

EU Citizenship: Revisiting its Meaning, Place and Potential

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Abstract

This paper takes a closer look at the legal framework on citizenship of the Union. In particular, it analyzes the amendments that took effect at the end of 2009, due to the entry into force of the Lisbon Treaty. Though at first sight, these seem to verge on the trivial, the present paper engages in detailed scrutiny, and hypothesizes that a more fundamental change may be perceived than is commonly acknowledged. It attempts to map the consequences of this supposed watershed with regard to both EU and third country nationals. Ultimately, it argues that the novel place attributed to the concept extends its reach further than ever before, and supplies it with a massive potential that the European Court of Justice is poised to exploit.

Keywords

EU citizenship; Treaty of Lisbon; Equal treatment; Residence rights; Third country nationals

1. Introduction

“[I]t is through citizenship that communities and identities are constituted. However, the concept of Union citizenship (...) can be enjoyed only by those holding the nationality of one of the Member States. It has therefore not helped the 16 million or so (and rising) third country nationals who are legally resident in the EC.”²

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² Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford: Oxford University Press 2008, p. 410 (footnotes omitted).

The concept of EU citizenship appears to be in a situation of almost permanent flux. In the past years, due to progressive case law of the European Court of Justice (ECJ), the ambit of the relevant provisions has been gradually widening. For the most part, this development has received political backing in the citizens' free movement directive, adopted in 2004.³ It remains uncertain nonetheless whether any further expansion is to be expected, and if so, in which direction. Simultaneously, faint indications of judicial retreat may be observed in recent ECJ jurisprudence. This paper explores the current legal regime underpinning EU citizenship (as amended, due to the entry into force of the Lisbon Treaty⁴), places the legislative and judicial trends in perspective, and outlines the opportunities and dilemmas ahead. Specifically, it attempts to establish whether we find ourselves on the cusp of a new era, where the concept becomes ever more prominent and valuable for litigants – be they Member States' or third country nationals – or rather, whether it may start receding into the background shortly. Ultimately, this paper will adhere to the former position, although of course, as Mark Twain asserted, it is always difficult to make sound predictions, especially about the future.⁵

In what follows, we shall first discuss the relevant Treaty rules, with particular emphasis on the wording of the provisions in their new editing, and the background thereto (paragraph 2). Next, applying a broad-brush approach, the Court's case law of the past decade will be sketched, including some of its surprising and more puzzling twists of late (paragraph 3). In this section also, an apparent and possibly critical tension between Treaty law and jurisprudence will be highlighted and analyzed. In the paragraphs that follow (4 and 5), we zoom in on the tentative ramifications for, respectively, EU and third country nationals (TCNs). At the end of this contribution, as usual, a few concluding observations are made.

2. Scrutinising the Post-Lisbon Legal Framework

³ *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*, OJ 2004, L 158/77, as corrected in OJ 2007 L 204/28.

⁴ In accordance with Article 6 of the Treaty of Lisbon (OJ 2007 C 306/1), the envisaged amendments to the EU and EC Treaties took effect on the first day of the first month following the deposition of the last national ratification, which was 1 December 2009 (the Czech Republic was the final state to ratify it, in November 2009).

⁵ Cf. Gregg Camfield, *The Oxford Companion to Mark Twain*, New York: Oxford University Press 2002, p. 23.

At present, the central provision on EU citizenship is Article 9, contained in Title II of the Treaty on European Union (TEU). It consists of three sentences. The first of these obliges the Union to observe the principle of the equality of its citizens in all its activities, guaranteeing that they will receive equal attention from all of its institutions, bodies, offices and agencies. The second and third sentence read:

Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.

These phrases are repeated in Article 20, paragraph 1, of the Treaty on the Functioning of the European Union (TFEU), albeit not entirely verbatim. It opens by stating that ‘Citizenship of the Union’ is hereby established, and then reads:

Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

As only this provision declares to ‘establish’ the legal construction, it is arguably the more important of the two. This is quite striking, as the treaty concerned contains the more detailed and technical rules of European law; thus, it could be regarded as secondary and subordinate to the general and programmatic EU Treaty. It would have been more sensible then to leave the formal creation of the concept to be regulated by the latter document, but the contrary has occurred. Naturally, this can be explained by the fact that the TFEU is the former EC Treaty, and Article 20 TFEU is the former Article 17 EC. Nevertheless, as many provisions have forcibly moved house and set up camp in a different treaty than before, the editors could have easily planted the most fundamental (‘establishing’) provision in the most fundamental treaty, where it belongs.⁶

Compared to the law that was applicable until recently, other changes to the legal framework concerning EU citizenship are few and far between, at least *prima facie*. In Title II TEU (‘Provisions on democratic principles’), one stumbles across the statement that the European Parliament is henceforth to be regarded as a direct representation of the citizens.⁷ Also, the

⁶ Admittedly, the issue is of little practical significance, as Article 1 TEU and Article 1 TFEU declare that the Union is founded on both Treaties, and that these have an identical legal value. All the same, this does not dispose of the principled argument voiced here; either the positioning is skewed, or the phrasing erroneous.

