

**EU CITIZENSHIP AS A BATTLE OF THE CONCEPTS:  
TRAVAILLEUR V CITOYEN**  
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*Ever since Citizenship was introduced at EU level, the concept's perception has varied from a mere declaratory status to a more substantial, fundamental status attached to Europeans. Regardless of whether one views Citizenship as the latter or the former of the above construes, this concept is undoubtedly intriguing and is still the subject of discussions and studies. This paper wishes to contribute to the debate regarding the concept of Union Citizenship and its future and relevance in today's EU. The scope of the notion has been enriched considerably since its conception, as a result of the work of the Court of Justice although the Treaty provisions have not reflected this and they remain largely unchanged since 1993. Owing to said case-law, different constructions of Citizenship have been proposed in the academic literature; this paper focuses on the nature of the relationship between Union Citizenship and the pursuit of an economic activity and the relative independence the former enjoys owing to the recent CJEU case-law. This independence will be assessed in three parts, covering this content of Citizenship which supports the latter's independence, its arguably receding association with the common market and its aims, and the support which the Lisbon Treaty's new stance on social values could potentially offer.*

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## I. INTRODUCTION

The concept of Union citizenship, which was introduced with considerable political turmoil by the Maastricht Treaty, is older than its founding treaty suggests; rather, an *incipient*<sup>1</sup> form of European citizenship has existed ever since the (then) Community was founded.<sup>2</sup> Of course, the economic rights that are now associated with Citizenship were at that time attached to workers only and it took the European Union (henceforth “EU” or “the Union”) many decades to realise that a political union was also needed to complement its already existing economic counterpart. With the progress of the Union and the efforts of the Court of Justice of the EU (henceforth “the Court”), the free movement provisions became more substantive and these efforts were amalgamated in the introduction of a more inclusive, but far from perfect, Union Citizenship.

However, not all rights are unchallenged; thus, workers’ rights, no matter how fundamental, are still subject to judicial review, which has to incorporate not only the wording, but also the aim of the legislation, along with the constitutional reality which stipulates the balance between social and economic values by which each era of EU integration should abide. The results of this review are most evident in the four cases associated with the Posted Workers’ Directive, although the most recent case-law has demonstrated a subtle yet important departure from the principles it created. Owing to this change of course, the previous Court’s efforts, and the new constitutional *status quo*, the rights of free movement, residence, and establishment have created a substantive nucleus of rights, which, combined with the Union citizenship, offer a significant advantage to European citizens.

This paper aims to compare the following two notions: the notion of the Union citizen who has the right to move and reside within the territory of the Union and enjoys a variety of rights which are detached from the need to fulfil an economic activity (*citoyen*), and the notion of citizen/worker who decides to pursue an economic activity in another Member State (*travailleur*). The notion of citizenship was introduced in order to ‘be the

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<sup>1</sup> The term was used as early as 1968 by the then Vice-President of the European Commission, who stated that free movement was ‘more important and more exacting than the free movement of a factor of production’. His speech was published in the EC-Bulletin of November 1968.

<sup>2</sup> See, indicatively, an article published in the mid-1970’s which already referred to citizens, a concept that, at the time, was 20 years away: A Lhoest ‘Le Citoyen à la une de l’Europe’ [1975] RMC 431. Even earlier than that, in 1951, the first President of the European Commission, W. Hallstein, said that free movement in the ESCS was reminiscent of a European citizenship.

fundamental status of nationals of the Member States<sup>3</sup> and ‘a positive contribution to the legitimacy of the European Union which an active and participatory concept of social citizenship may make’<sup>4</sup> and for these reasons it encompassed various rights but fewer, if any, obligations; the notion of worker, on the other hand, is older and comprises a wider variety of rights. In recent years, however, the Court has acknowledged the independent nature of citizenship rights.

This paper shall examine the manner in which citizenship rights operate in the current legal and constitutional configuration of the Union with the ultimate goal of providing an appropriate answer to the question regarding the true extent of citizenship’s independence from the pursuit of economic activity. In order to do so, the paper will first explore the independent nature of the Union citizenship by referring to the political rights attached to it while attempting an assessment of their value, extent, and shortcomings. Part II shall assess the citizenship’s connection to the internal market through the more recent case-law which suggests a departure from the market-based construction of citizenship and, in some cases, even from a long-established rule according to which EU rights are triggered by intra-border move. Initially, the second part shall focus on the case-law which revisits the rules on purely internal situations, while the rest of the second part will examine recent ground-breaking cases such as *Ruiz Zambrano* and *McCarthy* which seem to be establishing new guidelines on how to address issues of citizenship where the traditional rules of intra-border move may not apply as unambiguously as in the past, owing to potentially complicated lives of Europe’s residents. Lastly, part III will focus on the potential contribution of the Lisbon Treaty to the constitutional re-shaping of the Citizenship provisions. Effectively, the two parts which follow will present two strands of Citizenship, as identified in the title, and the third part shall suggest a way of bridging the gap between them.

## II. RIGHTS WITHOUT A MARKET

One of the most intriguing aspects of the Union Citizenship is the inclusion of political rights,<sup>5</sup> namely the passive and active electoral rights

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<sup>3</sup> C-184/99 *Grzelczyk v Centre public d’aide sociale* [2001] ECR I-6193.

<sup>4</sup> Jo Shaw, ‘Citizenship in the Union: Towards Post-National Membership’ in *Collected Courses of the European Academy VI-I* (Kluwer 1998).

<sup>5</sup> It is noteworthy that there is no reference to duties in the treaties. Although the *status civitatis* is normally associated with both rights and duties, the EU legislation governing citizenship mirrors the *sui generis* status of the Human Rights law that bypasses the states and gives rights to the individual without following the traditional state/citizen relationship, which is, by nature, reciprocal. The same principle was

that EU citizens enjoy.<sup>6</sup> The importance of these rights lies in their unique character in international law. Although in bilateral agreements signed by their respective parties a degree of reciprocity is not uncommon, the granting of political rights to nationals of another state, and voting rights no less, is not so common, and, thus, it should not be underestimated. However, the truth is that the participation in elections and exercise of the rights inherent in EU Citizenship have been low; moreover, the number of people exercising 'alien suffrage' has been lower than the number of people voting in their own countries.<sup>7</sup>

It seems, therefore, that the political rights have not had a considerable impact and this is reflected in the relevant case-law, which remains limited. In *Spain v UK*,<sup>8</sup> the Court allowed the UK to extend voting rights to

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used for the Charter of Fundamental Rights of the European Union, which is silent on duties. It is hard to imagine EU citizens having the same duties as in their states of origin; moreover, given the current integration in the EU, it is reasonable that the Union cannot impose any duties upon its citizens as it lacks the main characteristics of a state under international law. It could be argued, however, that all EU citizens have the duty to respect the laws and cultures of the states in which they reside when they exercise their right to free movement, but complying with the law is a general duty and not one that can be codified by the institutions of the EU.

<sup>6</sup> For a detailed study of the political rights see Shaw, *The Transformation of Citizenship in the European Union* (CUP 2007). The reader is reminded that the electoral rights are as follows: EU citizens have the right to stand and vote in municipal and European elections in a Member State other than their own. See Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals OJ L 329; also, the Resolution of the implementation of the Directive OJ C44/159. See also Council Directive 96/30/EC of 13 May 1996 amending Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals OJ L 92. See also Directive 2002/722 on the Act concerning the election of the members of the EP. The right was problematic in that it was introduced as it was against certain constitutional provisions at national level OJ L 220/18; therefore, derogations were permissible, as per Commission's Reports COM(2003)31 and COM(2005)382. EU citizens have also the right to protection by diplomatic authorities of any EU Member State in countries where their state of origin is not represented. This right provides for the equal treatment of non-nationals and it operates on a reciprocal basis and does not require any actions on behalf of the Union in the field of its international relations. Additionally, EU citizens have the right to appeal to the EP and the Ombudsman. The latter applies also to non-EU citizens, residents of EU Member States. The former was part of the EP's Rules of Procedure since 1981 but after 1993 the right to appeal was established by primary legislation.

<sup>7</sup> See COM/2002/260.

<sup>8</sup> C-145/04 *Spain v UK* [2006] ECR I-07917.

