LIVING A CONSTITUTIONAL LIFE:
THE COURT'S PARADIGM SHIFT ON EU CITIZENSHIP AND WHY IT MATTERS FOR BREXIT [1]

POLICY BRIEF BY
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Though most of us are not aware of it, Europeans today possess not one, but two layers of citizenship. After all, since the 1992 Maastricht treaty, Europeans are citizens not only of a Member State but also of the European Union. But what does that mean? Is this European citizenship a copy of national citizenship or is there more to it than meets the eye?

This article seeks to shed more light on how the European Court of Justice has dealt with European citizenship. To do so, we will follow the course of Court doctrine over the past couple of decades. It will become apparent that about a decade ago the Court unleashed nothing short of a revolution in relation to European citizenship. A revolution in what it means to be a citizen of the European Union.

Since that revolution there is much more to European citizenship that meets the eye. It has become the kind of thing that might just save the day in a moment of crisis [2]. And we have the Luxembourg Court to thank for it.

A MARKET-BASED EUROPEAN CITIZENSHIP

During the formative decades of European integration, the concept of "European citizenship" was absent from the European legal universe. Before the Maastricht treaty, as a concept, European citizenship was only informally used to denote the totality of rights and duties citizens of member states enjoyed because of their state's membership of the Union. This is also called the *acquis communautaire*, Union-speak for the totality of rights and duties that have been "acquired" by European integration. Until the Maastricht treaty, then, Europeans were legally speaking only citizens of their member state, albeit enriched with the European *acquis* by

1 My gratitude goes out to Erik Liss and Jeroen Dobber of the European Liberal Forum and to Mr David Mair for providing useful suggestions to earlier drafts of the text. This contribution is based on relevant EU (case) law and a general reading of articles found in the references list on page 7.

2 A good example is the 2010 *Ruiz-Zambrano* case mentioned later in this article.

reason of the accession of their country to the European Community (EC).

The kind of citizenship referred to by this informal concept was also rather far off from national citizenship as we know it today. It was no constitutional-type citizenship conferring general and inalienable fundamental rights upon those who enjoy it. Mirroring the limits of the so called *conferral of competencies* [3] from the national level onto Europe, European citizenship was no more than a kind of market-based citizenship of a rather narrow scope.

What does this mean?

Until the Maastricht treaty, the EC dealt mainly with economic policy. European integration was about making war in Europe impossible by tying European nations together in a strong web of economic exchange. It aimed at a more peaceful cohabitation under Europe's economically sheltering skies.

To this end, and to ward off the far-left doctrines of the USSR, the Founding Fathers decided to not only bring their economies together in a customs union, but to also liberalise the four basic factors of these economies: goods, services, people and capital. Thus were born the famed "four freedoms" and with it, the internal market.

As European construction was geared to so-called cross-border economic objectives, with some exceptions, the Court deemed European law only applicable to these cross border situations, and not to what came to be known as "wholly internal situations". The result was that only those participating in the achievement of the ever closer union of states and peoples in the European Community could enjoy the benefits of European law. This restricted the application of European law to (1) economic activities (2) of a cross border nature. Hence, in the days of the Court's market-based reasoning, by and large EU law did not apply to situations lacking these characteristics. This lead to the infamous European sanction of *reverse discrimination*, meaning that a member state was, and still is, allowed to discriminate against its own citizens in comparison with the rights other European citizens enjoy by means of EU law on its territory. [4]

In a market-based European legal environment, the informal concept of European citizenship was thus limited to those people engaged in cross-border economic activities within the internal market, whether as the providers or beneficiaries of the free movement of goods and services, as capital investors or as workers or independents crossing an internal market border in the pursuit of business incentives. European law was not applicable to wider categories of people and their activities. [5]

INTRODUCING EUROPEAN CITIZENSHIP INTO THE EUROPEAN LEGAL ORDER

When the 1992 Maastricht treaty finally introduced the concept of European citizenship into the European legal order, at a first glance it wasn't a very big deal. It enlarged free movement rights to economically inactive citizens and added a limited number of political rights to the economic *acquis*. It was by no means the intention of the new treaty to transform the Court's market-based

3 Unlike the sovereignty of its member states -traditionally considered natural, full and almost unlimited- the European Union *received* the sovereignty it possesses when the member states decided to "confer" certain competencies from the national to the European level. European sovereignty is therefore limited to those competencies it received in the treaties that make up the Union, and the degree to which it received them.

