannot be inferred from our observations, this conclusion is somewhat speculative. What we can observe directly is that the increase of negative outcomes coincides with the relocation of European citizenship cases from the Grand Chamber to the chambers of five judges around 2011. Although *Ziolkowski and Szeja* was the first case decided by the Grand Chamber with a negative outcome for the individuals in 2011, after 2014 the chambers of five judges have rendered twice as many judgments with negative outcomes for the individual citizen as the Grand Chamber. On this basis, we argue that the internal factors discussed above clearly underwrote the jurisprudential shift together with the external economic, constitutional and existential crises.

The contribution is structured as follows. In the second section, we briefly outline our methodology and theoretical framework. In the third section, we trace the modification of the Court's reasoning and approach to interpretation and precedent, in particular to the so-called citizenship classics. In the fourth section, we juxtapose the findings of the qualitative analysis with the changes in the professional composition of the Court and its internal organisation and professional composition (two internal factors). We also outline the timeline of external factors and try to contrast them to the critical junctures in the jurisprudence against the internal factors. We conclude in section five.

II. THEORETICAL FRAMEWORK AND METHODOLOGY

A. Framework

Our examination is anchored in the established theory of international and supranational adjudication, according to which the success of international and

supranational courts in terms of compliance with their rulings, interpretive authority and institutional legitimacy depends on a mixture of internal and external factors: (1) factors within the control of states such as the composition of the tribunal, or the caseload; (2) factors within the control of the supranational tribunal itself such as its awareness of the audience, neutrality and demonstrated autonomy from political interests; and (3) factors often beyond the control of both states and jurists like the type of cases or violations and the cultural and political homogeneity of the states. While on the one hand international courts can adopt strategies that significantly increase the odds of their success, on the other hand they can also decrease their chances of success. They can lose their audience awareness by not favouring individual rights over States and by not empowering national courts.[18] Moreover, external factors such the increase in cultural and political heterogeneity within the Court's community of law—against which courts cannot be immune internally either—can further impede their legitimacy of and compliance with their rulings.[19] More recent literature on the subject furthermore suggests that international courts are forced to *constantly* relate and respond to the changing context, political and societal,[20] and that they indeed do so by legal means available (aka legal diplomacy):[21] interpretation, argumentation and judicial remedies (outcomes).

This setting might provoke an internal struggle among the members of the Court regarding its role and its judicial tasks, which will most likely only exacerbate with the changing and rapidly expanding membership and professional reconfiguration, internal reorganisation and working methods. These will prompt judges to avoid giving concrete answers to national courts and defer them to policymakers, national and European. It will leave the Court with 'unfinished' judgments.[22]

B. Methodology

In this chapter we zoom into opinions and judgments of the Court, where the term 'unreasonable burden' (in any of the language formulations) occurs in the English text or the title of the document that has been stored in the EUR-Lex database until the end of 2016.[23] To capture a broader legal context, we also consider a

[18] L Helfer and A Slaughter, 'Toward A Theory of Effective Supranational Adjudication' (1997) 70 *Yale Law Journal* 273, 308–12.

[19] ibid 362–65.

[20] Alter, Helfer and Madsen (n 15).

[21] MR Madsen, 'The Protracted Institutionalisation of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence' in MR Madsen and J Christoffersen (eds), *The European Court of Human Rights between Law and Politics* (Oxford, Oxford University Press, 2011); MR Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 *Law & Contemporary Problems* 141.

[22] Jacob (n 16).

[23] Full list on file with the authors (email: Urska.sadl@eui.eu).

range of cases that are connected to those cases directly through case citations and cases that concern related matters of free movement of persons that resonate with external audiences and are accompanied by a press release.

First, we examine the case law qualitatively to tease out the legal shifts in the case law, and especially the doctrinal effect of the rights-curbing interpretations, reasoning and precedents of the Court. However, we do not focus on individual cases but on the specific aspect of all cases included in our selection. In particular, we examine the judicial method of interpreting Treaty Articles and Directive 2004/38, the selection of cited cases, and the Court's reading of its case law—known and treated in literature as both generally applicable and expansive (the so-called citizenship classics)—as well as the changes in the use of policy reasoning as a type of substantive reasoning of the Court. We also record the outcomes of cases, either as pro-individual or against the individual. The outcome is coded as pro-individual if the Court grants a right to the individual or deems measures which limit individual rights (to move, to reside, social advantages, non-discrimination) incompatible with European law. Then, we examine whether the Advocates General and the Court both adopt a more restrictive approach to interpretation, the references to the classics (eg, to describe the state of the law in the section preceding the argumentation part, or in the argumentative part itself), and the role of public interest of the Member State in the reasoning chain. We pay particular attention to the 'timing' of particular arguments, twists in interpreting or selecting cases, as well as to case outcomes and broader issues discussed.

The methodical examination of Advocates General opinions alongside the Court's judgments is largely missing from the detailed and thought-provoking analysis of the changing trends in the case law. Moreover, in case commentaries, the Opinion is most often juxtaposed with the judgment, or the case law more generally, rather than to the Opinions of the same Advocate General or opinions on the same or similar legal issues. On the one hand, this is justified by the fact that the opinions are not binding on the Court, and would tell us little about the case law as such. On the other hand, however, the Advocates General have considerable influence on the Court, especially in the area of European citizenship, where the Advocates General carved out the basic approach of the Court in the early case law.[24] Moreover, their legal analysis often goes beyond what is absolutely necessary in terms of deciding the concrete case. Given the proverbial explanatory silence[25] of the Court, the opinions are crucial for understanding the Court's reasoning process, the context of individual cases, as well as underlying concerns.