Commonwealth citizens residing in Gibraltar,<sup>9</sup> although they were not EU citizens. It was argued that the right to rule on who is a beneficiary of such rights should be retained by the Member States. Despite Spain's objection, the UK was not in breach of any rules when it decided to give electoral rights to individuals with close links to its territory. In a similar case, *Eman*,<sup>10</sup> the Netherlands excluded some of its nationals residing in Dutch overseas territories (henceforth "OST's"). Although the Court argued that nationals of a Member State residing in an overseas territory could still rely upon Union Citizenship rights, as far as voting rights were concerned, the situation was somewhat different. As per an earlier case of the European Court of Human Rights, residence criteria determining the entitlement to voting were acceptable.<sup>11</sup> However, the Court found that the Dutch were in breach of the equal treatment principle because Dutch nationals residing in non-Member States were given the right to vote, although their OST's counterparts were not. In other procedural details, in *Pignataro*<sup>12</sup> the Court held that national requirements which stipulated that a candidate for regional elections be a resident of the region in question were not a breach of European Union legislation.

Despite the limited participation and case-law, political rights are more important that the attention paid to them suggests.<sup>13</sup> It has been customary for states to provide their citizens with the right to participate in the electoral process (either as voters or as candidates).<sup>14</sup> Apart from the

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<sup>9</sup> Gibraltar is not officially part of the UK but remains a colony of the British Crown.

<sup>10</sup> C-300/04 *Eman v College van burgemeester en wethouders van Den Haag* [2006] ECR I-08055.

<sup>11</sup> *Melnychenko v Ukraine*, no. 17707/02 ECHR 2004-X.

<sup>12</sup> C-535/08 *Pignataro v Ufficio centrale circoscrizionale presso il Tribunale di Catania and Others* [2009] ECR I-00050.

<sup>13</sup> The elevated status of an EU citizen has give rise to a number of cases covering niche areas such as the right to respect the correct spelling of one's name or the recognition of the name. In C-208/09 *Sayn-Wittgenstein v Landeshauptmann* [2010] ECR I-00000 the Court found that EU legislation could not allow for national laws that did not recognise an adopted person's name which contained a title of nobility, because such titles were inadmissible according to Austria's constitutional law. See also C-391/09 *Runevič and Łukasz Paweł Wardyn v Vilniaus* [2011] ECR I-00000 where the Court also prohibited national laws to use only the country's language or only Roman letters when they write a person's name for administrative purposes without marks, ligatures or other diacritical signs that are used in other languages.

<sup>14</sup> In certain cases, individual Member States granted the right to vote to non-nationals before the introduction of citizenship, albeit in exceptional circumstances. Moreover, the right to vote and stand in local elections was also given to states with a certain degree of cultural homogeneity, like Ireland and the UK. Another noteworthy provision was a 1992 Council of Europe Convention which gave the right to vote to non-nationals who had a significant cultural, historic or linguistic link to

democratic importance of voting, there is another argument closer to the topic of this paper: freedom of movement. The Court<sup>15</sup> has scrutinised national legislation which constitutes discrimination of any kind and EU law, either primary or secondary, and it has made it clear that discrimination shall not be upheld. It follows that not having the right to vote in the state to which one wishes to move is a discriminatory rule that could hinder free movement, not to mention the better social integration that voting helps to create and the added substance voting rights represent. Further to the aforementioned democratic importance, it is significant, symbolically and practically, for the European Parliament (henceforth “EP”) to have a membership decided by the European electorate as it would give it the character of a European institution, detached from national interests,<sup>16</sup> while at the same time bridging the democratic deficit and perceived elitism from which the EU has been suffering.

The political rights associated with Citizenship are not devoid of thorny issues, however; two immediately identifiable problems concern, on the one hand, the limited number of rights, and on the other hand the lack of more substantive rights.<sup>17</sup> Regardless of the fact that these rights are of a non-derivative nature as they are independent of the pursuit of economic activity, the truth is that the rights to petition to the EP and to submit applications to the Ombudsman are applicable to any legal or natural person residing in any EU Member State, making the rights to vote and the consular protection the only rights that are appropriately ‘European’. An interesting addition is the Citizens’ Initiative which was introduced by the Treaty of Lisbon,<sup>18</sup> although it is too early to judge its effectiveness

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the territory in which they lived. This Convention was ratified by a small number of States and cannot, practically, be considered an influential step but its symbolic importance is vastly more considerable.

<sup>15</sup> The Court’s case-law played an instrumental role in the introduction of the Citizens’ Directive which has been heavily influenced by previous rulings such as this in *Baumbast*. Apart from said ruling, the ruling of *Van Duyn* regarding the assessment of personal conduct was also incorporated in the Directive (see Article 27(2)).

<sup>16</sup> Asteris Pliakos, ‘La nature juridique de l’Union européenne’ [1993] *RTDE* 187. The same effect has the fact that the seating plan is drawn according to political affiliations, not nationalities. Moreover, according to the Charter of the Fundamental Rights of the European Union, (see Article 12(2)), the EP expresses the political will of the EU citizens.

<sup>17</sup> Such gaps have made scholars call citizenship merely ‘symbolic’. See Catherine Jacqueson, ‘Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship’ (2002) 27 *ELRev* 260.

<sup>18</sup> See Article 11(4) TFEU which reads the following: ‘not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate

partly because more time is needed and partly because it is very much dependent on the will and organised actions of EU Citizens, residents of different Member States, and probably with different interests frequently shaped by national policies and mentalities. The Initiative is indeed very representative of most EU rights that remain unappreciated until the need arises and they are then invoked.<sup>19</sup>

The second problem identified above concerns the limited substance that some of the political rights carry. For instance, the right to vote applies only to municipal elections. It is indeed curious that the EU has failed even to endeavour to grant full voting rights to EU Citizens residing in a state other than that of which they are nationals, especially as it would seem as a *conditio sine qua non* for being a citizen of the democratic union which the EU treaties describe, an argument supported by the Advocate General (henceforth AG) in the *Spain v UK* case discussed previously. The Court, however, has not endorsed this view yet, which is, arguably, the most striking omission,<sup>20</sup> given the need to further differentiate political citizenship from the purely market-oriented rights<sup>21</sup> and the lack of any argument to support the discrepancy between voting rights at municipal and national levels.<sup>22</sup> This presents two problems for EU Citizens who reside in a state where they cannot vote: by moving to another state, a European citizen forfeits the right to vote in his or her country of origin in the same manner he or she forfeits the right to live there. Therefore, EU Citizens are left without the power to participate in the political life of the state in which they reside and, as a consequence of their decision to pursue their rights under the Treaties, they have arguably no reason to vote in their state of origin given that they do not live there. It could be argued that a number of these Citizens would still want to participate in home country elections for personal reasons, but this is missing the point of the gap in the EU political rights.<sup>23</sup>

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*proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties*'.

<sup>19</sup> N Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *CMLR* 1597.

<sup>20</sup> The Commission has, however, identified the need for a more evidently democratic Union. In 1975, in a report, it was stated that 'complete assimilation with nationals as regards political rights is desirable in the long term from the point of view of a European Union'. See European Commission, *Towards European Citizenship: The Granting of Special Rights*, COM(75)321.

<sup>21</sup> The arrangement between the UK and Ireland is an exception which is, however, unrelated to the Union and it concerns Britain's history.

<sup>22</sup> Dora Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13 *ELJ* 623.

<sup>23</sup> Understandably, this is a wider point and it can lead to a whole different discussion. Why one would choose to vote and especially participate in the electoral procedure of a country of which one is not a resident is a complex topic. Moreover,

The other problem that arises is reflective of the sometimes *à la carte* nature of the Union; although there is a great variety of rights, which cover working conditions, travel, social benefits, and education, EU Citizens are still unable to make an active contribution to the host states. This argument might seem very similar (if not identical) to the previous one, but there is a distinct difference: while the former argument looks at the issue from the perspective of the rights of the individual, the latter takes the host state into consideration in that it acknowledges that there are also benefits for the host states and it is not a matter of merely offering incentives to those who consider exercising their free movement rights. Despite the positive aspects of granting full voting rights and the sheer contradiction between the case-law, the intentions of the Commission, and the spirit of the law, Member States are not considering changing this situation, as the Lisbon Treaty showcases.

