Revisiting Union Citizenship from a Fundamental Rights perspective in the time of Brexit

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Abstract

The aim of this article is to offer a fundamental rights' reading of Union Citizenship at a time where individual life choices based on the assumed certainty of Union Citizenship and the right to free movement are put in jeopardy. The withdrawal of a Member State from the European Union serves as a prism through which to revisit the conception of Union Citizenship. The article starts by providing a close analysis of the evolving case-law of the Court of Justice of the European Union (the Court) on that citizenship. The article then highlights the potential of a normative, fundamental human rights approach to Union Citizenship that includes individuals in the EU legal order and protects them against exclusion through the removal of that right. That allows a coherent interpretation of the recent case law on citizenship, the Charter of Fundamental Rights of the EU and the general principles of Union law as derived from constitutional traditions of the Member States and international law. If Union Citizenship is understood as such a fundamental rights-based concept, then the intrinsic connection between being a Union citizen and a national of a Member States of the Union competes with the protection of Union citizenship as a fundamental right that is conferred on each individual. Union Citizenship is not just an objective status that States can confer and remove.

Introduction

This article enters new territory with the claim that primary law enshrines an individualistic fundamental human rights-based conception of Union Citizenship. The article offers an analysis of the material trend in the recent jurisprudence of the Court that together with the Charter of Fundamental Rights of the EU and the constitutional traditions of the Member

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States can be coherently explained with the conception of Union Citizenship as a fundamental right. The argument proceeds in three steps.

It first demonstrates that Union Citizenship is not simply a Treaty-conferred dispositive status, but that existing primary and secondary law limits the disposition on Citizenship and the rights that come with it. The case law of the Court of Justice of the European Union ('CJEU' or 'Court') highlights a tendency towards Union Citizenship as a fundamental right that cannot be taken away by a Member State, either through the decision of a State-authority or the collectivity of the people of a State, or by the European Union itself. To this end, the recent case law of the Court on Union Citizenship protecting the individual against exclusion will be examined closely. Part I analyses the recent jurisprudence of the CJEU concerning Union Citizenship in the citizen-State relationship and in the State-State relationship, with the focus on the protection of Union citizens against physical exclusion from Union territory, i. e. measures of expulsion or extradition that are obstacles to free movement. This is followed by close scrutiny of the case law for protection of Union citizens against legal exclusion through loss of their citizenship.

The article then adopts in Part II the normative perspective of Union Citizenship as a fundamental right. This section concludes with framing a normativity of Union Citizenship as a fundamental right which the analysis supports. The conception of Union Citizenship has attracted much debate in the literature. It has been proposed to differentiate on the basis of the function of citizenship between market citizenship, social citizenship, or republican citizenship.[1] Closely related is the question whether Union Citizenship is a *sui generis* concept, categorically different from the concept that has formed within the nation state.[2] Professor Barnard makes the case that all citizenship operates the distinction between inclusion of some and exclusion of others.[3] Others have focused on the rationale of each Union Citizenship right.[4] This section argues for a conception of Union Citizenship rooted in the normativity of a fundamental right. In examining the EU Charter of Fundamental Rights, the constitutional traditions of the Member States and international law, the analysis arrives at a normative turning point. The normativity of Union Citizenship as a fundamental right will not only capture the analysis but also prevent a sharp decline in the protection of Union citizens in case of the withdrawal of a Member State from the Union. From there, it will be demonstrated that protection against removal of Union Citizenship is the logical consequence. This is underpinned by the Charter of Fundamental Rights and the constitutional traditions of the Member States.

The article finally turns in Part III to three counterarguments that have been raised or could potentially be raised. The first concerns a purported categorical difference between citizenship in the state and in the European Union. The second counterargument is that Art. 20(1) of the Treaty on the Functioning of the European Union ('TFEU') and the claim that this provision inseparably and permanently connects Union Citizenship with EU membership

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[1] Dimitry Kochenov, "The Essence of EU citizenship emerging from the last ten years of academic debate: beyond the cherry blossoms and the moon?", (2013) 62 *Int'l Comp L. Q.* 97 (2013); Catherine Barnard, *The substantive law of the European Union* (5th ed, Oxford University Press, 2016) p. 325, with references in footnote 40.
[2] Barnard, Substantive law, at p. 325.
[3] Id, at 326.
[4] Daniel Thym, "The Elusive Limits of Solidarity. Residence Rights of and Social Benefits for Economically Inactive Union Citizens", (2015) 52 *Common Market L. Rev.* 17, 18.

of the State of nationality. The third counterargument is the claim that Art. 50(1) of the Treaty on European Union ('TEU') permits the collective decision of a State to withdraw from the EU, thereby removing citizenships and relating rights.