Second, to quantify our qualitative observations we code several characteristics related to the case. More specifically, we assign codes (different labels) for the

[24] See U Šadl and S Sankari, 'The (Elusive) Influence of the Advocate General on the Court of Justice: The Case of European Citizenship' (forthcoming 2017) *Yearbook of European Law* (first view available at https://doi.org/10.1093/yel/yex001).

[25] On the silence of the CJEU see Sarmiento (n 17); S Sankari, *European Court of Justice Legal Reasoning in Context* (Groningen, Europa Law Publishing, 2013).

composition, deference of final decisions to national courts, characteristics of the outcome (pro or against individual, abstract or concrete answer, avoidance of an answer, ie, minimalism) as well as characteristics of judges and Advocates General who participate in the decision-making in the case, especially their legal background, career paths, nationality, gender and stage at the time of the decision.

We assign the code explicit deference to those cases where the Court, in the operative part, refers to the national court ([it is for the] national court [to ascertain]). We assign the code implicit deference to the cases where the Court makes references to the national court ([it is for the] national court [to ascertain]) in the grounds of the judgment but not in its operative part, relating to the choice of major premise or facts or proportionality.

Similarly, we code for minimalism. We divide minimalist rulings into two further categories. The first comprises cases where minimalism is partial, meaning that the Court defers some elements or at least the application (concrete answer) to the national court. In this sense, partial minimalism can overlap with deference. However, it is a wider category than just deference in that the Court seemingly answers questions posed but does not fully address all aspects of them. Thereby it leads the national court only half way. By contrast, the second category of minimalism is complete silence, which means that the Court implicitly or explicitly refrains from answering all or one of often many questions posed by the national court, or reformulates them restrictively (including questions of admissibility or restrictive useful answers to the national court).[26]

We also code the Court's answers as concrete or abstract. When the Court explicitly uses the following phrases: 'in the specific circumstances of the present case', or 'in those precise circumstances', or 'taking into account all the relevant factors in the individual case', or 'a person in the circumstances of the appellant in the main proceedings in the operative part of the judgment', the answer is coded as concrete. Otherwise, we code the answer as abstract.

On this basis, we gain a (quantitative) overview of the shift with regard to the legal characteristics of case law as well as of the characteristics of the case law related to the institutional factors, which we interpret and contextualise further.

III. LEGAL ANALYSIS

In this section, we focus on the legal analysis of jurisprudential shift through the lens of three mechanisms: interpretation, reasoning and treatment of citizenship

[26] When legitimately not answering a question the national court has explicitly posed only in the alternative (or 'if so', 'if the first question is answered in the negative'), and the alternative question does not warrant an answer, this does not count as complete silence. However, when the Court or the Advocate General decide—without the national court posing questions in the alternative—that an answer to a further question is not necessary in light of the answer already given, counts as complete silence.

classics (precedent). As already mentioned above, we selected these mechanisms as the most important judicial tools which allow the Court to change the direction of the jurisprudence.

A. Proliferation of Objectives

With regard to interpretation, the main change of direction is in the use of the teleological method of interpretation, in particular on the reinterpretation of the objectives of Directive 2004/38. The classic interpretive position of the Court, embodied in cases like *Baumbast*[27] and extending to *Metock*[28] and even to *Lassal*,[29] can be defined as the reading of the Treaty provisions, Directive 2004/38 and Regulation 883/2004[30] in light of their *main* purpose to facilitate the exercise of the primary and individual right to move and reside freely and to strengthen that right. By contrast, the current position of the Court is based primarily on the reading of Directive 2004/38 as intended to strengthen only the rights of those who fulfil the conditions set therein.

This modification materialised through four interpretive twists. It began with the crowding of legislative objectives. In *Ziolkowski and Szeja*,[31] the Court explicitly invoked three objectives of Directive 2004/38 in parallel: to move and reside freely, referring to recital 1 of the Directive; to facilitate the exercise of this right by providing a single legislative framework, referring to recitals 3 and 4 of the Directive; and to introduce a gradual system of residence rights, referring to the 'overall context' of the Directive.[32]

Second, in the same case, the Court constructed a tension between the aim and the context of the Directive: it juxtaposed the aim of the Directive to strengthen rights by consolidating previously fragmented regulation of free movement of persons with the context of the Directive, which was to grant these rights gradually. Thereby the Court implicitly suggested that the sub-purpose of preventing

[27] In *Baumbast* (n 5) the Court held that the aim of Regulation (EEC) No 1612/68 [1968] OJ L257/2, amended by Directive 2004/38/EC [2004] OJ L158/77, was to achieve the freedom of movement for workers, which had to comply with the principles of liberty and dignity. *Baumbast* (n 5) para 50.

[28] In *Metock* the Court insisted that according to recital 2 in the preamble, Directive 2004/38/EC [2004] OJ L158/77 aimed in particular(!) to 'strengthen the right of free movement and residence of all Union citizens' hence guaranteeing the same or better rights to Union citizens than the amended or repealed secondary legislation'. See ECJ, Case C-127/08 *Metock and Others*, EU:C:2008:449.

[29] ECJ, Case C-162/09 *Lassal*, EU:C:2010:592.

[30] The Court clarified that all provisions laid down in the Regulations on social security should be interpreted in the light of the objective pursued by their legal basis, which aimed to facilitate freedom of movement. See R Cornelissen, 'EU Regulations on the Coordination of Social Security Systems and Special Non-Contributory Benefits: A Source of Never-Ending Controversy' in E Guild, C Sergio and K Eisele (eds), *Social Benefits and Migration A Contested Relationship and Policy Challenge in the EU* (Brussels, CEPS, 2013) 84.