The reasons for this can most likely be found in the customary fear of loss of sovereignty and, to a lesser extent, in the practical difficulties inherent in such a reciprocal agreement. As far as the former argument is concerned, it is possible that the constitutions of (some) Member States prevent them from awarding voting rights to non-nationals, rendering, therefore, the fruition of the endeavour in question problematic but by no means impossible. With regards to the latter argument, although the constitutional reality might be difficult to circumvent, the same could (and was) probably said for the reciprocity we now encounter in the field of social benefits and education. The Court has fought hard, and for a considerable amount of time to stop Member States posing either administrative or legal barriers to free movement, and these efforts have proven successful. The same could be applied to the case of the political rights and this would need a change of approach from the current reality of functionalism<sup>24</sup> to a more sentimental approach: Although we are all parts of the internal market, to such a degree that we rarely realise we operate within it, we continue to forget what the Union means to us Europeans

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in an ever closer Union, decisions in one country might affect residents and nationals of another Member State making the possibility of double voting a topic in its own right. However, for the purposes of this paper, the lack of comprehensive voting rights in the country of residence is the important omission.

<sup>24</sup> This is not to say that functionalism and pragmatism are to be dismissed. Indeed, they have their own role to play especially when the Union tries to promote its policies to national governments. As the 2010 crisis showed, countries are reluctant to offer their funds to bankrupt (or failing) economies but it will be easier to present the case for health care and/or effective protection abroad for all EU Citizens, regardless of what this might mean in terms of costs and sovereignty at national level. Admittedly, such an endeavour seems particularly challenging in times of severe economic turmoil when solidarity is a scarce commodity.



and this is also a failure of the institutions to maintain the history of Europe as a continent in the foreground, given the very existence of the Union is based on its continent's turbulent history.

A different lesson that we can learn from the progress in the area of social benefits is that reciprocity is not enough, and this should also apply to the discussion about further, more comprehensive political rights for EU Citizens. Any reciprocal agreement should be coupled with a (reasonable and proportionate) number of duties.<sup>25</sup> Currently, Europeans do not have duties at EU level, apart from general legal principles such as the duty to respect the law of the host state, a principle that is a general attribute of the Law and not a distinct feature of the EU legal order. This lack of duties has not changed even after the introduction of the Lisbon Treaty; normally, this would not be an obstacle as the Court has proven it can interpret the treaties broadly. However, when it comes to duties, the Court will probably consider them to be obstacles to free movement rather than a healthy component of any democracy-based legal and constitutional order<sup>26</sup> and will rarely uphold them. This is particularly worrying in the case of abuse of rights<sup>27</sup> by EU Citizens<sup>28</sup> and it seems that the most prudent solution would be a formal inclusion of duties in a Treaty as the Court would not be wise, or in constitutional terms properly endowed, to replace the legislator and create duties for Citizens.

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<sup>25</sup> Possible duties that have been mentioned include taxation and military service, although the latter might be deemed inappropriate given the nature of the EU, while the former indirectly exists as each Member State pays due contributions to the EU and these are financed (at least partly) by national taxes. See indicatively, AJ Menendez, 'Taxing Europe: Two Cases for a European Power to Tax' (2004) 10 Colum.J.Eur.L 297; Norbert Reich, 'Union Citizenship- Metaphor or Source of Rights?' (2001) 7 ELJ 4.

<sup>26</sup> For a more general discussion on the role of duties in citizenship see R Rubio Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (CUP 2000).

<sup>27</sup> See for instance case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-992. The case did not concern an EU Citizen (but it is nevertheless representative of the argument made above) but a third country national who had been expelled from the UK and subsequently moved to Ireland where she gave birth to a child who bore the Irish citizenship owing to the *ius soli* principle. The UK government argued that Ms Chen used the EU legislation in order to return to the UK but the Court did not accept it although it might as well have been the case. Ireland has ever since modified its law to allow for *ius soli* to operate but only if the parent(s) has been a resident (either permanent or not) of the country for a period of time.

<sup>28</sup> Even if a Member State genuinely believes that another Member State citizen residing in its territory is abusing his or her EU rights for personal gain, the Court will rarely accept it without objective evidential material and will have to embark on an investigation on an *ad hoc* basis.

Contrary to what the notion of citizen means at a national level, at the EU level it was not created to be either independent or reminiscent of the legal status of national citizens. It was created as the amalgamation of an enormous free movement case-law backlogue and for years it was coupled with the fundamental freedoms of the common market, non-discrimination,<sup>29</sup> the right to residence and the principle of equal treatment. However, it has been suggested that owing to the work of the Court, these concepts have gradually lost their blind attachment to market values and, consequently, Citizenship has moved towards the status of a fifth fundamental freedom.<sup>30</sup> This progress notwithstanding, the political rights have not been entirely successful (or inclusive) and the following section shall explore this change in approach and how it is reflected in the most recent case-law.

### III. CITIZENSHIP AND FREE MOVEMENT CASE-LAW: BRAVE NEW APPROACH

#### I. *Early constructions of Citizenship*

The first concept to which Citizenship was tied was that of the nationalities of the Member States which were not to be replaced by citizenship but merely complemented. Therefore, only the bearers of one

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<sup>29</sup> Under the Lisbon Treaty, discrimination is covered by Article 18 TFEU but is not included in the citizenship provisions (although both provisions are under the same title), arguably because non-discrimination has become a basic principle of EU Law and underpins every piece of legislation. It has been argued that the Court has not coherently interpreted EU law by allowing non-discrimination principle to be used even by non-economic actors. However, such an interpretation would be contrary to the objectives of the Union and its internal market. For an example of this criticism see D Martin, 'A Big Step for Union Citizens, but a Step Backwards for Legal Coherence' (2002) 4 EJML 136-144. It is noteworthy that even discrimination is not utterly limitless. In C-138/02 *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703, the Court effectively stated that derogations from the principle might be upheld if evidence arises that suggests that the provision in question has a legitimate aim and the nationality of the litigants is immaterial, but there are other, impartial evidence to be taken into account. This is particularly the case with regards to social benefits, a restricted access to which has been accepted by the Court when it concerns the initial enter to the host state. For instance, the Citizens' Directive excludes social benefits from the benefits EU Citizen may enjoy during the initial 3-month period stipulated by the Directive. In this respect, Member States enjoy a wide discretion.

<sup>30</sup> See Editorial Comments, 'Two-Speed European Citizenship? Can the Lisbon Treaty help close the gap?' (2008) 45 CMLR 1; 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 1.

of the 27<sup>31</sup> nationalities of the EU can benefit from the rights associated with EU Citizenship. The trouble in this is that nationalities, and, thus, national citizenships, are governed by national civil codes, and, thus, decisions to grant or, more importantly for this argument, remove one's nationality rests with the Member States. Although this is not unreasonable or uncommon in and of itself, the problem will arise when someone is deprived of his or her national citizenship, they will have no opportunity to use their European rights,<sup>32</sup> and, given the authority Member States still have on issues of civil law, invocation of the principle of proportionality may not be an option for the Court, especially if the case concerns a wholly internal situation. It would take a very radical and bold Court to challenge this particular division of powers.

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<sup>31</sup> The case of the 12 new Member States is interesting as, prior to their accession they had to rely upon European Agreements. The case-law that concerns the new states is still limited and it mostly concerns cases that arose while the new states were under the preparatory regime which would allow them to adopt the *acquis communautaire*. See C-162/00 *Land Nordrhein-Westphalen v Beata Pokrzeptowicz-Meyer* [2002] ECR I-1049; C-348/00 *Deutscher Handballbund v Maros Kolpak* [2003] ECR I-4135; C-257/99 *R v Secretary of State for the Home Department ex parte Julius Barkoci and Marcel Malik* [2001] ECR I-6557. These cases dealt with the direct effect of the non-discrimination provisions for the nationals of the Member States which were preparing their accession. Although these Agreements did not provide the right to free movement, they did provide better cover to nationals of the 12 who were already residing in the EU. Equally important is C-327/02 *L.G. Panayotova et al v Minister voor Vreemdelingenzaken en Integratie* [2004] ECR I-11055, which established the right to establishment, albeit in a preliminary version which covered only those who, upon entering an EU Member State could be self-sufficient. After the EA's, the treaties that provided for the free movement rights in the new Member States were the Accession Treaties, which gave free movement rights to 10 of the new Member States after a transitional period of 7 years (Malta and Cyprus were excluded). This transitional period was established with the insistence of Germany and Austria, but it is still morally questionable that such long periods had to apply. These restrictions expired in May 2011 and, consequently, we have yet to grasp the effect this will have on the labour markets of the 'old' Member States but judging from the relatively low number of Europeans who exercise their right to move in order to work in another Member States, these effects should not be grave. It is, however, noteworthy, that the transitional rules for students allowed them to work, for a limited period during their studies in a Member State other than their own, as long as they were not workers under Article 39 EC (now 45 TFEU) in which case the host state retained the right to apply national measures. Despite these restrictions, which were inserted for political reasons, it seems that providing citizenship rights (even in a more limited incarnation) was a very plausible way to insert a certain feeling of 'Europeanness' to the new States.