The article explores the implications of this fundamental rights-based conception of Union Citizenship by reference to the departure of a Member State from the European Union. With the withdrawal of the United Kingdom from the Union pursuant to Art. 50 TEU becoming effective by default in March 2019, the Treaties will cease to apply between the UK and the remaining Member States. Brexit thus amounts to a fundamental test for a still new legal institution of supranational citizenship: it challenges the very viability of Union Citizenship as a concept that has, just as citizenship in Member States, at its core the individual's claim to protection. More radically, the second and third part of the article make the case that since citizenship rights *and* Union Citizenship as such are fundamental rights, they can survive the UK's withdrawal from the EU. The most obvious argument against this proposition is that citizenship rights derive from the EU Treaties, so if those treaties cease to bind then the rights must disappear as well. The Treaties could confer individual rights that are powerful and far-reaching, yet that alone would not explain in itself what happens when the instrument from which they originate is removed. However, if Union Citizenship is seen as a fundamental right, then it acquires a normativity of its own that is distinct from the classic normativity of treaty that ultimately rests on the (continuing) consent of sovereigns. That normativity sustains Citizenship post-exit of the State. In the political discussion at least, it is by far more difficult to argue that Union citizenship is similar to being a citizen in the Member State, than to state that citizenship in a State is conceptually different from citizenship in the Union, even if that means arguing for a an understanding of State sovereignty that directly diminishes individual protection. By contrast, this article will outline a coherent conception of Union Citizenship that has the implication that Brexit does not extinguish the Union citizenships held by UK or EU27 nationals. Rather, current citizenships will continue as a matter of law.

I. Analysing the evolution of the Court's Citizenship case law

Pursuing the aspiration to create a 'Europe for citizens' dating back to the early 1970s, the 1992 Maastricht Treaty inserted a new Part Two into the EC Treaty, entitled 'Citizenship of the Union'[5]. The roots of this citizenship go even further back, with the idea of removing obstacles to free movement of workers dating back to the establishment of the Organization for European Economic Cooperation.[6] Arriving at the single marked after founding a free trade area and a customs Union, the conception of Union citizenship was greeted with the expectation that it would manifest the principle of non-discrimination and equal treatment of workers and non-workers, and it would give back the person-quality to workers beyond their market-functionality while raising the level of protection for non-workers.

After revision by the 2007 Lisbon Treaty[7], Union Citizenship is now contained in Title II of the Treaty on European Union ('TEU')[8] and Part Two of the Treaty on the Functioning of the

[5] Treaty on European Union, (1992) OJ C 191/1, 29 July 1992.
[6] Catherine Barnard and Fraser Butlin, "Free movement vs. fair movement: Brexit and managed migration", (2018) 55 *Common Market L Rev* 203, 208.
[7] Treaty of Lisbon, (2007) OJ C 306/1, 17 September 2007.
[8] Treaty on European Union (Consolidated version), (2016) OJ C 202/13, 7 June 2016.

European Union ('TFEU')[9]. Art. 9 TEU and Art. 20(1) TFEU establish Citizenship of the Union, held by every person holding the nationality of a Member State, while paragraph 2 of Art. 20 TFEU lists rights that this Union Citizenship encompasses: the right to reside in another Member State; the right to vote and stand in certain elections; diplomatic and consular protection; and the right to petition to the European Parliament and to the European Ombudsman. These rights are provided for in more detail in Art. 21-25 of the TFEU. The right to reside in another Member State than the home State (Art. 21 TFEU) and the right to vote and stand for candidate (Art. 22 TFEU) are directly applicable individual rights.[10]

This section demonstrates that the case law of the Court extends citizenship law beyond the wording in the Treaties. This case-law has established Union Citizenship as the fundamental status of individuals. From that basis, it has progressively strengthened the right to reside in the EU territory (1) to comprise the right not to be excluded through either expulsion or extradition (2).

1. Union citizenship as fundamental status in the citizen-State relationship

In its constant case-law since *Grzelczyk*,[11] the Court has qualified Union Citizenship, under Art. 20(1) TFEU, as the 'fundamental status' of individuals. The deontological quality of this status, its function and capacity to yield rights, have attracted much debate.[12] The test lies in the rights that are based on the status, without being explicitly provided in the Treaties or the implementing legislation. The Court has had recourse to the status itself to shore up protection. Since *Singh*, it recognises the right to return to one's Member State of nationality.[13] The Court includes such unwritten rights into the supporting secondary law on Union Citizenship,[14] by way of analogy, to citizens who return to their Member States of nationality after having exercised their free movement rights.[15]

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[9] Treaty on the Functioning of the European Union (Consolidated version) (2016) OJ C 202/47, 7 June 2016.