[31] *Ziolkowski and Szeja* (n 11) para 40.

[32] ibid paras 35–38.

unreasonable burdening of public finances (recital 10 of the Directive) could override the main purpose when the rights of those who reside from three months to five years were concerned.

Subsequently, in *Brey*, the Court reinforced the understanding of the Directive as simultaneously pursuing two apparently opposing aims: to facilitate free movement on the one hand and to set out the conditions for free movement on the other.[33] The crowding of objectives in *Brey* was possible because with the third interpretive twist the Court reduced the objective to strengthen rights from the main objective to one among many objectives of Directive 2004/38, stating that the Directive was intended 'inter alia' to facilitate the primary right to move and reside freely and its practical effectiveness.[34] With the first three interpretive twists, the Court opened the Directive *as a whole* to reinterpretation. Fourth, and finally, in *Commission v United Kingdom*, the Court interpreted the objective—newly levelled with others—to set the conditions for the exercise of citizenship rights as a legitimate interest of the Member State to protect its public finances.[35] For the relatively small group of right-holders concerned, the Court settled the question, open since the introduction of Directive 2004/38, namely whether the host Member States could protect their public finances against *abstract and cumulative* or *actual and individual* risks. The fourth and final interpretive twist—the generalisation of *Brey* and *Dano*—which favours the financial interest of the Member States over free movement, accomplishes the process of reinterpretation.

The Court complemented this interpretive position with public policy arguments. It presupposes substantial negative consequences without discussing any alternative outcomes and without the necessary support of empirical evidence. This raises the question whether the omission of the Court to reason openly hides an unstated justification for its position, which might not be economic.

B. Public Policy Arguments

European citizenship is a highly politicised area of law, prone to arguments of unpersuasive reasoning. EU law has never been blind to the financial interests of individual Member States, and their economic rationality. In particular,

[33] '[A]lthough the aim of Directive 2004/38 is to facilitate and strengthen the exercise of the primary and individual right to move and reside freely … it is also intended, as is apparent from Article 1(a) thereof, to set out the conditions governing the exercise of that right … which include, where residence is desired for a period of longer than three months, the condition laid down in Article 7(1)(b)'. *Brey* (n 4) para 53.

[34] *Brey* (n 4) para 71.

[35] *Commission v United Kingdom* (n 14) para 68: 'It is clear from the Court's case-law that there is nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the host Member State (see to this effect, in particular, *Brey* (n 4) para 44; and *Dano* (n 11) para 83)'.

Article 7(1) of Directive 2004/38 imposes the requirements of comprehensive sickness insurance and sufficient resources, which should prevent migrant citizens from becoming an unreasonable burden on the public finances of the host Member State.[36] In general, the Court has operationalised these requirements in the case law by introducing the concept of a sufficient degree of integration and the real or genuine link to the labour market of the host Member State,[37] as well as a certain degree of financial solidarity between the nationals of the Member States.[38] In particular, the protection of public finances was considered a legitimate concern of the Member States in *Grzelczyk*[39] and *Baumbast*,[40] as well as in *Zhu and Chen*,[41] and could in principle (but not in those cases) justify limitations of the exercise of residence rights—yet it was not considered as *telos* in the classic case law.

It is simply common sense to expect that arguments based on economic consequences of increased migration and welfare policies, and the ability of the Member States to protect their public finances, will continuously resurface in the case law, especially in cases that concern economically non-active European migrants.[42] They are the so-called public policy arguments.[43]

What public policy arguments reflect are the 'real' social considerations underlying formal legal sources. However, when a public policy argument is based on specific consequences, it becomes a so-called slippery slope argument.[44] It can still be valid (and persuasive) but it must be based on temporally and spatially relevant

[36] Prior to it, for example Directive 90/364/EEC [1990] OJ L180/26 granted the right of residence to persons who have ceased to be in gainful employment, provided that they did not place an excessive burden on the public finances of the host State.

[37] *D'Hoop* (n 5) para 38; Case C-138/02 *Collins*, EU:C:2004:172, para 69; Case C-258/04 *Ioannidis*, EU:C:2005:559, para 30; *Bidar* (n 5) paras 55–56.

[38] The Court's vocabulary is largely determined by Arts 18–21 TFEU [2016] OJ C 202/01; Arts 7, 14, 24 and recitals 1, 4, 10 and 11 of Directive 2004/38/EC [2004] OJ L158/77, which refer to an unreasonable burden, a genuine link to the labour market of the host Member State, or a certain degree of financial solidarity. However, the legislation borrows from the Court's practice in this field and the origin of the concepts is not always easy to determine.

[39] *Grzelczyk* (n 5) paras 42–43.

[40] *Baumbast* (n 5) para 90.

[41] ECJ, Case C-200/02 *Zhu and Chen*, EU:C:2004:639, para 32.

[42] Nic Shuibhne and Maci discuss these arguments as public interest arguments, which Member States put forward in disputes to preserve their protectionist measures in different domains, such as competition law, free movement of goods and persons. N Nic Shuibhne and M Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2013) 50 *CML Rev* 965.