<sup>32</sup> The situation between the two distinct types of citizenship is more complicated than that as the citizenship of the Union still affects how Member States grant or remove their citizenships (see C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239; C-135/08 *Rottman v Freistaat Bayern* [2009] ECR 0000; and *Chen and Zhu* (n 27), but, nevertheless, national citizenships have priority.

It could be argued that national citizenships are not as important when exercising EU rights. Ever since the first transitional period to implement the EEC Treaty ended, job-seekers have enjoyed rights related to social benefits, access to employment, residency and education, owing to the adoption of secondary legislation. Additionally, the Court expanded the scope of non-discrimination in order to ensure that 'Community law [...] is based on the freedom of movement of persons, and, apart from certain exceptions, on the general application of the principle of equal treatment with nationals'.<sup>33</sup> The degree of solidarity afforded by the Court to job-seekers and workers<sup>34</sup> in terms of access to employment and benefits but also residence without the need to pursue an economic activity has been surprisingly high for a supranational organisation such as the EU, but despite all these Union citizenship is still attached to its national counterparts and the latter have traditionally been outside the scope of equal treatment.<sup>35</sup> Claiming, however, that national citizenships are obsolete would be premature partly because there is a lack of a constitutional basis to such a claim given the wording of Article 20 TFEU regarding the relationship between national and European citizenships; and partly because Member States still have the right to protect their heritage and national idiosyncrasies and these would include citizenship.

Citizenship, however, is also attached to the right of residence. When the Community realised that a political union was also necessary if the European project was to be fruitful, it covered residence issues with three Residence Directives which included non-economic actors in their personal scopes. Of course, these provisions were not without reservations, whether these came in the shape of public policy derogations or in that of economic conditions related to income and insurance, but they were inserted in the treaty texts to avoid potential welfare tourism; the Court has been sufficiently protecting free movement rights from abuse and disproportionate measures to restrict them. More importantly, the Lisbon

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<sup>33</sup> 8/77 *Sagulo* [1977] ECR I-1495.

<sup>34</sup> At a later stage of European integration this list included also students, persons of independent incomes, and tourists. These inclusions have loosened the connection between the market and the free movement provisions.

<sup>35</sup> See C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691; C-274/96 *Criminal Proceedings against Bickel and Franz* [1998] ECR I-7637; see RW Davis, 'Citizenship of the Union... Rights for All?' (2002) 27 *ELRev* 121; RCA White, 'Free Movement, Equal Treatment, and Citizenship of the Union' (2005) 54 *ICLQ* 885. Access to employment in the public services remains one of the most indicative examples of this discrepancy (see Articles 45(4), 51; and 62 TFEU). A less striking example is the reluctance of the Court to recognise war benefits to EU Citizens who are claiming them from countries for which they did not fight during the War, although given the degree of solidarity and union in modern-day Europe this is peculiar.

Treaty has changed the constitutional basis of the right as it is now granted by a Treaty Article (see Article 21 TFEU) and not by secondary legislation. This elevation, combined with the 2004 Citizens' Directive,<sup>36</sup> presents a good opportunity for further association of Citizenship with residence; it would be much more substantive to couple these two concepts together than maintain the current configuration as the residence and Citizenship are both EU concepts and the former 'would strengthen the feeling of union citizenship and is a key element of promoting social cohesion, which is one of the fundamental objectives of the Union'.<sup>37</sup>

As a conclusion, no matter how strictly the Court interprets the provisions on expulsion owing to matters of public policy or how liberal the residence requirements and mutual recognition of qualifications are, national citizenships can be revoked and so can EU rights as a consequence of this. A decoupling of the two notions would greatly ameliorate citizenship both substantially and conceptually as it would give it a more European aspect and would add protection from national actions against EU citizens while it would also achieve a better balance between the need to allow for more regulatory independence at a national level and a more meaningful concept at the European level. Such an arrangement would also resolve the problem that arises when job-seekers apply for benefits;<sup>38</sup> although citizens who are employed (*travailleurs*) have equal access to social benefits, unemployed Citizens (*citoyens*) may not be covered so comprehensively because they are not economic actors. This distinction provides an additional argument to those who claim that being a worker is currently better than being a citizen. A further argument could be added to this and which is the material scope of non-discrimination which is not without boundaries, especially in term of areas that are under the exclusive jurisdiction of the host state, such as public posts where non-discrimination cannot fully

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<sup>36</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC OJ L 158.

<sup>37</sup> Citizens' Directive Recital 17.

<sup>38</sup> It has been suggested that citizenship at EU level is an ever-expanding field, both owing to how it has been constitutionally construed and to practical reasons related to its nature, and, thus, it should remain bound to its national counterpart as the latter tends to become weaker as European integration proceeds. Although this argument does seem reasonable in the light of the interdependent powers in EU's constitutional reality, a bold movement towards an independent concept with Community rather than nationally-derived meaning would provide EU movement rights with a momentum they currently lack.

operate.<sup>39</sup> It is then a matter of choosing the form which the new citizenship should take after the addressing of the two elements of deficit cited above.

## 2. *The new approach to citizenship*

The aim of this section is not to provide potential solutions to what the new citizenship concept will be but to present the basis of such a discussion by examining recent case-law, which seems to be improving the citizenship dynamics, and the new approach of the Court in the cases of wholly internal situations. The latter might indicate an effort to create a nucleus of citizenship rights entirely independent from economic activities or even from intra-border movement. This set of cases will be examined alongside another trend, that of basing the notional reasoning on citizenship (via its sister right to residence) while maintaining the free movement provisions as a (arguably more influential) legal basis. Therefore, almost two decades after its introduction, mixed messages are sent with regard to the status of citizenship: although it has progressed sufficiently enough to be mentioned in the case-law as the sole reason behind the granting of more rights, it still needs the support of the free movement provisions.

### a. The abandonment of the wholly internal rule

One of the categories under which the free movement case-law can fall concerns the cases of litigants who initiate actions based on EU legislation, but their contextual details have few, if any, actual links to intra-border movement. In these cases the Court would refrain from passing a judgment as it would consider that they lack satisfactory connection to EU law or that the mainly economic subtext of the Treaty and secondary legislation was not related to the situations discussed.

One early example of this was case *Ritter-Coulais*,<sup>40</sup> where the defendants were working in the Member State of which they were nationals (Germany) but had moved their permanent residence to another Member State. Mr and Mrs Ritter-Coulais requested that the loss of income they suffered as a result of owning a house be considered for the calculation of

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<sup>39</sup> F. Wollenschläger makes a related point: he cites the possibility to expel an EU Citizen from a Member State which is still permissible under the Treaty but it seems as an extreme example mostly because practically it would be hard to implement mostly owing to the Court's approach to proportionality. However, it is indeed peculiar that the right to expel a Citizen is still present in primary law provisions even if its implementation is harder than the wording suggests. See Wollenschläger (n 30).

<sup>40</sup> C-152/03 *Ritter-Coulais v Finanzamt Gemersheim* [2006] ECR I-1711.

the tax they should be paying under German law. The German authorities did not accept this as there was no positive income gained from immovable property in another Member State. The Court held that this case had sufficient ties with the Union law as the defendants were exercising their free movement rights, regardless of the non-economic nature of his movement. This might not appear strange at first given that there is a degree of intra-border movement and the example of frontier workers has been found to fall within the Court's competence<sup>41</sup> but the defining element is the fact that the economic activity, on which the internal market is based, was performed in the Member State of origin. Traditionally, in order to invoke EU legislation the movement of a production factor is needed<sup>42</sup> but in this case the Court was happy to effectively dismiss its previous rulings according to which the intra-border movement took place with a view to pursuing an economic activity.<sup>43</sup> The Court addressed the relevance of the case to the Union legislation and it appeared to suggest that any movement in order to take up employment falls within the scope of EU legislation, a reasoning that has attracted attention as legally incoherent owing to the discrepancy between the wording of the judgment and the conclusion which was reached.<sup>44</sup> A more important problem is the fact that the details of the case relate to 1987, prior to the introduction of the Maastricht Treaty and the inclusion of Article 18 EC regarding free movement. Therefore, the Court was expected to follow the *Werner*<sup>45</sup> precedent but did not.