⁷ Article 10 paragraph 2 TEU; Article 14 paragraph 2 TEU.

latter are endowed with a right to participate in the Union's democratic life, and are promised somewhat vapidly that decisions will be taken in all openness and as closely to them as possible.⁸ The icing on this cake is to be found in the celebrated 'popular initiative' proviso (Article 11 paragraph 4), enabling a million or more citizens to request a legislative proposal from the Commission.⁹ Rather stunningly, the Union's minions receive only scant attention in the paramount opening articles of the TEU. True, 'the peoples of Europe' are being referred to twice,¹⁰ but for a polity that professes to connect directly with its subjects and yearns for greater grassroots legitimacy, the employment of a plural ('peoples') can be considered highly erosive here. As a welcome compensation, the Union does kneel down gallantly to offer its citizens (*expressis verbis*) an Area of Freedom, Security and Justice, and vows to protect them from external threats, securing their values and interests in the wider world.¹¹ Finally, one may nowadays at last lay claim to what the Charter of Fundamental Rights has been holding out since 2000, albeit that the Charter provisions that contain 'principles' are to be further implemented by legislative and executive acts of the EU and the Member States, and are only judicially cognisable at the interpretation of, or in rulings on the legality of those acts.¹²

Do we then, in sum, come across any new 'flesh on the bones' of European citizenship here? True, there is little to suggest a Copernican revolution or any grand paradigmatic shifts. However, the devil may well be hiding in the details, and it is too easy to disparage the pursued amendments as wholly trivial. In fact, the spectator that wants to draw his conclusions quickly is prone to undervalue, or even overlook altogether the innovative turn of phrase in the key provision: citizenship of the Union *shall be additional to*, and not replace national citizenship, where previously, it was held to *complement*, and not replace the latter. Though one might, again, be inclined to downplay this alteration, it is contended here that it substantially exceeds the cosmetic. Moreover, the substitution of the idea of complementarity can hardly be seen as accidental, or attributed to sloppy editing; in the high politics arena of

⁸ Article 10 paragraph 3 TEU.

⁹ The further conditions and procedures are to be determined in accordance with Article 24 paragraph 1 TFEU. After a broad public consultation on the basis of a green paper, the Commission recently tabled a *Proposal for a Regulation on the citizen's initiative*, COM (2010) 119 final.

¹⁰ In Article 1 and Article 3 paragraph 1 TEU.

¹¹ Article 3 TEU, paragraphs 3 and 5 respectively.

¹² See Article 52 paragraph 5 of the Charter (OJ 2007 C 303/01). Moreover, Polish, British and Czech nationals are left empty-handed following their countries' opt-out from the Charter, secured respectively in *Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom* (OJ 2007 C 303/156), and the *Conclusions of the European Council of 29 and 30 October 2009*, (publicly available on http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/110889.pdf).

treaty change, the stakes are much too high for that. The available evidence also suggests that the novel formula, stressing the additionality of the concept, has been both meaningful and intentional. At the European Convention that drafted the Treaty establishing a Constitution for Europe (the Treaty of Lisbon's ill-fated predecessor), far-reaching proposals were tabled that aimed to underline the dual status of national and Union citizenship, without the former in any way being subservient to or dependent upon the latter. Though these were flatly rejected at the plenary votes, the Convention presidency managed to push through a dressed-down version,¹³ only to see the text being reverted to the traditional wording at the Intergovernmental Conference that compiled the Lisbon Treaty. Yet, with the apparent blessing of the twenty-seven delegations of the Member States, the eventual outcome was the provision as it is today.

Of course, the question may now be raised as to whether there exists a true semantic difference between the old and the new clause. The *Oxford English Dictionary* defines 'to complement' as 'to make complete or perfect, to supply what is wanting', whereas an 'addition' is 'the putting or joining of one thing to another so as to increase it, or the joining together of several things into one amount'.¹⁴ Clearly then, a complement is something that works to the benefit of the object it complements; an addition can however hold its own, with or without the thing it adds to. Thus, an additional good appears to command a greater significance than a complementary one. This difference in meaning is by the way not peculiar to the English version of the Treaty, but quite faithfully mirrored in the editions in other languages. For instance, the French has 'La citoyenneté de l'Union s'ajoute à la citoyenneté nationale et la ne remplace pas', the German 'Die Unionsbürgerschaft tritt zur nationalen Staatsangehörigkeit hinzu, ohne diese zu ersetzen', the Italian 'La cittadinanza dell'Unione si aggiunge alla cittadinanza nazionale e non la sostituisce', and the Dutch 'Het burgerschap van de Unie komt naast het nationale burgerschap en treedt niet in de plaats daarvan'.¹⁵

Now that we have established that, contrary to common expectations and early estimations,¹⁶ a deliberate alteration has been carried out – one that is stealthy but, in all likelihood, not

¹³ See e.g. CONV 369/02; CONV 528/03; CONV 598/03, available at <http://european-convention.eu.int>.

¹⁴ Entries consulted in the second edition, Oxford: Oxford University Press 1989.

¹⁵ Emphasis added in all versions.

¹⁶ See e.g. Samantha Besson and André Utzinger, 'Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box', (2007) 13 *European Law Journal*, p. 586-7; René Barents, *Het Verdrag van Lissabon: Achtergronden en Commentaar*, Deventer: Kluwer 2008, p. 226-227; Charlotte O'Brien, 'Social Blind Spots and Monocular Policy Making: the ECJ's Migrant Worker Model', 45 (2009) *Common Market Law Review*, p.

completely devoid of significance – we should turn to the issue of legal effect: what does the supposed shift entail for those that fall within its ambit, and how does it aid future litigants? To prepare the ground for answering that question and in order for us to draw correct inferences, we should first assess its bearing on the course the ECJ has plotted in its case law up until now.