[43] MacCormick in 1978 argued that a policy argument 'shows that to decide the case this way will tend to secure a desirable state of affairs', that is, a policy argument is rather the course of action leading to a goal than the goal itself (N MacCormick, *Legal Reasoning and Legal Theory* (Oxford, Oxford University Press, 1978) 262. Bengoetxea—siding more with Dworkin—perceives policies as closer to principles, goals in themselves, and places policy arguments in the category of dynamic criteria of interpretation, reminiscent of consequentialist arguments. For him, policy arguments are not extra-legal, like, eg, substantive arguments (eg, common knowledge, general economic, social or political topoi): J Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford, Oxford University Press, 1993) 262.

[44] F Schauer, 'Slippery Slopes' (1985) 99 *Harvard Law Review* 361, 381.

empirical facts, in addition to logical inference.[45] It loses validity when it relies on simple logical inference alone, presupposing substantial negative consequences without discussing any alternative outcomes. In such cases the reasoning jumps to extreme hypotheticals and fails to engage with the issue at hand. It becomes irrational.

Most illustrative examples concern the well-known benefit/welfare/social tourism argument. The Opinion in *Dano* contains the following slippery slope:

> Although the referring court provides no precise information about the existence of such a risk,[46] it none the less refers to the limits of basic provision systems financed from taxation in the light of the amounts involved, amounts which might encourage immigration of Union citizens whose average income is considerably lower.[47]

The same approach is apparent from the Opinion in *Alimanovic*, namely that the 'granting entitlement to social assistance to Union citizens who are not required to have sufficient means of subsistence could result in relocation *en masse* liable to create an unreasonable burden on national social security systems'.[48] While the Court did not explicitly repeat these arguments it might appear from other references to the Opinion[49] that it based its judgment in *Alimanovic* on a similar logic.[50] To summarise, the Court could have validly and persuasively justified its reinterpretation of the Directive with a public policy argument. However, the argument that the Court offered was, first, based on an extreme hypothetical (fear of *en masse* migration), second, unsubstantiated with facts and, third, it did not engage in the weighing of alternatives, value and policy choices (even if they could not be empirically supported)[51] based on which a balance between

[45] RS Summers, *Form and Function in a Legal System: A General Study* (Cambridge, Cambridge University Press, 2005) 274.

[46] The risk of seriously undermining the social assistance system and insurance in the Member State.

[47] Opinion of Advocate General Wathelet in *Dano* (n 11) para 133.

[48] Opinion of Advocate General Wathelet in Alimanovic (n 13) para 91. The Advocate General equates the situation of a national of a Member State who moves to the territory of another Member State and stays there for less than three months, with a national who moves for more than three months but without pursuing the aim of seeking employment there.

[49] Explicit references in Alimanovic (n 13) to points 93–96 and 106 of the Opinion in the same case.

[50] Compare, *Dano* (n 11) para 78: 'A Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, OJ L158/77, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.' and *Dano* (n 11) para 79: 'To deny the Member State concerned that possibility would, as the Advocate General has stated in point 106 of his Opinion, thus have the consequence that persons who, upon arriving in the territory of another Member State, do not have sufficient resources to provide for themselves would have them automatically, through the grant of a special non-contributory cash benefit which is intended to cover the beneficiary's subsistence costs.'

[51] In fact, broader constitutional considerations could even speak against a strict systemic evaluation, or empiricism in the area of social policy. Social policy is arguably not an empiricist undertaking but a reflection of a compromise among the members of society reached on largely non-economic grounds. See for instance in PM Huber, 'Unionsbürgerschaft' (2013) *Europarecht* 637,

individual rights and public interests could be realised in the individual case within the legal framework of the Directive.

C. Change of a Reference Frame

Finally, the analysis suggests that the Court is replacing its reference frame, and increasingly relying on the rights-closing precedents. The tracing of references might be problematic, generally speaking. There are two caveats to the approach. First, changes in the practice of precedent citations will be reliable indicators of legal change only if precedent citations reflect the Court's actual reasoning process[52] and where citation practice will be relatively well established and consistent over time.[53] Second, if the process of change is continuous, desirable and inherent in judicial decision-making, 'genuine' indicators of change are impossible to isolate and distinguish from the 'regular' fluctuations in case citations. Law is updated because old precedents are replaced with newer ones, which have more bearing on the current legal problems just for that sake alone. Finally, the Court has a particular citation style, referencing older and most recent cases in citation strings of three cases, which more often hides rather than elucidates the evolution of the case law.

These objections notwithstanding, we can observe three trends that suggest the Court has introduced new reference points in the citizenship case law by ways of omission, reinterpretation and treating citizenship classics (*Martinez Sala*, *Baumbast*, *D'Hoop*, *Bidar* and *Grzelczyk*)[54] as opening-line references. This means that the Court increasingly cites the classics as preliminary points that do not

650–54; and J Croon, 'Comparative Institutional Analysis, the ECJ and the General Principle of Non-Discrimination' (2013) 19 *European Law Journal* 153, 163–72. That said, these arguments do not dispense with the need to substantiate the statements about serious economic consequences and financial implications, even with value judgements and non-economic considerations, especially when they are available.

[52] There is a lasting disagreement in jurisprudence on this point, which we do not discuss here. We simply assume that precedents are not selected at random by the Court and that they *grosso modo* reflect the reasoning process (that is, they are not simply a legal façade for underlying non-legal considerations and arguments).

[53] With regard to the latter point, it is widely thought that the Court has not developed sophisticated 'common law' techniques of distinguishing and overruling and only exceptionally discusses the substance of earlier decisions in greater detail. However, the Court's citation practice is remarkably stable and consistent. Hence, permutations in the strings of references are good indicators of shifts in the jurisprudence. The Court most often refers to lines of cases, or the so-called settled/well-established/consistent case law, and cites several, most often three, cases in a citation string. In other words, the Court's practice might be particular to the institution and reminiscent of a typical civil law court but follows a consistent pattern.