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<sup>41</sup> There was no reason to suggest that this case concerned a frontier worker as in such cases the country where the task is performed tends to differ from the country of origin, not the country of residence. However, it had been found that such daily commutes could not be left outside the jurisdiction of the Court for any good reason, not because of the need to protect the commute itself, but, rather, owing to the Court's determination to remove any obstacles which might deter people from exercising their right to move.

<sup>42</sup> Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (2<sup>nd</sup> edn, CUP 2007).

<sup>43</sup> See C-293/09 *My v ONP* [2004] ECR I-12013; C-115/78 *Knoors v Secretary of State for Economic Affairs* [1979] ECR 399, which was the first case to establish the Court's conduct in such cases.

<sup>44</sup> Alina Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?' (2009) 46 CMLR 1591; D Martin, 'Comments on *Ritter-Coulais* (Case C-152/03) of 21 February 2006 and *Ioannidis* (Case C-258/04 of 15 September 2005)' (2006) 8 EJML 231.

<sup>45</sup> See C-112/91 *Werner v Finanzamt Aachen-Innenstadt* [1993] ECR I-429. This case concerned a German national who resided in the Netherlands and lived in Germany. The case arose owing to different tax regimes but the important element is that the Court acknowledged that this case would be treated as a purely internal situation had it not been for the movement of Mr Werner to the Netherlands. However, given that this case's circumstances took place prior to the Maastricht Treaty, the Court said that the legislation in force at the time did not justify extending its personal

Another case of reverse frontier worker was *C-527/06 Renneberg*,<sup>46</sup> where a Dutch national who worked in his state of origin but lived in Belgium was denied the right to have his rent in Belgium considered for tax allowance purposes given the purely internal situation of the case, according to the Dutch arguments. According to the Court, however, the claimant fell under the scope of Article 39 EC (now Article 45 TFEU) owing to the outcome the opposite view would have on the freedom to move to one Member State while still having ties with another. It seems that whether the state where the economic activity is pursued is also the state of origin is immaterial for the purposes of defining the scope of EU legislation on free movement.

A similar reasoning was followed in *C-227/03 A.J. van Pommeren-Bourgondiën*,<sup>47</sup> during the proceedings of which the *Ritter-Coulais* case was cited; in this case, a Dutch national who had spent her entire working life in the Netherlands but resided in Belgium was found eligible for insurance in the Netherlands despite her not residing there. The Court's justification was that the opposite would constitute discrimination and would hinder free movement. It is interesting that the Court did not endeavour to explain how the case fit within Union law<sup>48</sup> but this could have been because it realised the importance of making the abolition of borders more substantive. Given that in certain areas the EU operates as a quasi-federation, allowing its citizens to work and reside in different Member States would be a natural implication. It is arguably true that the Court did not entirely change its stance: it still required certain conditions to be met, specifically that an intra-border move takes place and that an economic activity is pursued; the difference in the new approach was that these two actions no longer needed to be connected.<sup>49</sup>

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scope to include Mr Werner's claim. Interestingly enough, in the case of *Ritter-Coulais*, Mrs Ritter-Coulais was of dual nationality and the Court could have used this detail to support its argument and avoid the criticism, but did not make use of this opportunity.

<sup>46</sup> *C-527/06 R.H.H. Renneberg v Staatssecretaris van Financiën* [2008] ECR I-07735.

<sup>47</sup> *C-227/03 A.J. van Pommeren-Bourgondiën* Raad van bestuur van de Sociale verzekeringsbank [2005] OC C 171.

<sup>48</sup> The Court did state that the Dutch legislation 'undermines the principle of free movement secured by Article 39 EC'; the only problem with this statement was that this particular provision could not have been applied to the claimant as it did not exist when the facts of the case took place.

<sup>49</sup> See also *C-544/07 Ruffler v. Dyrektor Izby Skarbowe* [2009] ECR I-3389 where a German national, recipient of two pensions, moved to Poland where he planned to reside without taking up employment. He paid income tax in Poland and applied for his insurance contributions to be factored in so he could pay less tax; these contributions, however, had been paid in Germany during his working life and



In *C-212/05 Hartmann*,<sup>50</sup> a German national who worked in Germany but moved to Austria in order to be with his wife applied for child-rearing allowance which was denied because he was not a resident of Germany. The Court did not uphold this ban because Mr Hartmann was, for the purposes of this case, a frontier worker and thus eligible for such an allowance.<sup>51</sup> A similar line of reasoning was followed in *Hendrix*,<sup>52</sup> where a Dutch national was the recipient of a disability allowance, which was discontinued when he moved his residence to Belgium, although he retained his status as a worker in the Netherlands. The Court again did not accept the arguments of the Dutch authorities, according to which residence in the Netherlands was a prerequisite for the granting of the said allowance.

The Court seems to be abandoning the wholly internal situation rule for the sake of a more comprehensive protection of free movement. It also seems that there are only two conditions that need to be met for the Court to initiate action and these are the pursuit of an economic activity and intra-border movement. Despite the somewhat dubious reversals of previous rulings, there are positive attributes that should not be undermined by negative comments on the potential inappropriateness of the Court's judgment. Although the early case-law did offer a qualified right to free movement, the introduction of citizenship and the consequent evolution would not be compatible with the need to meet both requirements mentioned above in the same way the Court had suggested in the past. A new element is that these two conditions do not have to be linked and, thus, the economic activity in question may take place in one's state of origin; the EU legislation will still be applicable irrespective of the fact that the move might take place for personal (relocation) rather than economic (a job abroad) reasons. This is a notable departure from the initial construes of the free movement rights, according to which a movement had an economic rationale first and foremost. Of course, over the years the Court and the Union have recognised that a right to residence would logically complement the right to free movement but this decoupling of the right to residence and an economic activity is an

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Poland refused to take them into consideration. The Court did not uphold its refusal since it constituted discrimination and also put those who exercised their free movement rights in a disadvantaged position.

<sup>50</sup> *C-212/05 Gertraud Hartmann v Freistaat Bayern* [2007] ECR I-06303.

<sup>51</sup> The Advocate General based her reasoning on Article 18 EC (NOW Article 21 TFEU) rather Article 39 EC (now Article 45 TFEU) and Directive 1612/68 as the Court did but it has been suggested this has been a legally incoherent application of the law as Article 18 was not applicable *ratione temporis*.

<sup>52</sup> *C-287/05 Hendrix v Social Security for Migrant Workers* [2007] ECR I-06909.

indication of a better form of citizenship.<sup>53</sup> The Court has been particularly active in its endeavours to offer a new interpretation of free movement by arguing for an independent notion of citizenship, possibly in order to strike a balance between market freedoms and social Europe, a balance which can be elusive.

Similarly, in *Schwarz*<sup>54</sup> the Court addressed the issues created owing to a German provision according to which school fees could be taken into consideration for tax deduction purposes but only if the said schools were situated in Germany. The Court found this requirement unlawful as it constituted a potential barrier to free movement. The same reasoning was followed in *Morgan*,<sup>55</sup> where according to a German law, in order to acquire a grant to pursue studies or training in another Member State, the said further studies had to be in continuation of a degree undertaken in Germany. In both cases, the nationals who were affected would be exercising their rights to free movement for educational purposes, namely a non-economic activity. Therefore, the Court once again stripped the free movement from the economic requirements and brought it in line with the citizenship provisions.<sup>56</sup>

However, the Court's approach has not been entirely unproblematic. Although the residence provisions (Article 25 TFEU) are mentioned in the case-law, they tend to be read in conjunction with Article 45 TFEU, which covers the economic freedoms. More worrisome is the fact that the claimants in some of the cases above never, strictly speaking, exercised the

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<sup>53</sup> This departure, it has to be noted, is not the outcome of *Ritter-Coulais*. The AG in the seminal case of C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091 had suggested that there is a right to residence even if the pursuit of an economic activity has moved to another state, although the residence provisions were combined with those of free movement for economic purposes. Nevertheless, it shows how gradual a process the evolution of citizenship rights has been.