3. Treaty Rules and Case Law: Discord or Harmony?

After having dodged or repudiated questions on the meaning and scope of the early provisions on EU citizenship on multiple occasions,¹⁷ in 1998, in the instantly famous case of *Martínez Sala*, the Court got off to a new start.¹⁸ The judgment is generally regarded the herald of a new age, though its hazy reasoning has also attracted much adverse comment.¹⁹ The crucial paragraph from *Sala* soon achieved classic status, allowing all EU citizens lawfully resident in the territory of another Member State to rely on the principle of non-discrimination (now Article 18 TFEU) in all situations which fall within the scope *ratione materiae* of EU law. By conferring the claimant in the case concerned, a non-economically active Spanish national, an entitlement to a German child-raising allowance reserved for Community workers, the ECJ essentially fudged the matter at stake;²⁰ but by its outright negation of the construction of the applicable primary and secondary Treaty rules, the Court underscored that it was mounting a white charger, and would start attaching prime importance to the citizenship rules at long last.

This soon became clear in *D’Hoop*, where a Belgian national was allowed to challenge the rejection of her claim to a tideover allowance.²¹ Quickly surmounting the point that she was

1109-10. Contrast however Annette Schrauwen, ‘European Union Citizenship in the Treaty of Lisbon: Any Change at All?’, (2008) 15 *Maastricht Journal*, p. 60.

¹⁷ See e.g. Case C-378/97, *Criminal proceedings against Florus Ariël Wijzenbeek*, [1999] ECR I-6207; Joined cases C-64/96 & 65-96, *Land Nordrhein-Westfalen v Uecker and Jacquet v Land Nordrhein-Westfalen*, [1997] ECR I-3171. Prior to the entry into force of the Amsterdam Treaty, the provisions were Article 8 and 8a EC.

¹⁸ Case C-85/96, *Maria Martínez Sala v Freistaat Bayern*, [1998] ECR I-2691.

¹⁹ Ulrich Becker, ‘Freizügigkeit in der EU – auf dem Weg vom Begleitrecht zur Bürgerfreiheit’, *Europarecht* 1999, p. 532; Christian Tomuschat, ‘Case Note *Martínez Sala*’, (2000) 37 *Common Market Law Review* 2000, p. 450; Dieter H. Scheuing, ‘Freizügigkeit als Unionsbürgerrecht’, *Europarecht* 2003, p. 782.

²⁰ Barnard, *op. cit.* (supra, footnote 2), p. 432: “The Court fudged the issue of what was meant by ‘all situations’ falling within the material scope of Community law. It seems that the Court thought that because the child-raising allowance constituted a social advantage within the meaning of Article 7 (2) of Regulation 1612/68 it fell within the material scope of Community law, even though the judgment was premised on the fact that Martínez Sala was not a worker.”

²¹ Case C-224/98, *Marie-Nathalie d’Hoop v Office national d’emploi*, [2002] ECR I-6191.

in fact in litigation with national authorities to procure a wholly domestic social security payment, the ECJ confirmed its expansive view of the benefits lying within the material scope of the Treaty: the right to be treated equally will work for those in similar circumstances as Mrs Sala, including those situations involving the exercise of the fundamental freedoms guaranteed in the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States. Thus, Union citizens were seen as falling within the personal scope of the Treaty *by definition*, and the migratory rights conferred therein (part of the material scope) are only *some* of the rights conferred upon EU citizens.²²

Perhaps the string of follow-up cases constitutes European citizenship's finest hour so far. In *Grzelczyk*, the ECJ extended the scope of the Treaty further, so as to encompass entitlements in the sphere of higher education that were believed to be explicitly excluded from students' reach.²³ The claimant, a French national enrolled at an academic institution in Belgium, was awarded the sought-after minimum subsistence allowance, in spite of the restrictive wording of the applicable secondary law. The Court thereby relied on a nebulous and noncommittal extract from the preamble of Directive 93/96 that merely stated that migrant students should not become an 'unreasonable burden'. Reasoning *a contrario* and with dogged reliance on *Sala*, persons in the situation of Mr Grzelczyk, lawfully residing in another Member State, could here demand equal treatment, despite the fact that *prima facie*, the Belgian rules on the award of the *minimex*-benefit were perfectly in line with the relevant secondary law (Regulation 1612/68 and Directive 93/96). As a telling statement *in obiter*, the Court expounded its creed that Union citizenship is 'destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.²⁴ This was repeated in *Baumbast*,²⁵ where the British government was precluded from terminating the residence of the person of the same name, *quia* disproportional, although this case appeared precisely to be such an 'exception expressly

²² Eleanor Spaventa, 'Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects', (2008) 45 *Common Market Law Review*, p. 19.

²³ Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193.

²⁴ *Ibid.*, paragraph 31.

²⁵ Case C-413/99, *Baumbast and R v Secretary of State for the Home Department*, [2002] ECR I-07091 (the repetition is in paragraph 82).

provided for', as he did not meet the condition of comprehensive healthcare insurance.²⁶ A comparable situation arose in *Trojani*, where a French national of doubtful economic productivity, who disposed of neither health insurance nor sufficient resources, was considered justified in his claim to a Belgian social security benefit. The ECJ held that Mr Trojani had a right to rely on Article 12 and Article 18 EC by virtue of being a citizen of the Union; that the dispute fell outside the scope of EU law, as his residence right stemmed from *national* law, and moreover, was not of unlimited duration (rendering this another case of equality forced upon strictly unequal situations), simply did not come to the Court's mind.