[54] They established a conventional framework for the review of conditions and limits to primary and directly effective citizenship rights. N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *CML Rev* 889, 894.

contribute to the ensuing actual legal discussion (opening-line references), cites them together with newer cases that do not lead to the same outcomes or rest on the same rationale (reinterpretation), or omits them altogether, even in situations where the classics would be of legal relevance (omission).[55]

An example of an opening-line reference can be found in *Dano*, where the Court repeats its famous passage that 'the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope *ratione materiae* of the EU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard', referring to two classics, *Grzelczyk*, paragraph 31, and *D'Hoop*, paragraph 28. These references, however, have no tangible bearing on the Court's main line of argumentation. The Court answers the preliminary reference mainly by relying explicitly on its judgments in *Brey* and *Ziolkowski and Szeja*.[56] Neither of them departs from the premise of fundamental status or even mentions it.

An example of reinterpretation of the classics can be found in *Commission v United Kingdom* on the entitlement of European citizens to social benefits in the host Member State. The Court, when assessing the proportionality of a presumably discriminatory residence test invokes the classic rights-opening cases (*Grzelczyk*, *Bidar*) in a string/together with more recent and more restrictive cases (*Brey*, *Dano*) to argue that the test does not contradict previous case law.[57]

The judgments that are cited together in a citation string do not rest on the same rationale, and suggest opposite outcomes and opposite weighing of citizens' rights and Member State interests. In fact, *Grzelczyk*, *Bidar*, and *Brey* all build on the idea of a 'certain degree of solidarity'[58] and, moreover, all three clearly adopt a so-called individual approach to establishing whether the citizen would exceed the expectation of solidarity and become a burden on the finances of the Member State.[59] They do not—and this holds true even for *Dano*—permit *systematic* residence tests.

Finally, in *García-Nieto* the Court replaced entirely a reference frame, in which claims to equal treatment of economically non-active citizens could be made. The legal question concerns the interpretation of the scope of Directive 2004/38.

[55] For instance to *Sala* (n 5) (economically non-active EU citizens that are lawfully present in the territory of the host Member State); either *Grzelczyk* (n 5) or *Bidar* (n 5), or both (student maintenance, certain degree of solidarity and the prohibition to revoke residence automatically where the applicant applies for social assistance); and *D'Hoop* (n 5) (equal treatment, and prohibition to penalise the exercise of rights).

[56] References to *Brey* in *Dano* (n 11) paras 60 and 63, and references to *Ziolkowski and Szeja* in *Dano* (n 11) paras 70, 71 and 73.

[57] *Commission v United Kingdom* (n 14) para 80.

[58] *Bidar* (n 5) para 56; *Grzelczyk* (n 5) para 44; and *Brey* (n 4) para 72.

[59] See also the discussion on abstract and cumulative risks above (III.A).

The Court made a far-reaching decision in *García-Nieto*:[60] instead of resolving the issue within the reference framework of its older case law,[61] which narrowed the scope of Article 24(2) of Directive 2004/38,[62] it decided to resolve the question within the reference framework of its later case law, in particular *Alimanovic*[63] and *Dano*, paragraph 69, which extended the reach of the conditions of Article 24(2) of Directive 2004/38. The result of this choice of new reference points is that a Union citizen can claim equal treatment with nationals of the host Member State under Article 24(1) of Directive 2004/38 only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38 (judgments in *Dano*, paragraph 69, and *Alimanovic*).[64]

IV. JURISPRUDENTIAL SHIFT IN THE CONTEXT OF INTERNAL AND EXTERNAL CRISIS

The jurisprudential shift, which we examined qualitatively in the previous section, can be observed also quantitatively. Our examination of the judgments shows that the percentage of pro-individual outcomes dropped from 83 per cent to 55 per cent after 2011, that is, by 28 per cent, and to 27 per cent of pro-individual outcomes after 2014, that is, by 56 per cent. Similarly, the proportion of opinions with pro-individual outcomes delivered by the Advocates General has dropped from 89 per cent to 50 per cent since 2011, and to 36 per cent since 2014. Our systematic analysis of the reasoning of the Court furthermore demonstrates that the Court has not become more deferential to the national courts. Nor has the Court delivered more minimalist judgments. Another noteworthy change in the reasoning of the Court is a significant rise of abstract answers to concrete questions posed by national courts. The proportion of these has increased from 41 per cent before 2011 to 89 per cent since 2011. By way of comparison, deference to national courts and the proportion of abstract answers in the opinions of the Advocates General have remained largely unchanged. Furthermore, the Court has explicitly referred to

[60] *García-Nieto* (n 4). The benefit in question was a jobseeker benefit under A 7(1) Book II of the German Social Code. The Act is under amendment at the federal level.

[61] ECJ, Case C-22/08 *Vatsouras*, EU:C:2009:334, the judgment in *Vatsouras* relies on Collins (n 37), see N Nic Shuibhne, The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice (Oxford, Oxford University Press, 2013) 75. *Vatsouras* para 45: '[B]enefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting "social assistance" within the meaning of Article 24(2) of Directive 2004/38'.

[62] eg D Chalmers, G Davies and G Monti, *European Union Law: Text and Materials*, 2nd edn (Cambridge, Cambridge University Press, 2010) 458. Similarly, K Lenaerts, 'European Union Citizenship, National Welfare Systems and Social Solidarity' (2011) 18 *Jurisprudence* 397.