<sup>54</sup> C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I-06849.

<sup>55</sup> See joined cases *Rhiannon Morgan v Bezirksregierung Köln* (C-11/06) and *Iris Bucher v Landrat des Kreises Düren* (C-12/06) [2007] ECR I-09161.

<sup>56</sup> These two cases along with C-224/02 *Pusa Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I-05763; C-406/04 *De Cuypter v Office national de l'emploi* [2006] ECR I-06947; and C-192/05 *Tas-Hagen v Raadskamer* [2006] ECR I-10451 are a testament to the Court's efforts to ensure the independent enforceability of the Citizenship provisions by decoupling them from the non-discrimination principle. In *Tas-Hagen*, for instance, the Court reversed previous rulings on war benefits and decided that they can be granted even when they fall outside the scope of Article 12 EC regarding discrimination (now Article 17 TFEU). Under the Lisbon Treaty these two principles are grouped but when these judgments were delivered the Court tried to interpret the law in such a way as to give citizenship more legal weight.

right to free movement of workers; they only moved to reside in another Member State, which is a citizenship right, valid since 1993. Although the former is understandable in the cases where Article 25 was not still in effect, the Court seems to prefer the safety of using the freedom of movement provisions in order to make its reasoning more substantial, or more 'airtight'. This practice seems to undermine the increasing importance of citizenship and its undeniably positive effects on EU rights that were not explicitly covered by the Treaties<sup>57</sup> and it calls for a different construction of the relevant rights. The latter situation is further testament to the relevance of such a readjustment. It is still true that the rights of a migrant worker can be suspended, albeit with considerable difficulty as there is little room for maneuver, unless there is an attested act that may affect public security, safety, or health; conversely, an individual who relies purely on their residence rights would have to face additional scrutiny as the Citizens' Directive still speaks of the need to avoid becoming an unreasonable burden on a state's social systems.<sup>58</sup> It is my conviction that the practical implementation of the strictest elements of the provisions would be difficult and probably disproportionate. Therefore, although 'mere' residents seem to be under a thinner legal regime than their workers counterparts, the end result may be the same. Additionally, the cases above concern areas which are not harmonised and in which Member States still have almost absolute freedom: taxation and non-contributory social benefits.<sup>59</sup> This is another argument in favour of further integration as such cases will continue to arise for as long as we have free movement rights in the EU, and the Court might again face a case which will result in the adoption of a legally questionable judgment in which the Court or its Advocates General consider the substance of the

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<sup>57</sup> See job-seekers, students, pensioners, and persons of independent means. Their legal status is much better now but this is owing to the work of the Court and the introduction of Citizenship.

<sup>58</sup> This could also be a problem for an individual who relies upon their free movement rights but has found themselves without employment and thus fails to meet the requirements of Article 45 TFEU. However, it is arguable that this would pose fewer problems in practical terms than the wording of the provisions suggests, partly because said individual would have already worked in the country and would have been able to extend their residence if they could prove they had been looking for a new job or, they would have been in possession of the necessary means to survive on their own (an additional safety net is provided by the Court's view that being asked to provide evidence for such claims would be a disproportionate requirement); and partly because there would have been the possibility to acquire the status of permanent resident of the host state after a 5-year uninterrupted residence. Moreover, one could also prove they have successfully integrated in the Member State in question, not to mention the practical difficulties in justifying expulsion.

<sup>59</sup> This is particularly relevant in the post-enlargement EU and especially as the transitional period has finally expiring (for the 2004 accession).

question and the potential impact on free movement rather than the strict constitutional basis of the judicial review they will be performing.<sup>60</sup>

Another criticism of the new approach of the Court suggests that it has been maximising the personal and material scopes of the free movement provisions to such an extent that one would wonder why EU citizens who do not exercise the right to move at all should not be included.<sup>61</sup> Although this would resolve the issue of reverse discrimination, it does seem a step too far and an unfair and disproportionate criticism of the Court. What the Court has done is interpret the provisions in a teleological fashion and apply the law in order to give it the substance the legislator intended. It is not for the Court to act as a legislative body and it has refrained from doing so; rather, its endeavours reflect its role of interpreting and reviewing the implementation of EU law and it seems logical that it has been providing those who exercise their free movement rights with more comprehensive cover, regardless of the economic action pursued. The Union is indeed based on a common market but a political union is not beyond its scope.<sup>62</sup> Quite the contrary, in fact, as ambitions for wider integration have been present ever since the very beginning of the Union and the Court is wisely factoring this in its decisions. However, as noted above, the Court should have used the residence and citizenship provisions as a legal basis (where that was possible) and not Article 39 EC (now Article 45 TFEU), as this practice denotes that the former provisions lack the legal weight of the latter.

This section focused on a new tendency to revisit the established *modus operandi* which governs the purely internal situations and their relevance (or lack thereof) to EU law, which is used as a test by the Court to decide whether a case falls within its jurisdiction. This, however, is not the only new approach which questions the outer limits of Citizenship; two more

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<sup>60</sup> AG Leger, for instance, acknowledged the *Werner* precedent while discussing *Ritter-Coulais* but also said that the case-law has been assessing the impact of cases that appear to have little, if any, actual connection to EU Law and may be discriminatory to workers (even if the claimants are not actually workers for the purposes of Article 45 TFEU).

<sup>61</sup> Tryfonidou (n 44).

<sup>62</sup> It is true that the wording of the free movement articles has not changed much since the 1950s but this is only one side of the argument. Ever since the ECSC Treaty, other articles have been added, including those regarding residence and citizenship, while secondary legislation has covered groups such as students, who have been deemed beneficial for a better European integration irrespective of the fact that they perform no economic activity. Reading the articles without considering the temporal context and the efforts in other types of legislation in order to prove the Court's imprudence tells only half the truth.

recent cases, *Ruiz-Zambrano*<sup>63</sup> and *McCarthy*<sup>64</sup> also gave rise to a debate about the future of Citizenship and the departure from rules, such as the purely internal situation and the need for an intra-border movement to take place in order to trigger the application of EU law. *Ruiz-Zambrano* referred especially to a new European space, while *McCarthy* is a more limited application of the principles established in the former case but, nevertheless, establishes a new trend which may be used in future Citizenship cases.

b. A new, autonomous European space for Citizenship in the CJEU case-law

The judgment for the *Ruiz Zambrano* case was delivered only a few months ago in April 2011; the case concerned a Colombian national who left his home country and moved to Belgium where he applied for asylum. Although his application was rejected, he remained in Belgium in order to appeal against the initial decision, found employment and, in the meantime, his wife gave birth to two children. These children, by virtue of having been born in Belgium and in order to avoid rendering them stateless, were registered as Belgian nationals and, therefore, became EU citizens. When Mr Zambrano and his wife failed to win their appeal, they were unable to work and applied for unemployment benefits; their application was rejected and they initiated legal action and the case was subsequently referred to the CJEU.

The case is reminiscent of *Zhu and Chen*,<sup>65</sup> where a non-EU national was granted the right to remain in the Union because her daughter was born in Ireland and, although the UK had previously tried to deport her, this would have resulted in also deporting the baby who was an EU citizen. This finding was affirmed in *Ruiz Zambrano* and expanded as there was a material difference; in the Belgian case, there was no intra-border movement. The young children, upon whom the parents's right to residence was based, had never left Belgium, but, nevertheless, the Court found that any measures which deprive EU citizens of their rights are against EU law (in this case, deporting the parents would constitute such a measure). Moreover, another qualification added by *Zhu and Chen*, that regarding the parents's financial independence was removed.

The important elements of the case are threefold: one concerns the right

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<sup>63</sup> C-34/09 *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-00000.

<sup>64</sup> C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-00000.