No change of tack occurred in either *Avello* or *Chen*, although on the facts, both cases were highly unusual, and perhaps for that reason alone deserving of a *Sonderweg*.²⁷ In *Avello*, the ECJ trampled upon the Member States' reserved domain of national and private international law rules regulating the right of name, dictating that a Spanish-German couple could follow its own preference as regards the composition of the progeny's surnames. Again, the fundamentality of the concept of EU citizenship was thought to warrant this particular outcome. The link with European law was however extremely tenuous, as the Court saw the relevant transnational dimension to lie in the fact that if the offspring, in a later stage of their life, were *eventually* to migrate to Spain, confusion could *potentially* arise as to the identity of their lawful parents. In *Chen*, the ECJ took a positively tepid view on a manifest case of abuse of rights: a Chinese couple attempting to circumvent the application of UK immigration rules succeeded fully in their objective, as they were conferred residence rights by virtue of the fact that their baby had been born with Irish nationality.²⁸ They could thus profit happily from the EU's rules on citizenship, the fundamental quality of which the Court stressed once again.

Although that last nub received no further emphasis in the latest jurisprudence, of which *Schempp*, *Tas-Hagen*, *Morgan*, *Schwarz* and *Nerkowska* are notable samples, we do there see a faithful continuation of the overall trend. For example, in *Schempp*,²⁹ the Court showed no hesitation to examine German tax rules applied to a German citizen residing in Germany. The

²⁶ Contained in Articles 1 and 3 of *Council Directive 90/364/EEC of 28 June 1990 on the right of residence*, OJ 1990, L180/26.

²⁷ Case C-148/02, *Carlos Garcia Avello v Belgian State*, [2003] ECR I-11613; Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, [2004] ECR I-9925.

²⁸ Cf. Arnall, *The European Union and its Court of Justice*, Oxford: Oxford University Press 2006, p. 531: "The Court refused to limit a citizen's rights through a notion of abuse, even though it was clear that her nationality had been acquired purely to secure a right of residence for herself and her mother, a national of a third country, in another Member State and that neither of them had any real and effective link with any Member State."

claimant was placed in a marginally less favourable situation as regards the tax treatment of duly payable alimony, as a result of the fact that his former wife had moved to Austria. The ECJ considered the case to be far from being purely internal; as his former wife had exercised her free movement rights, there was no bar for him to appeal to Articles 12 and 18 (1) EC, though the German rules at stake were ultimately found to square with these provisions. In *Tas-Hagen*³⁰ and *Nerkowska*,³¹ while scrutinising a residence condition imposed on those in receipt of a pension for war victims, the Court again found for the applicants; though earlier, the benefits concerned were excluded from the material scope of the Treaty, this at present no longer barred their claims. A similar reasoning in *Schwarz*³² and *Morgan*³³ placed EU citizens on an enhanced footing in relation to study finance and the fiscal treatment thereof, thus providing entitlements otherwise unavailable, also against their Member State of origin.

In recent case law, we do however notice the emergence of slight cracks in the wall. Where in *Bidar*,³⁴ the Court had previously sent shockwaves through the Union, seemingly prescribing wholesale financial equality for EU students resident in other Member States, in *Förster*,³⁵ it balked when Dutch rules imposed a residence condition on students before any social benefits could accrue to them. What makes this case extremely remarkable is that the disputed policy guidelines displayed a total disregard for the factual degree of integration (one of the pivotal points in *Bidar*), and to compound matters further, constituted direct discrimination. They were nonetheless not seen as falling foul of the provisions on EU citizenship and the associated equal treatment rights; rather, the Dutch rules were considered justified without much ado, as they chimed nicely with the five-year residence condition in secondary law³⁶ (which actually did not yet apply to the case at hand), thus paying a great service to the sake

²⁹ Case C-403/03, *Egon Schempp v Finanzamt München V*, [2005] ECR I-06421.

³⁰ Case C-192/05, *Tas-Hagen and Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, [2006] ECR I-10451.

³¹ Case C-499/06, *Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie*, [2008] ECR I-3993.

³² Case C-76/05, *Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I-6849.

³³ Joined cases C-11/06 and C-12/06, *Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren*, [2007] ECR I-09161.

³⁴ Case C-209/03, *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, [2005] I- ECR 2119.

³⁵ Case C-158/07, *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*, [2008] ECR I-8507.

³⁶ Directive 2004/38/EC, specifically Article 24 (2) thereof: “[T]he host Member State (...) shall not be obliged (...) prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.”

of transparency. This judgment has already been hailed as the end of an era,³⁷ but naturally one swan does not make a summer, and evidence of the ECJ's continued determination can still be found elsewhere. For instance, in *Metock*,³⁸ decided at roughly the same time as *Förster*, it took an unflinching stance vis-à-vis national immigration rules precluding third country nationals from joining their lawful spouses with EU nationality, letting a liberal interpretation of free movement rules prevail, setting aside its own earlier, much more deferential approach in the process.

Having surveyed most of the landmark judgments, we should now be able to answer the question in this paragraph's heading: how does the Court's jurisprudence, if at all, accord with the Treaty framework? As we have noted, due to the new formulation of the key provision, EU citizenship appears to have acquired a more independent quality. The case law can be seen as having preceded this development, particularly in the ECJ's oft-repeated mantra that it is "destined to be the fundamental status of nationals of the Member States". Yet, this does reveal a glaring discrepancy: if the *Herren der Verträge* have placed European citizenship (at most) on an equal and equivalent plane to its national counterpart, the Court is reversing the order of play, and cautiously maneuvering the EU concept into pole position.³⁹ The Union's institutions also take a more reserved view: in the main secondary law vehicle they have put together, Directive 2004/38, EU citizenship is said to be the fundamental status of nationals of Member States only when they exercise their right of free movement and residence,⁴⁰ which evidently lies at odds with several of the rulings highlighted above. Moreover, it should be noted that said vehicle only benefits Union nationals who move to or reside in a Member State *other* than that of which they are a national.⁴¹ Therefore, the European legislator has made it clear as day that 'static' EU citizens have no claim to equal treatment, as they are left outside the Directive's protected scope. In this respect, a potentially more arresting disparity comes to the surface, namely one between the latest legislative arrangement and case law of

³⁷ Siofra O'Leary, 'Equal treatment and EU citizens: A new Chapter on Cross-border Educational Mobility and Access to Student Financial Assistance', (2009) 34 *European Law Review*, p. 627. In the same sense O'Brien, *op. cit.* (supra, footnote 16), p. 1110-1.