[63] *García-Nieto* (n 4) para 37: 'it should be recalled that, in the judgment in Alimanovic (ECJ, Case C-67/14 *Alimanovic* [2015] EU:C:2015:597 paras 44–46), the Court held that benefits such as the benefits at issue cannot be considered to be benefits of a financial nature which are intended to facilitate access to the labour market of a Member State, but must be regarded as "social assistance" within the meaning of Article 24(2) of Directive 2004/38, OJ L158/77'.

[64] *García-Nieto* (n 4) para 38.

the opinions of the Advocates General more often since 2011. Several judgments contain more than one reference. This is particularly evident in recent judgments with negative outcomes for the individuals, delivered after 2014. All above findings are presented in Table 1 below.

In this section, we attempt to explain and contextualise the change by first examining the professional backgrounds of the sitting judges and the decision-making in chambers. Second, we place the institutional factors alongside the political and the economic context.

A. Institutional Transformation

Institutional transformations can have non-negligible—even if indirect—effects on the development of the jurisprudence. It is easy to imagine that a sharp increase in judges with diverse educational and professional credentials and conflicting understanding of the judicial role will affect both the organisation of daily judicial work and the established working methods and find expression in the case law. In the context of the Court of Justice, the institutional transformation comprises the change in presidency of the Court after 12 years, in 2015, its internal restructuring, including a physical relocation to new premises, the reorganisation of the chamber system, a prolonged and controversial reform of the General Court, and the rather sudden increase of the number of judges without extensive training and experience in European Union law pursuant to the 2004 and 2007

Table 1: Comparing early, recent and most recent case law

	Group 1 (early)	**Group 2 (recent)**	**Group 3 (most recent)**
Chamber judgments	28%	67%	45%
Grand Chamber judgments	72%	44%	55%
Number of sitting judges	10	8	10
Seniority of AG at the time of delivery of opinion	5.5 years	5.45 years	5.45 years
Seniority of JR at the time of delivery of judgment	5.5 years	8.75 years	8.9 years
Number of references to the AG	0.5	1.15	1.45
Reference to AG opinion in the judgment	50% of judgments	60% of judgments	63% of judgments
Pro-individual outcomes CJ	83%	55%	27%
Pro-individual outcomes AG	89%	50%	36%
Number of observations	20% of MS	16% of MS	14% of MS

enlargements. In addition, the mere establishment of a panel in 2009 in Article 255 TFEU could have an impact on the nomination and the selection of post-Lisbon judges. These factors importantly play into the case law along with the types of questions referred by the national courts or the maturity of a specific area of law. The key question is whether they accelerated the restrictive turn in the European citizenship case law.

Our findings, presented in Table 1 above, show two notable institutional developments. First, the proportion of judgments decided by the Grand Chamber has decreased since 2011 (Group 2, in the second column) from 72 per cent of cases to 44 per cent of cases. Second, fewer judges participated in the decision-making in Group 2: eight as opposed to 10 in Group 1. Since 2014 (Group 3), however, the number of judges has again increased to 10 sitting judges per case on average and the percentage of cases, decided by the Grand Chamber, has increased to 55 per cent.

Table 2 below presents the findings with regard to the professional background of judges. We can observe that among the judges who participated in the decision-making in the selected cases, the percentage of participating academics has doubled since 2011 (from 16 per cent to 33 per cent), while the percentage of sitting judges coming from the ranks of judiciary has declined. The proportion

Table 2: Percentage of different judicial backgrounds of judges participating in the decision-making in early, recent and most recent cases (percentage of 'votes'), the backgrounds of the Advocates General and Reporting Judges (JR)

Sitting Judges	**Group 1**	**Group 2**	**Group 3**
AC	16%	33%	32%
JUD	38%	28%	29%
LP	3%	4%	2%
POL	43%	35%	37%
Reporting Judges			
AC	17%	10%	0%
JUD	0%	5%	0%
LP	28%	15%	9%
POL	56%	65%	91%
Advocates General			
AC	33%	25%	9%
JUD	0%	0%	0%
LP	44%	40%	27%
POL	22%	35%	64%

of judges participating in the decision-making in the selection with the main career background in legal practice and politics or the civil service has remained relatively stable. By contrast, the percentage of opinions delivered by the Advocates General with an academic background has dropped significantly, to only 9 per cent since 2014. The percentage of opinions delivered by the Advocates General with a background in national politics and the civil service has increased significantly, from 22 per cent before 2011, to 35 per cent after 2011 and 64 per cent after 2014. The most significant finding, however, relates to the Reporting Judges. Since 2014, 91 per cent of cases have been reported by judges with a background in national politics and the civil service. The judges with an academic background have been Reporting Judges in 10 per cent of opinions since 2011 and in none since 2014. With regard to individual Members of the Court, more opinions have been delivered by Advocate General Wathelet, and assigned to two Reporting Judges, Berger and Lapuerta. Judges Makarczyk and Klucka were replaced in 2009 before their terms expired and Küris, who served a full term, was not reappointed in 2010. The general findings with regard to the professional composition of the sitting judges are presented more systematically in Table 2. Group 1 comprises cases decided before 2011; Group 2 cases decided since 2011; and Group 3 the most recent cases, decided since 2014. All cases in Group 3 are also part of Group 2. We treat them separately to evaluate the persistence of the restrictive turn. We discuss the findings in more detail in section C below, after we place them into the broader political and economic context (section B below).