<sup>65</sup> C-200/02 *Zhu and Chen* (n 27).

to residence conferred to parents via their children's status of EU citizen; the other is the lack of intra-border movement, which seems not to be needed in order to trigger the application of the Citizenship rights; thirdly, the judgment refers to a new European space and a new European territory, which is more than the sum of the territories of the Member States. The first element is important because it recognises an independent feature of Citizenship: one can invoke one's rights simply by being an EU citizen, without the need to pursue an economic activity and without the need to have exercised their free movement rights, which is the second element of the judgment. In the past, the Court would look for an intra-border movement to establish a connection to EU law but, according to recent case-law, citizenship seems to be a bearer of rights in and of itself. This is indirectly relevant to the third point identified above, regarding the new European space. In the first years of Citizenship, one would talk about a type of European integration which would work at a transnational level, namely among the Member States and, especially to those involved in the intra-border movement, which would trigger the application of EU law.

However, the *Ruiz Zambrano* judgment has given rise to a debate on the meaning of 'European space'. According to the Court, this European territory is more than a geographical reference and it denotes an area of rights, a common identity, and European values. Therefore, the Court is approaching the founding ideals of personal fulfillment and the amelioration of one's wellbeing by referring to rights which are applicable to individuals who are physically in the Union, without the need for an intra-border movement<sup>66</sup> or the exercise of an economic activity (or even the need to be financially independent). In many ways, one can see in *Ruiz Zambrano* the principles first established in the earlier case of *Rottman*;<sup>67</sup> Citizenship was referred to as providing independent rights to its beneficiaries and was regarded as a source of rights. Contrary to previous decisions, Citizenship should now be protected in order to protect the

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<sup>66</sup> Interestingly, the preamble of Directive 2004/38 does mention that citizenship is to be the fundamental status of the EU citizens when they move to another Member State but the Court chose to use Article 20 of the Treaty as a legal basis for the judgment rather than the Directive.

<sup>67</sup> C-135/08 *Rottman v Freistaat Bayern* [2009] ECR 0000. The case concerned an Austrian national who moved to Germany after a case of fraud had been initiated against him in Austria and acquired the German nationality. He did not disclose his dealings with the Austrian authorities and when the German authorities discovered the case which was pending against him decided to remove his nationality. This would have rendered him stateless. The Court did agree with Germany's decision but it demanded the proportionality principle be respected in order not to disadvantage him by rendering him stateless. It was, however, up to the Austrian Courts to decide whether his nationality could be reinstated.

rights to which it gives access and the European identity which it helps to create.

However, the reasoning of the case was not repeated in an otherwise very similar instance, in *McCarthy*. Ms McCarthy was a resident of Northern Ireland who held dual British and Irish nationality. She had never left Ireland or taken up employment and was relying upon state benefits. Following her marriage to a Jamaican national who had no valid residence permit for the UK, she tried to use her own residence rights to make a case for her husband by acquiring an Irish passport. The Court found that she could not benefit from EU legislation because she had never exercised her free movement rights and the Court also referred to the *Ruiz Zambrano* case but failed to find any parallels between the cases as in Ms McCarthy's case, her situation did not prevent her from enjoying her citizenship right fully. Moreover, the decision of the British court, which referred the case to the CJEU, did not mean that she would be expelled from the territory of the Union, as was the case with the Zambrano children.

It appears from the case-law presented above that *McCarthy* and *Ruiz-Zambrano* are uncomfortable bedfellows and the latter has a limited exportability, which would only apply to the situation of a carer. However, this might be a premature statement given the tendency of the Court to approach every case in a different fashion, depending on the material details of each situation and the *ad hoc* assessment of each case's circumstances. Therefore, it is not improbable that the Court will use the above reasoning again. What is of importance is to ensure that the Court has the necessary constitutional basis upon which to base its decision. The final section will focus on the suitability and potential of the Treaty of Lisbon to act as the said legal basis.

#### **IV. THE CONSTITUTIONAL RELEVANCE OF A NEW FORM OF CITIZENSHIP**

The previous sections have examined the political aspect of Citizenship and its ties with the pursuit of an economic activity and have identified a number of solutions that could make the concept more meaningful and relevant to Europeans of today, especially given the low degree of integration in specific areas or policy. However, there is another element that needs to be factored in any effort to move towards a new Citizenship: the constitutional basis upon which it will be built. The Treaty of Lisbon is still fairly recent but it can provide the said basis for any new endeavours to re-assess and revisit citizenship and also can provide for more social (and, eventually, political) rights which could form the building blocks for citizenship 2.0.

### 1. *First signs of change*

The case-law of the Court comprises cases where Citizenship rights are deemed to be independent and cases where they are so in theory but not in essence. Despite this dichotomy, steps towards a more substantial concept can be identified and, in conjunction with the social aspect which is becoming more prominent, one can identify the premise of the efforts to offset the effects of liberalisation of services and employment in the EU. For instance, the Court was following the letter of the law when it delivered the judgments for *Laval*<sup>68</sup> and its progeny but it had its victims, in the form of the social character of the Union. Therefore, EU Citizenship has the potential to be used as a means to counterbalance this and the Treaty of Lisbon may provide the necessary constitutional ground for such an endeavour.

In fact, a very good case in point is the evolution of the case-law from the four Posted Workers' Directive (PWD) cases to the most recent one, *Santos Palhota*;<sup>69</sup> *Viking*<sup>70</sup> and *Laval* were two cases regarding industrial action and its lawfulness under EU Law. In the former case, a Finnish company running ferries between Finland and Estonia wanted to reflag one of its ships in order to lower running costs, prior to Estonia's accession to the EU. The Finnish Seamen Union (FSU) threatened with industrial action while the International Transport Workers' Federation (ITF) participated in the negotiations regarding the ferry's crew and demanded that the ferry be governed by Finnish law even after the re-flagging. This proved unsuccessful and negotiations were halted after an ITF circular to that effect. After Estonia joined the EU the negotiations resumed without success, and *Viking* referred the case to the English courts. In *Laval*, a Latvian firm won a commission for a construction project in Sweden and the Swedish unions wanted to ensure that the workers whom *Laval* would post to Sweden would be entitled to all their rights under Swedish law. *Laval* was not willing to agree to all suggestions made by the builders' union and the latter blocked *Laval*'s construction site. Other unions joined in solidarity and in the end *Laval*'s Swedish branch declared bankruptcy.<sup>71</sup>

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<sup>68</sup> C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet avd. 1 Byggettan and Svenska Byggnadsarbetareförbundet Elektrikerförbundet* [2007] ECR I-11767.

<sup>69</sup> C-515/08 *Criminal Proceedings Against Santos Palhota and Others* [2010] ECR I-00000.

<sup>70</sup> C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779.

<sup>71</sup> The PWD quartet also includes C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-01989 and C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* [2008] ECR I-04323 but, for the purposes of this paper *Viking* and *Laval* are more relevant. The reader is reminded that *Commission v Luxembourg* concerned the transposition of the Directive in the Luxembourgish legal order; while *Rüffert*



In both these cases, the thorny issue concerned the right to strike. Although the Court did recognise the right as being fundamental, it also pointed out that it can be a barrier to free movement and, thus, subject to judicial review and the proportionality test. Furthermore, and maybe more importantly, the Court also acknowledged the need to safeguard the right to strike in the battle against social dumping and the unpleasant effect of an open market based on competition; however, it stated that a minimum of standards could be provided for and this would be sufficient protection of fundamental working rights.<sup>72</sup> Neither of these cases has been welcomed but it could be argued that the Court was actually using its long-established teleology to interpret the then current legal status quo.

Since then, however, the Treaty of Lisbon has come into force and another case, the aforementioned *Santos Palhota* case, was referred to the Court. The case concerned a Portuguese company posting workers to Belgium and the national regulations by which it had to abide. According to these rules, the Portuguese company had to produce specific documents for the social protection of the workers involved in the posting, whereas it also had to set up accounts for the payment of wages. It was the view of the company in question that the Belgian requirements were an obstacle to free movement of services. The Advocate General found that the case should be seen through a constitutional light and he based his opinion on the Treaty provisions rather than the PWD. As a consequence, he suggested that owing to the new constitutional reality, social values and the protection of workers cannot be deemed to be contrary to the market-based aims of the Union; rather, they have equal standing and the manner in which they are treated should reflect this. The Court agreed with the essence of AG's points but did not pay the same attention to the constitutional debate he opened.

Why the Court chose to do this is not exactly clear; maybe it felt it was

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concerned minimum wages in a Land of Germany which differed from the minimum wages applicable elsewhere in Germany.