³⁸ Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, [2008] ECR -06241.

³⁹ Albeit that the ECJ, by employing the term 'destiny', seems still to be gazing into a crystal ball, and projecting full delivery for the near (though *certain* – as destinies tend to be) future. Compare however the recent ruling in Case C-135/08, *Janko Rottman v Freistaat Bayern*, nyr, in which the Court stressed that national rules on the acquisition or loss of nationality should take heed of their possible effects on the EU citizenship of the persons concerned – not the other way around.

⁴⁰ Thus Article 3 of Directive 2004/38.

⁴¹ *Ibid.*

older pedigree, which is substantially more generous to migrants returning to their native Member State.⁴²

At the same time, what we have witnessed is a neat correspondence between Treaty rules and case law as regards the treatment of purely internal situations. If indeed EU citizenship can now hold its own, and henceforth constitutes an independent asset of nationals of the Member States, it is only right that the accompanying rights and privileges can be exercised in *any* situations falling within the material scope of the Treaties, thus fully living up to the *Sala* promise, including those situations in which no transnational aspect is present at all. If the scattered dots may be seamlessly connected in this way, an (eventual) autonomous EU citizenship could also have real added value for nationals of third countries aspiring to a greater equality and less inhibited residence rights. Below, we shall investigate the tenability of these assumptions, and attempt to provide a tentative sketch of some of the ramifications.

In sum, the Court appears to have been ahead of its time, and probably still is, in attaching prime importance to the European framework. To an extent, the Treaty authors have caught up, although it is highly doubtful whether there was any real willingness to acknowledge the fundamental characteristic of the supranational contraption; it is rather more likely they remain inimical to unwarranted further leaps forward (à la *Grzelczyk*). The ECJ's vacillation in at least one recent ruling could well be explained as a response to that reticence. Supposing, however, that the Court will take its cue more fully from the novel Treaty formula, the real question becomes to which limit(s) it could be taken, and to what ends it could be employed.

4. (Presumptive) Impact for EU Nationals

If citizenship of the Union were to become an immanent and non-contingent feature that all nationals of any of the Member States possess, and moreover, the prime capacity in all of their legal relations, the repercussions could be considerable. For starters, it seems inevitable that public authorities must then adhere to rigid equal treatment at all times, whereby any prejudice to the detriment of domestic citizens is no longer permissible. Whatever

⁴² See Case C-370/90, *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-04265; see also Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind*, [2007] ECR I-10719.

disadvantages the latter would experience would then have to be deemed unlawful *per se*, unless objectively justified. Thus, we find ourselves on the brink of a direct parallel arising with the regimes established in past decades for all Treaty freedoms (no direct or indirect discrimination, elimination of all barriers),⁴³ only this time encompassing all natural persons legally residing anywhere on the Union's territory. By consequence, an EU citizenship placed on an equal footing to national citizenship spells a quick death to the concept of reverse discrimination – for in the brave new world lying ahead, the 'static' citizen ought to suffer socio-economic or political loss no longer for not having moved.⁴⁴

Seemingly, this would represent a profound sea change. But in fact, it is rather easy to take existing case law a step further so as to arrive at that very stage. After all, the Court has already gone far beyond a cross-border *telos* in its interpretations of both the economic free movement and the citizenship provisions.⁴⁵ In sundry rulings, the potential provision or reception of services sufficed to demonstrate the existence of a cross-border element.⁴⁶ If then Mr Carpenter succeeded in his claim, despite his case's fairly remote link with EU law, why not the persons who happen not to enjoy such a link, but nonetheless dispose of the same fundamental feature of EU citizenship? Also consider a case like *Eind*,⁴⁷ where the Court deemed decisive that a national of a Member State *could* be deterred from leaving his Member State to pursue gainful employment elsewhere if he did not have the certainty of being able to return to his Member State of origin with his close relatives, irrespective of whether he was actually going to do so or not. Mr Eind, an EU citizen of Dutch nationality, was therefore entitled to let his Surinamese daughter come over to the Netherlands. It then becomes increasingly hard to stomach that Member State nationals who have not used their free movement rights are not entitled to be directly reunited with TCN spouses or progeny, even though, again, they too dispose of the same fundamental feature of EU citizenship. In *Garcia Avello*, the barrier to movement appeared to be entirely hypothetical, yet even this did

⁴³ See Case 120/78, *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649; Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL and Royal club liégeois v Jean-Marc Bosman*, [1995] ECR I-4921; Case C-76/90, *Manfred Säger v Dennemeyer & Co.*, [1991] ECR I-4221; Case C-55/94, *Reinhard Gebhard v Consiglio dell' Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165.

⁴⁴ As already anticipated by e.g. Niamh Nic Shuibne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 *Common Market Law Review*, p. 731; Herwig Verschueren, 'Reverse Discrimination: an Unsolvable Problem?', in: Paul Minderhoud and Nicos Trimikliniotis (eds.), *Rethinking the Free Movement of Workers: The European Challenges ahead*, Nijmegen: Wolf Legal Publishers, p. 99.