4 A good example is the *Aubertin* case (ECLI:EU:C:1995:39). French hairdressers in France were treated less favorably than hairdressers from other EU countries in France since French hairdressers had to possess a specific diploma while hairdressers from other member states only had to prove that they had lawfully practiced hairdressing in their member state of origin, even if this didn't require a specific diploma. Example mentioned on page 6 of Tryfonidou, A., "Purely internal situations and reverse discrimination in a citizen's Europe: time to 'reverse' reverse discrimination?", consulted online at: www.um.edu.mt/europeanstudies/books/CD_MESA09/pdf/atryfonidou.pdf

5 Though it must be added that mainly starting the 1980s, the Court was stretching these categories a bit to also include, for instance, students.

approach into a wider, constitutional kind of citizenship. It was still understood that, in order to establish a link with the EU, there had to be a cross-border element.
And this was also how the Luxembourg Court itself understood the incorporation of citizenship provisions in the treaty. In the 1997 *Uecker and Jacquet*[6] case, for instance, the Court still repeated its traditional "market-based plus" approach -now including also economically inactive citizens- by stating that the insertion of European citizenship into the European legal order did not change the material scope of EU law.[7]

Throughout the 1990's, the Court did gradually erode the inherent limitations imposed by a market-based conception of European citizenship, but it did so by nibbling at the margins of its traditional doctrines rather than by unleashing a Copernican revolution. For instance, on a case-by-case basis the Court would seek to gradually enlarge what counts as a cross-border element in attempt to bring more cases within the ambit of European law. All of this piecemeal nibbling led scholars and legal practitioners alike to complain about the growing incoherence of European law.

Given the above, the enlargement of economic cross-border freedoms to economically inactive citizens was generally conceived as nothing more than a kind of a new, "fifth freedom". Without fundamentally altering the scope of EU law, a wholly novel category of citizens had now acquired the right to freely cross Europe's internal borders, albeit within the traditional limits of Court doctrine.

TOWARDS A NEW CONCEPTION OF EUROPEAN CITIZENSHIP

Somewhere around the turn of the millennium, however, voices inside and outside the Court started looking anew at the nature of European citizenship as a legal concept.[8]

Market-based citizenship was felt to be unduly limiting in scope. People found it increasingly hard to accommodate its anomalies in a Union that had, over time, mutated from an economic club with a narrow integration agenda to an emerging supranational democracy with its own directly elected parliament and competencies extending far beyond the economic sphere.

In such a context, the Court's habit of nibbling at the margins of established doctrines came to be seen as problematic. Instead, legal practitioners inside and outside of the Court started reading articles 20[9] and 21 TFEU – the legal base of European citizenship in the treaties – not through the traditional lens of the *acquis*, but as carrying the potential for a constitutional revolution.

The first time something of all of this seeps through in Court doctrine is in the 1999 *Grzelczyk*[10] case, where the Court makes the bold statement that "European citizenship is destined to be the fundamental status of the nationals of the Member States". Such a statement is, of course, difficult to reconcile with a limited and market-oriented conception of European citizenship.

Then, in the 2008 *Rottmann* case[11], the Court indicated that, although member states are exclusively competent

6 ECLI:EU:C:1997:62

7 Lenaerts, K., *o.c.*

8 According to Jo Shaw, the work of the Court's Advocates-General played an important part in this. See: Shaw, J., Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism", *University of Edinburgh, Working Paper Series No 2010/14*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585938

9 Mirrored by article 9 TEU.

10 ECLI:EU:C:2001:458

11 ECLI:EU:C:2010:104

for granting or withdrawing national citizenship, that does not mean EU law is irrelevant. After all, national policy in this domain may influence the rights of the concerned persons under European law.