B. The Chronology of Mounting Crisis

The transformations of the European citizenship jurisprudence occurred in a highly specific political and economic context. The classic case law in this field was established well before the 2007–08 global financial crisis and the ensuing unprecedented policy action programmes and measures on the European level. The intergovernmental action ratified by the Court to contain the crisis provoked political and ideological disagreement over their appropriateness and democratic legitimacy, and in turn the Court's authority faced increasing political and scholarly challenges for these and other unpopular judgments handed out in 2007–15.[65] And while the devastating societal consequences of the economic crisis for many Europeans and the controversy over austerity measures still reverberated across Europe in 2015, unprecedented numbers of migrants started arriving from the Middle East. The latter highlighted the failure of the EU's mechanisms intended to

[65] Having laid out the groundwork on the internal market by *Viking* and *Laval* (ECJ, Case C-438/05, EU:C:2007:772; Case C-341/05 EU:C:2007:809), followed by *Ruiz Zambrano* (ECJ, Case C-34/09, EU:C:2011:124) and two EMU-related cases, complex with regard to competence and technicality (ECJ, Case C-370/12 *Pringle*, EU:C:2012:756; Case C-62/14 *Gauweiler*, EU:C:2015:7), the Court's popularity was not at an all-time high.

deal with such issues, as well as notable differences in Member States' attitudes to them. This did no favours to the overall legitimacy of the Union and its law, and in turn also allowed local politics to project the problem on Brussels.

The coinciding crises increased the pressure from different political corners of the individual Member States to control migration more effectively, wrapping the movement within the Union with that from the outside. The rhetoric of taking back control or repatriating competences featured prominently in the UK Government's reviews of balance of competences produced from 2012 onwards.[66] Member States were keen to preserve the 'Western' standard of living and their autonomy and ability to maintain the habitual high level of welfare—or rather workfare—and reserve it for their 'own' citizens. This added pressure to revisit the Court's interpretations over the extent of equal treatment of Member State nationals. Coincidently, the public discourse, mushrooming since the enlargements in 2004 and 2007, took a rather explicit and unfriendly if not an outright hostile turn in some Member States from 2013 onwards. Social benefits for economically non-active European citizens and study maintenance fees have sparked a great deal of public controversy in Germany, Austria and Denmark. Child benefits to mobile EU workers became a cause célèbre in the United Kingdom (and in Austria) in spite of their estimated limited economic relevance.[67] In the UK, mobility overall became a burden *per se*, formulated in terms of repatriating immigration control, in spite of the fact that it was never wholly lost and no concrete comprehensive numbers on costs and benefits of mobility were ever produced.[68] Moreover, throughout all this, the Court was also on tenterhooks (internally and externally) over the reform of the EU court system that started in 2011, increasingly so for two years since late 2013.[69] In the anticipation of Brexit in June 2016 the crisis turned constitutional-slash-existential.[70]

With the exception of the Lisbon Treaty entering into force at the end of 2009, the legal framework governing European citizenship rights has not changed since

[66] Review documents are available at: www.gov.uk/government/collections/review-of-the-balance-of-competences.

[67] See chapter by SK Schmidt in this volume. The UK's requirements for a renegotiated deal with the EU are documented in European Council Conclusions (18 and 19 February 2016, EUCO 12/16): www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions/, 22 and 33; on public discussion, see eg S Booth, C Howarth and P Swidlicki, 'How to Save EU Free Movement: Make it fair to keep it free' (2014) 11 *Open Europe Report*; J Doyle 'Tax credits "turned UK into a honeypot for EU immigrants": worker on minimum wage could receive additional £330 a week' *The Daily Mail* (25 November 2014): www.dailymail.co.uk/news/article-2848128/Tax-credits-turned-UK-honeypot-EU-immigrants-Worker-minimum-wage-receive-additional-330-week.html; and P Oltermann, 'Germany among EU countries keen to copy UK child benefit peg' *The Guardian* (23 February 2016): www.theguardian.com/world/2016/feb/23/germany-angela-merkel-eu-countries-keen-copy-uk-child-benefit-peg.

[68] On the absence of data on the UK covering both revenue and expenditure, A Iliopoulou-Penot, 'Deconstructing the Former Edifice of Union Citizenship? The Alimanovic Judgment' (2016) 53 *CML Rev* 1007, 1029.

[69] A Alemanno and L Pech, 'Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU'S Court System' (2017) 54 *CML Rev* 129, 138–39.

[70] In his State of the Union address on 14 September 2016, European Commission President Juncker declared that: 'Our European Union is, at least in part, in an existential crisis'.

2006 (Directive 2004/38). Hence, forces external to the law should largely account for the jurisprudential shift, which became visible after 2011. However, the classic case law in this field was developed prior to the implementation deadline of new secondary legislation in 2006 and, moreover, time in itself is a factor in that it was developed mainly by different judges and Advocates General than those who served during and from 2012. The Court members' selection panel introduced by the Lisbon Treaty, Article 255 TFEU, became operational from early 2010 onwards, but during its first three years did not give a single unfavourable opinion on a Court candidate.[71]

Although a simple timeline can be drawn this way of the (overlapping) events that establish the external as well as internal context for the Court, it is a crude tool that does not alone allow deducing causality between events and twists in the Court's case law. It is nevertheless possible to argue that external pressure on the Court mounted during 2008–11, reached its peak in 2012 and prompted the Court to change the direction of the citizenship jurisprudence, and did not subside until the British referendum in June 2016. Namely, even in mundane times national governments, whose interests are hypothetically negatively affected by the Court's decisions, will put pressure on the Court by the use of national media or economic threats.[72] This tendency will most likely not disappear in times of crisis. These strategies will only intensify in times of grave financial crisis. The Member States will want more flexibility to define the fundamental interests of their own societies and restrict or expand public spending. They will expect the Court to apply laxer proportionality review to their protectionist measures, which limit free movement and individual rights, or discriminate between nationals and non-nationals, and find them compatible with European law. It is not hard to imagine that such events will further accelerate developments, more favourable to national interests, in the jurisprudence.