⁴⁵ Spaventa, *op. cit.* (supra, footnote 22), p. 38.

⁴⁶ See e.g. Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, [2002] ECR I-6279.

⁴⁷ *Supra*, footnote 42

not prejudice the case's outcome – an outcome that, understandably, encourages Belgian nationals to seek the right to have their offspring's surname (re-)composed *ad libitum* as well.

So far, the impact of Articles 17 and 18 EC has not been quite as dramatic. By and large, *la doctrine* regards them still as a safety net, only hovering into view when the traditional categories do not grant relief.⁴⁸ When intended to procure a right of residence, that safety net, may only be deployed when one poses no 'unreasonable burden' for the host state's public purse.⁴⁹ In reality, due to the fact that it is hard for authorities to produce irrefutable evidence that a social security claimant (either native or foreign) weighs in disproportionately, in various Member States, the disposal of sufficient resources has been made a precondition for access to benefits for the non-economically active.⁵⁰ Now, as long as Member States conform to EU law principles, most notably that of proportionality, they retain a wide discretion to administer 'social integration tests', so as to justify discrimination of economically inactive migrants (already evident in *d'Hoop*, and condoned in a rather extreme way in *Förster*).⁵¹ Nevertheless, it is clear that, should the time arrive when *any* national may structurally invoke the magic words 'civis europeus sum',⁵² this situation cannot last, and such restrictions may no longer be tolerable. After all, if Articles 9 TEU and 20 TFEU reinforce the equivalence of European and national citizenship, the whole safety net idea is bound to be abandoned; for if these provisions may be understood to contain a general command of equal treatment, serving each and every national of the Member States, they categorically outlaw uneven access to public benefits. Momentarily, such unevenness is in accordance with the secondary law, adopted under the Treaty provisions in their previous form. Ultimately though, taking the *current* phrasing to the max, a full-swing access to public benefits would have to ensue for all, irrespective of where one resides and whether one meets more specific national requirements; for the general principles of EU law must then be applicable for everyone, entailing that

⁴⁸ See e.g. Oxana Golynger, *Ubiquitous Citizens of Europe: The Paradigm of Partial Migration*, Antwerp-Oxford: Intersentia 2006, p. 50.

⁴⁹ Article 14 (2) of Directive 2004/38. Ex Article 14 (3), expulsion may however not be an automatic consequence of recourse to social assistance.

⁵⁰ *Inter alia* in the United Kingdom, where the 2006 Social Security Amendment Regulations make the council tax benefit, income support, jobseekers allowance, housing benefit, pension credit and the social fund maternity benefit dependent on the right to reside, which in turn depends on meeting the resources requirement. For further details, also on the approaches taken in other Member States, see Paul Minderhoud, 'Free Movement, Directive 2004/38 and Access to Social Benefits', in: Minderhoud and Trimikliniotis, cited supra (footnote 44), p. 77-84.

⁵¹ On this point, see also Jochen Meulman and Henri de Waele, 'Funding the Life of Brian. Jobseekers, Welfare Shopping and the Frontiers of European Citizenship', (2004) 31 *Legal Issues of Economic Integration*, p. 285-288.

⁵² As famously argued by AG Jacobs in his Opinion in Case C-168/91, *Christos Konstantinidis v Stadt Altensteig-Standesamt* [1993] ECR I-1191, para 46.

national rules conflicting with the principles of equality or proportionality in whatever way must be set aside.⁵³ For the time being however, the reluctant approach of several Member States prevails, to a great extent endorsed by the Union institutions – and EU nationals are stuck with a European citizenship that is more than symbolic, yet retains a residual character.

5. (Presumptive) Impact for TCNs

Though perhaps not readily evident, third country nationals would also be likely to gain significantly from an upgraded Union citizenship. For them, the potential plus-points appear to run along three strands, discussed in subsequent order here below. Nonetheless, it must not be forgotten that for quite some time, a number of provisions have already been furnishing them with extras, such as the right to petition the European Parliament or the European Ombudsman. True, Article 20 (2) and 24 TFEU mention these as being connected to EU citizenship, but the predecessors of Articles 227 and 228 TFEU, Articles 194 and 195 EC, expressly extended to cover natural and legal persons residing or having registered offices in the Member States. In addition, there has never been a reason why TCNs were not permitted to exercise vested procedural rights, such as the action for damages against the EU or against Member States. Thus, were they to suffer financial harm, they could just as well appeal to the *Francovich* remedy,⁵⁴ or Articles 268 / 340 TFEU. Lastly, as cases such as *Chen, Carpenter* and *Metock* demonstrate, TCNs have been increasingly favoured by the ECJ, and the EU legislator has meanwhile not been blind or deaf to their needs either.⁵⁵ Let us however focus at present on the novel entitlements that could be accruing to them in the post-Lisbon era.

Firstly, it is questionable whether only EU citizens could lay claim to the protection of Article 18 TFEU (formerly Article 12 EC). After all, it spells out that within the scope of application of the Treaties, *any* discrimination on grounds of nationality shall be prohibited. Granted, it has now been relocated to a new Part Two, which carries the explicit caption ‘Non-Discrimination and Citizenship of the Union’. All the same, the conjunction ‘and’ still sets the

⁵³ The pervasiveness of the general principles of EU law, excluding the applicability of contrary national rules even in purely horizontal situations, was recently underlined in the rulings in Case C-144/04, *Werner Mangold v Rüdiger Helm*, [2005] ECR I-9981 and Case C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG*, Judgment of 19 January 2010, nyr.