But it was in *Ruiz-Zambrano* [12], a 2010 Belgian case, that the Court finally turned the page on a purely market-based European citizenship.

The Zambrano's were a family of four, including the parents and two small children born in Belgium. Belgium turned down the initial Zambrano request for refugee status but did not immediately send the couple back to Columbia due to the ongoing civil war there. Awaiting their return home, the Zambrano's were given residence permits, though Mr Zambrano did not hold a working permit. During their subsequent stay in Belgium, the Zambrano's had two children. In accordance with Belgian law at that time, the Zambrano children became Belgian citizens. Moreover, though lacking a permit, Mr Zambrano had worked in Belgium. He had even paid some taxes.

After the birth of their children, the family asked for long-term residence rights for both parents and, based on him having worked in the country, unemployment benefits for Mr Zambrano. When the Belgian authorities turned down these requests, the Zambrano's invoked European law, asking for residence and working rights based on the European citizenship of their small children.

The remarkable thing about this case was that the children had, in fact, never left Belgian soil. Neither had their parents. There was no cross-border link of any kind to connect the case with the European legal order. It seemed like a textbook example of a "wholly internal situation".

Yet, if the Zambrano's were to leave Belgian and so EU territory, their children would be forced to follow them. The question thus arose if the Zambrano parents could derive rights from the European citizenship of their children in a situation falling far short of the traditional cross-border doctrine.

To the surprise of many, in *Ruiz-Zambrano* the Court finally abandoned the cross-border requirement. It ruled that, to be able to make use of cross-border rights, European citizens must possess a deeper, more fundamental right to reside on European territory, even if they haven't crossed any internal borders. In other words, as European citizens, the Zambrano children had a right to reside on EU territory no matter whether they had crossed borders or not. And to allow the children to exercise this right, the Belgian authorities had to grant their parents derived rights to residence and work.

To be sure, the Court went on to nuance and refine the *Ruiz-Zambrano* doctrine in subsequen cases like *McCarthy* [13], *Dereci e.a.* [14] and, more recently, *CS* [15] and *Chavez-Vilchez* [16]. It did so in considerable measure to avoid member state backlash over EU incursions into what is still today considered a bulwark of national sovereignty. But with *Ruiz Zambrano* the Court nonetheless turned the enigmatic 1999 *Grzelczyk* announcement into established legal doctrine, steering from a market-based citizenship concept towards the constitutional status traditionally conferred upon citizenship in a national setting. As a result, European citizenship is today a unique constitutional concept closely in tune with the emerging constitutional democracy that is the European Union.

12 ECLI:EU:C:2011:124

13 ECLI:EU:C:2011:277

14 ECLI:EU:C:2011:734

15 ECLI:EU:C:2016:674

16 ECLI:EU:C:2017:354

EUROPEAN CITIZENSHIP AND BREXIT [17]

Given how much the European legal order has evolved over the past decades, it is to be deplored but respected that the UK voted to leave the European Union.

A Brexit, especially a hard Brexit, would leave UK citizenry deprived of the umbrella provided by European law and the generous constitutional protection offered by *inter alia* European citizenship and the Charter of Fundamental Rights. For UK citizens, citizenship rights would henceforth be a question of UK law, the case being enriched by a bilateral agreement with the European Union or other instruments of international law.

This is a direct consequence of the democratic choices of the UK populace, expressed in accordance with UK law. In fact, the vote for Brexit was all about what European citizenship stands for: a constitutionalising European Union driven by a bold European Court of Justice as well as free of movement for EU citizens and a prohibition to discriminate between them.

Deplorable though it may be, then, it is hard to see in Brexit anything else but the democratic choice of the UK population to withdraw from EU membership, including its citizenship regime. This is to be respected, if alone to respect ourselves as democrats and adherents to the rule of law.