<sup>72</sup> The literature on the PWD case-law is vast and not all issues attached to the cases can be covered here. Indicative reading includes See ACL Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 ILJ 126; C Joerges and F Rödl, 'Informal Politics, Formalised Law, and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' (2009) 15 ELJ 1; Barnard, 'Social dumping or dumping socialism?' (2010) 67 CLJ 262; Barnard, 'The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law' (2009) 38 ILJ 122; P Davies, 'The Posted Workers Directive and the EC Treaty' (2002) 31 ILJ 298; Nicole Lindstrom, 'Service Liberalisation in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?' (2010) 48 JCMS 1307.

not constitutionally endowed to act as the legislator as it is the responsibility of the drafters of new treaties to set the aim of the primary law documents of the Union. In any case, *Santos Palhota* may become the basis for more judgments with a bias towards the social aspect of the EU; similarly, if the above reasoning is applied to the case of Citizenship, the Lisbon Treaty may be able to justify a new stance on Citizenship rights with a gradual move towards a more independent configuration. The next section will focus on changes in the Treaties which may help with such a departure.

## 2. *How could Lisbon bridge the gap*

Although no major amendments were made in the wording of the Citizenship provisions, the structure of the Treaty on the Functioning of the European Union led to grouping of the citizenship and non-discrimination provisions and extended their scopes to include the entire Area of Freedom, Security and Justice,<sup>73</sup> owing to the abolition of the pillar structure, first introduced by the Maastricht Treaty.<sup>74</sup> Similarly, the right to residence is part of the citizenship rights, which in turn means that economically inactive persons have a right to free movement granted by primary law and not by *ad hoc* secondary law provisions. Another problem which has been identified is the gap between social Europe and the market. One of the solutions suggested concerned a shift in priorities or, at the very least, better efforts to balance conflicting priorities such as fairer social rights and economic advancement. The Treaty of Lisbon seems to have addressed that by the insertion of a provision regarding services or general economic interest<sup>75</sup> and the removal of the old reference to ‘free and undistorted competition’.<sup>76</sup> Rather, the Lisbon Treaty now makes reference to a social market economy, which might sound like an oxymoron but demonstrates the Union’s wish to retain the social character for which European welfare states are known, but also to invest in open market policies in an increasingly competitive

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<sup>73</sup> Equally, the jurisdiction of the Court now covers the entire Area of Freedom, Security and Justice.

<sup>74</sup> Editorial Comments (n 30).

<sup>75</sup> See Article 16 TFEU. It should be read along with the EU Charter of Fundamental Rights. These provisions aim at ensuring that all EU citizens live in a socially advanced Union where the negative effects of free competition are not left unaddressed.

<sup>76</sup> This reference was not entirely omitted; it can still be found in a Protocol on the internal market and competition. The Protocols attached to the Treaties carry the same legal significance but the omission from the text of the main Treaty might be more symbolic than it seems.

environment.<sup>77</sup> If these changes seem to be less than substantive and mere changes to the wording, one has to remember that the institution trusted with the interpretation of the Treaties, the Court has proven to be a liberal and radical interpreter of the Treaties. Therefore, these changes, minor as they may seem, will be more influential depending on the Court's conduct.

This is not to say that the Treaty of Lisbon introduced only welcome changes. Member States have the right to stop the drafting of a Directive destined to provide social security incentives for free movement if they find it to be against their social security systems. The process may, of course, be resumed but there is the option to do so even if as few as nine Member States reach an agreement, which is a double-edged sword: although such an arrangement will lead to the adoption of a potentially beneficial directive, it will create a fragmented *à la carte* European Union and will jeopardise all the efforts towards a more legally coherent Union. Additionally, and maybe more importantly, the balance mentioned above would appear to be a lost battle, mostly owing to the competences afforded to the European institutions. First of all, the efforts towards a social Europe will always have to be measured against the need to have an open market; this would not be a problem in and of itself were it not for the little independence the Union enjoys in the area of social policy. Industrial relation in the EU Member States are based on at least three different models which rarely converge and when they clash with the EU policies, the results are unwelcome to say the least.<sup>78</sup> This seems like another reason for further harmonisation as, sooner or later, it will become more evident that the dichotomy between social and economic competences is no longer attainable.

The former are covered by articles whose wording has hardly changed and which make reference to 'harmonisation' but also to its exclusion from certain policy areas. Unsurprisingly, Member States retain the right to adopt national laws which are stricter than their EU equivalent, provided the former comply with the Treaties.<sup>79</sup> This requirement probably refers to

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<sup>77</sup> Loïc Azoulay, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation' (2008) 45 CMLR 1335.

<sup>78</sup> A relevant point concerns the legal significance given to the Charter of Fundamental Rights under the Lisbon Treaty and the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The former might not be as important an addition as it seems. The latter addition will mean that the European Court of Human Rights will have jurisdiction over the EU institutions and such a change should prove more substantive.

<sup>79</sup> Phil Syrpis, 'The Treaty of Lisbon: Much Ado... But About What?' (2008) 37 ILJ 219.

the aims of the Treaties (and thus the Union's) and the principles of non-discrimination and proportionality. Therefore, there is scope for judicial review as the Court might be asked to rule on the compatibility of national provisions with EU legislation, prompted either by the Commission or by a Citizen or other legal person; however, this does not change the fact that in order to rule on the said compatibility an action has to be initiated and, more importantly, harmonisation does not become easier as the fragmented state of the EU legal regime is protected.

Notwithstanding these shortcomings, the changes in the Union's aims and objectives reveal a certain bias in favour of social policies and even if this is not particularly outspoken or explicit, the Court will probably take this shift into consideration in its teleological reasoning. Despite reservation expressed over how possible this is<sup>80</sup> the Court has a long story of loyalty to the letter of the law and such an example can be seen in the *Santos Palhota* case mentioned previously. This seed of a new stance towards fundamental freedoms read in conjunction with the Citizenship provision and the emphasis on social provisions afforded by the Lisbon Treaty may provide the latter with a solid constitutional basis and much-needed independence. However, the Court is not a panacea when it comes to finding the necessary ground for an elevated form of Citizenship and a proper constitutional revisiting of the provisions would be a longer-term solution.

## V. CONCLUSIONS

This paper's premise was the evolving nature of the citizenship provisions and their potentially independent construction. The distinction between a citizen as a political entity (*citoyen*) and a citizen/worker (*travailleur*) was a means to paint the picture of ever changing and growing material and personal scopes. The first section focused on the voting rights attached to Citizenship and criticised their limited scope. Despite the fact that the EU is not a state and, thus, cannot be expected to be organised as one, the rule of law and democracy are among its founding principles and this should be reflected in its political arrangements.

The second section of the paper focused on the case-law of the CJEU in order to depict the changing attitudes towards what means to be a citizen of the EU. To do so, the first part presented a series of cases which seemed to signal a departure from the established rules on wholly internal situations, while the second part examined the most recent case-law which takes the aforementioned departure a step farther by revisiting the

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<sup>80</sup> Ibid.

requirements which need to be met in order for the application of EU law to be triggered. This set of cases has been particularly important as it gave rise to a discussion about the new borders of Europe. It is arguable that we are moving towards a less geographical notion of Europe and towards a new construe whereby Europe is regarded as a common space of rights and common values, where EU citizens have rights by virtue of their physical presence in the Union rather than their exercise of free movement rights.

The final part of this paper sought to explore the Lisbon Treaty's potential to form the constitutional basis upon which this new configuration can be based. The first signs of the new approach were evident in the cases presented previously in this paper and, provided the Court follows similar reasoning, one could speak of a new dawn for citizenship, with a more independent character and less reliance upon market values and crossing of borders. Clearly, as *McCarthy* showed, this will not be always the case but, the Court's *modus operandi* relies heavily upon *ad hoc* assessment of facts which means that each case will be judged differently, rather than on a 'one size fits all' basis.

This is where the Lisbon Treaty comes in; given the changes it introduced, and the apt demonstration of said changes in the *Santos Palhota* reasoning (albeit reflected only in the AG's opinion but not in the Court's judgment), the Court could use this as a starting point for a more inclusive version of citizenship. It is indeed too early to talk about more political rights, a lack which the first part of the article noted, but the independence of the Union citizenship is ambitious could act as a catalyst for further change towards an independent source of rights and, maybe given time, a residence-based Citizenship with further political rights in a more democratic Union.