⁵⁴ Joined Cases C-6/90 and C-9/90, *Andrea Francovich v Italy* and *Danila Bonifaci v Italy*, [1991] ECR I-5357.

⁵⁵ See, most notably, *Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, OJ 2004 L 16/44, and *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification*, OJ 2003 L 251/12.

equal treatment-imperative apart from the batch of specific rights that are handed to EU citizens only. Thus, direct reliance on that provision, at least by those that have acquired long term residence status in accordance with Directive 2003/109, as well as beneficiaries of Directive 2003/86 (the Family Reunification Directive), but also other TCNs, cannot be dismissed out of hand.⁵⁶ There is nothing else in the Treaties to suggest that the gospel of *Martínez Sala* ('lawful residence yields reliance on Article 12 EC in all situations falling *ratione materiae* within the scope of the Treaties') was addressed to the flock of Member States' nationals only.

Secondly, it is already thinkable at present that Member States extend European citizenship rights to TCNs, without conferring them that very status. As touched upon briefly, over the course of time, case law and legislation has improved their stock of socio-economic and residence rights, gradually putting them in a semi-identical position as EU nationals (*e.g.* family members and dependents of Union citizens). As regards political rights, nothing stands in the way either of Member States granting TCNs the right to vote for the European Parliament.⁵⁷ In fact, more and more Member States are currently switching over to granting social and political rights to foreign residents, without conferring them full citizenship.⁵⁸ As Besson and Utzinger have noted, this does however risk to dilute the idea of political membership and the exclusivity of rights that is in principle inherent to citizenship.⁵⁹ The newly-styled provisions on EU citizenship would seem to make it possible for a more coherent pattern to emerge. Article 79 (2) (b) TFEU allows for Parliament and the Council to adopt measures to 'defin[e] the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States'.⁶⁰ Thus, effectively, the EU legislator could now proceed to bring method into the madness, and dish out an uniform package for all TCNs. More importantly however, it would seem possible for TCNs to acquire the newly-styled, more autonomous brand of European citizenship, without them having to come to terms with the Member States or EU

⁵⁶ Albeit that Directive 2003/109/EC contains specific, more limited non-discrimination guarantees.

⁵⁷ As recently sanctioned by the ECJ in Case C-145/04, *Spain v United Kingdom*, [2006] ECR I-7917.

⁵⁸ See Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens*, Cambridge: Cambridge University Press 2004, p. 153-163.

⁵⁹ Besson and Utzinger, *op. cit.* (supra, footnote 16), p. 580.

⁶⁰ This is considerably broader than the previous Article 63 (4) EC, which permitted the Council only to adopt 'measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States'.

secondary legislation at all.⁶¹ Thus, they could avoid the hindrance of having to qualify for the nationality of one of the Member States first (which becomes a useless intermediary), and sidestep the (divergent and regularly changing⁶²) rules on acquisition of nationality. Enabling them to link in directly with the nascent supranational community of EU citizens also diminishes the presumed risk of dilution just referred to. Of course, it is highly uncertain that the political will exists to acquiesce to this brave new world, which would indeed constitute a shift of Copernican proportions. For sure, the legal framework would also have to be adapted further. Free-standing access to EU citizenship is, presently, a virtual reality at most. At the same time, the potential is there, looming beneath the surface. To increase its visibility, it ought to be poured into a mould that is somewhat clearer than the current Article 20 TFEU.⁶³

Finally, a (more peripheral) consequence of the citizenship arrangements post-Lisbon that improves the position of TCNs is the newly-binding character attributed to the Union's Charter of Fundamental Rights.⁶⁴ Title V of the Charter comes with the heading of 'Citizenship' and reproduces the main rights found in the TFEU, the political as well as the free movement and residence ones; the right to petition; access to documents, good administration and equal treatment. Its Article 45 (2) stipulates that freedom of movement and residence may be extended to nationals of third countries legally resident in the territory of a Member State, which is unremarkable in light of the more specific competences discussed above; its presence in a fundamental rights manifesto can even be considered inappropriate. Of stellar importance is at any rate Article 34 paragraph 2, which proclaims that '[e]veryone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices'. Everyone, *i.e.* excluding none – Pandora's box might have never appeared more open, and it

⁶¹ Cf. Schrauwen, *op. cit.* (supra, footnote 16), p. 60: "If Union citizenship *complements* national citizenship, there is no Union citizenship without national citizenship. If Union citizenship is *additional* to national citizenship, then there might one day be Union citizenship without national citizenship." (italics in original).

⁶² Although some discern a cautious trend of convergence: see Ayelet Shachar, 'Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws', *Jean Monnet Working Paper* 2/03, p. 27 (available on <http://centers.law.nyu.edu/jeanmonnet/papers/03/030201.html>); Benhabib, *op. cit.* (supra, footnote 58), p. 156 ff.

⁶³ In abeyance of the required political will, the EU could of course also go and adopt measures to facilitate the naturalization of TCNs (stopping short of harmonising the conditions governing the acquisition of nationality, which continues to lay outside its competence). As Besson and Utzinger (supra, footnote 16, p. 581) have pointed out, this would have the advantage of working bottom-up instead of top-down, thus enjoying greater legitimacy, and building up momentum for a greater leap forwards at a later stage.