But our respect for the UK decision should also be a direct consequence of the EU treaties themselves. To begin with, article 20 TFEU, the basis for European citizenship, expressly links European citizenship to citizenship of an EU member state. Even though, in constitutionalising EU citizenship, the Luxembourg Court added a constitutional *dimension* to article 20 TFEU, it has by no means ever declared its intention to sever the acquirement or withdrawal of European citizenship from membership of the Union. Not in individual cases like *Rottman* or *Ruiz Zambrano*, and certainly not in a case of collective withdrawal by democratic means, as in Brexit. Taking such a course could even fatally damage its legitimacy with the Union's member states, so it is not generally expected that the Court will seriously contemplate something in that direction. [18]

Not to wholeheartedly respect the democratic decision of the UK electorate would moreover not only empty article 50 TEU -containing the right of any member state to withdraw from the Union- of any *effet utile* [19] , the Union would also disrespect its own fundamental values of respect for democracy and the rule of law, as expressed in article 2 TEU. [20]

And if the above does not suffice, then there's still article 4(2) TEU, obliging the Union to respect "[member state] national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

It is thus clear that under the current state of the *acquis,* Brexit means Brexit. It means leaving the European Union as well as European citizenship. Any other reading would not make much sense not only from a Brexit perspective, but also from the point of view of EU law.

What is left then? Well, if the EU and the UK act carelessly, not much. In fact, so little remains in the case of a no-deal scenario, that according to some commentators UK citizens would be in a legally less favourable situation vis-à-vis the Union than, say, Russians or Moroccans. [21]

17 It is not the purpose of this contribution to go in depth into the debates surrounding Brexit. This section therefore does not seek to present a full account of all the points of view concerning Brexit, their drawbacks and their merits.

18 For a very similar view: van den Brink, M. & Kochenov, D., A Critical Perspective on Associate EU Citizenship after Brexit, *o.c.*

19 As is rightly emphasized by van den Brink and Kochenov. van den Brink, M. & Kochenov, D., A Critical Perspective on Associate EU Citizenship after Brexit, *o.c.*

20 Ibid.

21 Kochenov, D., "EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?", in Carlos Closa (ed) *Secession from a Member State and Withdrawal from the European Union: troubled membership*, Cambridge University Press, 2017

That is why the UK and the EU should strive as much as possible to cushion the potentially harsh implications of Brexit from the point of view of citizenship rights. The negotiators have a whole range of possibilities to choose from. Possible examples include the EEA or the Swiss cases[22], to cite but a few obvious examples.

In any case, any cushion would be a matter of reciprocity contained in a bilateral treaty between an ex-Member State and the European Union, rather than of European constitutional law.[23] Such an approach is legally coherent and practical, it respects the democratic process of the UK as well as the legal and political integrity of the Union.

CONCLUSIONS

Liberals should wholeheartedly applaud how the European Court of Justice has constitutionalised European citizenship.

A strong Court boldly driving an aptly nuanced constitutional agenda is a blessing compared to a more limited and market-based cross-border approach.

To be sure, there is still a pervasive gap between constitutionalised European citizenship as we know it today and the axioms of national citizenship. After all, as a concept of EU law, European citizenship continues to be limited by the conferred powers and the resultant *derived* sovereignty of the European Union. Given this gap, it would perhaps be more apt to label EU citizenship today as "quasi-constitutional".

Be this as it may, a stable and active European Union, well anchored by concepts such as European citizenship, implies more human rights on a European level and a well-functioning system of multi-layered governance.

In the long run, membership of such a vibrant European Union, firmly embedded in a culture of inalienable rights and protections, and affixed to a deeper and constitutional concept of European citizenship, provides the ideal environment for enduring development, peace and prosperity for all.

22 It is widely known that citizens of EEA countries, though not part of the EU constitutional order strictly speaking, share in quite some of the advantages of their Union colleagues, the EEA being – given some exceptions – an enlarged internal market. Swiss citizens, by contrast, are linked to the EU through a series of piecemeal bilateral treaties of a more circumscribed integration with EU market freedoms.

23 van den Brink, M. & Kochenov, D., A Critical Perspective on Associate EU Citizenship after Brexit, *o.c.*

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