C. Summing Up

How can the findings be interpreted? Generally, they imply, first, that the Court has become more sensitive to broader—mainly economic—concerns of the Member States in individual cases. More concretely, the restrictive approach, which limits individual rights to social advantages in the host Member State, is clearly observable on the level of outcomes. This could indicate that the Court increasingly adopts decisions which do not aggravate the economic situation in

[71] H de Waele, 'Not Quite the Bed that Procrustes Built: Dissecting the System for Selecting Judges at the Court of Justice of the European Union' in M Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford, Oxford University Press, 2015) 44–47.

[72] D Terris, CPR Romano and L Swigart (eds), *The International Judge. An Introduction to the Men and Women Who Decide the World's Cases* (Oxford, Oxford University Press, 2007) 173.

the Member States, even hypothetically speaking. Second, the Court has not been more deferential to national courts: it has not let the national courts weigh the individual and national interest in concrete situations more often, or given the national courts the authority to perform comprehensive and autonomous proportionality tests within the national context. At the same time, the Court has not been more unwilling to solve broader problems of interpretation comprehensively than before 2011. The proportion of minimalist judgments has increased only slightly, by 6 per cent, and remains relatively low at 44 per cent. Third, and almost paradoxically, the Court has become more unwilling to provide clear and concrete solutions to preliminary questions. Instead, it has provided highly abstract answers, unrelated to the situations at hand. This might indicate that the Court is in favour of coherent and general (legislative) rather than partial, judicial, case-to-case solutions.

One could argue that the changing profile of judges who have participated in the decision-making process since 2011 corroborates this sensitivity to the broader economic context of the Court and a new openness to the political process with uncertain outcomes for individual citizens. Explicit reliance on the opinions of the Advocates General, who overtly invoke negative implications of granting equal rights to migrant European citizens, in particular increased immigration from less affluent parts of the European Union, sends an additional signal to the Member States and European political institutions that the Court will not resist but assist the political process.

Literature has dubbed European citizenship as an 'unhappy misnomer'[73] and a product of 'academic imagination'.[74] O'Brian recently questioned whether it ever existed outside scholarly imagination sparked by a handful of rulings from Luxembourg? (The emperor was naked.) So conceived, citizenship as protection of rights was destined to fail, and the external crisis could only speed up but not trigger this process. The internal working of the Court as well as the profile of its members and especially the assignment of cases to chambers with Reporting Judges and Advocates General less determined to block national policy choices were a necessary precondition for the restrictive turn.

V. CONCLUSION

There were times where the Court could do no wrong: if it was 'deferential', it was giving impetus to the legislative action and to a comprehensive approach to individual rights. If it was 'activist,' it was because it was protecting individual rights, bearing the burden of integration where political institutions have faltered. These

[73] The term is used by AJ Menéndez, 'Which Citizenship? Whose Europe?—The Many Paradoxes of European Citizenship' (2014) 15 *German Law Journal* 907.

[74] ibid; C O'Brien, '*Civis Capitalist Sum*: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 *CML Rev* 937, 974.

are times where the Court is judged harshly, also by its habitual allies, most notably the national courts.

The jurisprudence ebbs and flows. Change is an intrinsic element of judicial law-making everywhere. However, it can safely be concluded that the citizenship jurisprudence of the Court took a decisive turn, which will be difficult to reverse. The implications are significant. In legal terms, the new approach means less favourable legal treatment of economically inactive migrants, jobseekers and third-country family members. In existential terms it might be the beginning of the end of the aspiration to 'the good life,' which has characterised the European project since its inception.[75]

Qualitatively, the shift encompasses three main modifications. First, the Court altered its use of teleological interpretation, which had far-reaching consequences: stressing different objectives of the interpreted texts or previously less used objectives of Treaty Articles and provisions of Directive 2004/38, and finding a new balance between the particular and the general objectives. Second, the Court complemented this interpretive position with policy arguments. It presupposed substantial negative consequences without discussing any alternative outcomes and without the necessary support of empirical evidence. Third, the Court effectively created a new reference frame by selecting new reference points of interpretation and argumentation. Most conspicuously, rights-closing reference points such as *Brey* have practically replaced the classic rights-opening reference points in the argumentative parts of the judgments, and have achieved (in a very short time) the status of 'settled case law'. New precedents support negative outcomes for whole groups of economically non-active citizens.

The practice of decision-making in chambers importantly encourages and sustains this type of decision-making. Namely, while the professional membership of the Court has not changed considerably, the same could not be said about the professional background of the Advocates General who delivered the opinions in the examined cases. Since 2011, the percentage of opinions delivered in cases under examination by the Advocates General coming from academia and legal practice has decreased, while the percentage of opinions delivered by the Advocates General with a previous dominant career in politics or the civil service has increased. Substantive references to the Advocates General have become much more common in the most recent cases.

When juxtaposed with the context in which they occurred, our findings can be understood as a politically savvy response from an institution, which is losing political power, authority and legitimacy. Content wise, they indicate that the Court, especially when sitting in chambers, has a fragmented vision of European citizenship on the one hand and a strong 'jurisdictional claim' to re-define and co-design a new system of European solidarity on the other.

[75] F de Witte, Justice in the EU: The Emergence of Transnational Solidarity (Oxford, Oxford University Press, 2015).