⁶⁴ The version solemnly proclaimed by the presidents of the Commission, the Council and the Parliament, on the evening preceding the signing of the Treaty of Lisbon (published in OJ 2007 C 303/1, with the explanations of the drafters and guidelines for interpretation in C 2007 303/17), which replaced both the Herzog-Convention and the Constitutional Treaty editions (published in OJ 2000 C 364/1 and OJ 2004 C 310/41 respectively).

seems incredible that the Member States managed to agree on the inclusion of this phrase. The startling breadth and bearing of precisely these types of provisions induced a country like the United Kingdom to pursue and secure a (probably far from water-tight) opt-out from the Charter.⁶⁵ However, the (binding) explanations that accompany the Charter stress that we are not dealing here with a ‘right’ but with a ‘principle’, and as Article 52 (5) ordains, these are to be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law. TCNs are then in all likelihood stumped when attempting to rely on it before the European Courts or a national judge, for Article 52 (5) rules out the direct effect of ‘principles’. All the same, this does not denude it of operational meaning altogether, as the same provisions do make it possible that principles play a role at the interpretation of adopted acts, and in rulings on the validity thereof. Naturally, Article 34 (2) could be deployed to make the most of prospective secondary law that envisages TCNs. In addition, it offers sufficient room for some creative rule-bending and stretching when it comes to those legal advantages designed exclusively for Member States nationals. We have seen that, in the past, the ECJ has been keen to do just that, and, following the reasoning expounded earlier, has brought TCNs within the ambit of rules originally thought not to encompass them. This chimes quite nicely with the entire notion of fundamental rights, which are, after all, supposed to be universal and inalienable.

6. Concluding Remarks

This contribution opened with a quote that emphasized the primordial function of citizenship in shaping modern society. With that statement one can only concur. However, the excerpt also contained the reproach that the European rendition has failed to live up to its promise for non-EU nationals. This strikes one as more peculiar, as the latter were not meant to profit from it to begin with. Moreover, owing to progressive case law and legislation, the veracity of the statement has rapidly slid into decline. After the Lisbon amendments to the primary law, even the most hardened critics will have to admit that EU citizenship has come of age at long last. This paper has sought to portray the general contours of the regime and uncover some

⁶⁵ Cf. supra, footnote 12; on the defects of these opt-outs, see Michael Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’, (2008) 45 *Common Market Law Review*, p. 665-71; Julio Baquero Cruz, ‘What’s Left of the Charter? Reflections on Law and Political Mythology’, (2008) 15 *Maastricht Journal*, p. 71-2.

possible directions for further evolution. It has argued that those lawfully residing in the Union appear to be in for a treat. Thereby, the legal position of third country nationals – who during the past decade, were perhaps not lavished, but not neglected either – is deemed to improve as well.

The year 1992 bore witness to a historically unprecedented event, as, for the first time in the history of the Westphalian political order, a design of citizenship beyond the nation state reared its head.⁶⁶ All the same, the expectations in legal doctrine were quite low, and most scholars tended to look down upon EU citizenship as an empty shell, a new garment sewn for a non-existing emperor.⁶⁷ At the present day, hardly two decades on, a further transformation lies ahead. Although in the foregoing, we have succumbed to the lure of conjecture on more than one occasion, ultimately, the prospects outlined cannot be reduced to mere speculation. For that, the desire for change in various corners of the Convention that crafted the 2004 Constitutional Treaty, to enhance the citizenship rules and multiply the array of available rights, has been much too evident.⁶⁸ Admittedly, the eventual outcome only partially reflects that zeal, and may disappoint many commentators once again. Yet, we must keep in mind that it has earlier reached a surprising apogee, in spite of the half-baked, not to say overtly minimalist conception in the Maastricht Treaty. As known, the Union's founding fathers sadly continued to prioritise the economic interests of individuals, at the expense of other dimensions such as active involvement and political participation in the polity, the cultivation of a sense of political belonging, reciprocal duties towards fellow citizens, and redistributive concerns. What is more, its relevance was strangely restricted to a favoured group of nationals, that is, to those EU citizens that possessed the financial and material resources required for intrastate mobility. Contrary to the historically developed, rich notion of membership in a national community, EU citizenship mainly comprised economic entitlements that were primarily designed to facilitate market integration.⁶⁹ In that respect, the authors of the revised rules put in place at the end of last year must be reproved by critics and

⁶⁶ Dora Kostakopoulou, 'European Union Citizenship: Writing the Future', (2007) 13 *European Law Journal*, p. 624.

⁶⁷ See, with further references, Meulman and De Waele, *op. cit.* (supra, footnote 51), p. 275.

⁶⁸ As most readers will be aware, judged from countless angles, the Constitutional Treaty is as like the Lisbon Treaty as two peas in a pod. See Tim Corthaut, 'Plus ça change, plus c'est la même chose? A comparison with the Constitutional Treaty', (2008) 15 *Maastricht Journal*, p. 17-31; Dougan, *op. cit.* (supra, footnote 64), p. 621-6.

⁶⁹ Kostakopoulou, *op. cit.* (supra, footnote 66), p. 625.

zealots alike; for they have effectively exploded the prior economic linkages, and simultaneously succeeded to all but emancipate the notion vis-à-vis national citizenship.

In embryonic form, a rich notion of membership is now lying in waiting on the supranational plane, ready to be meticulously sculpted and polished to perfection. For good measure, perhaps commentators ought not to fixate on the (alleged) meager progress in twenty-odd years, but take the life of the European Economic Community as a yardstick, which evolved for over thirty years unperturbed by official Treaty amendment. In comparison, we have only witnessed the dawn of EU citizenship. All the key pieces have just been realigned to take the game to the next level. We now have to wait and see whether the ECJ will carry the ball again.