[10] See Niamh Nic Shuibhne, "The Developing Legal Dimensions of Union Citizenship", in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015) 477.

[11] Case C-184/99, [2001] ECR I-6193, para 31; Case C-413/99, Baumbast and R, [2002] ECR I-7091, para 82 [hereinafter *Baumbast*]; Case C-135/08, Janko Rottmann v Freistaat Bayern; [2010] ECR I-1449, para 43 [hereinafter *Rottmann*]; Case C-256/11, Murat Dereci and Others v Bundesministerium für Inneres, [2011] ECR I-11315, para 62 [hereinafter *Dereci*];

[12] See for qualification of citizenship as status in domestic law Laurie Fransman, *Fransman's British Nationality Law* (3rd ed, 2011).

[13] *Singh*, Case C-370/90, para 25, with regard to Art. 39 EC and Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 II, p. 475); also Case C-291/05, Eind, Judgment of 11 December 2007, para 32.

[14] 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, (2007) OJ L 204/28 as amended by Regulation 492/2011, (2011) OJ L 141/1 [hereinafter Citizenship directive 2004/38).

[15] Case C-133/15, *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others*, Judgment of 5 May 2017 [hereinafter *Chavez-Vilchez*] uses analogy to extend the Citizenship Directive 2004/38, which concretises Art. 21 TFU to a

Starting with *Ruiz-Zambrano*[16] and continued recently in *Rendón Marín*[17] and *Chavez-Vilchez* the Court has consistently concluded that citizens, who have not exercised their right of free movement and therefore do not fall under Art. 21 TFEU, still have the right to reside where they choose in the EU territory including their own Member State. In this reasoning, reference to the effectiveness of the status informs the interpretation of the relating bundle of rights, so that beyond the wording of Art. 21 TFEU a right to reside in and to return to one's own Member State is recognised.[18] Thus, the reasoning that underpins this jurisprudence merits closer attention. It invokes the 'effectiveness' of the fundamental status of Union Citizenship and the 'substance' of the relating rights that is inviolable.

The underlying logic of effectiveness is twofold. First, to prevent Union citizens from being deterred from exercising their freedom of movement rights, if on return to the home country, conditions of entry and residence are not at least equivalent to those in another Member State.[19] Second, exercising free movement rights shall not entail *ex post* disadvantages for Union citizens. So, not only should Union citizens not be discouraged from leaving their home Member State, they should also not be ex post penalised for doing so.[20] To put it differently, exercising freedom of movement rights should not be a risky endeavour, which it will be, if Member State nationals must consider whether they will be able to return to their home State with their family members. Even more risky is free movement, if the individual citizenship is discontinued in case the EU Membership of the State of destination comes to an end. Such uncertainties about continued membership of States pose the most profound threat to exercising freedom of movement rights and while they have materialised in Brexit, they are not necessarily restricted to this one case.

Going further than the Court, in *Ruiz Zambrano*, Advocate General Sharpston had reasoned that 'only seamless protection of fundamental rights under EU law in all areas of exclusive or

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returner situation: "Even though Directive 2004/38 does not cover such a return, it should be applied, by analogy, in respect of the conditions that it lays down for the residence of a Union citizen in a Member State other than that of which he is a national, given that in both cases it is the Union citizen who is the reference person if it is to be possible for a derived right of residence to be granted to a third-country national who is a family member of that Union citizen"; Case C-456/12, O. v Minister voor Immigratie, Integratie en Asiel**,** Judgment of 12 March 2014, para 50; Case C-89/17, *Secretary of State for the Home Department v Rozanne Banger*, Judgment of 12 July 2018, para 33. Art. 21 TFEU has served as the basis for the application by analogy of Directive 2004/38 in O. and B., Case C-456/12, Judgment of 12 March 2014, para 61.

[16] Case C-34/09*, Gerardo Ruiz Zambrano v Office national de l'emploi* (ONEm)*,* [2011] ECR I-1177 [hereinafter *Ruiz Zambrano*].

[17] Case C-165/14, Alfredo Rendón Marín v Administración del Estado, Judgment of 13 September 2016 (n.y.r.) [hereinafter *Rendón Marín*] (the Spanish daughter of a third-country national had a right to reside in Spain under Art. 20 and the Polish daughter had a right to reside under Art. 21 TFEU and the Citizenship directive 2004/38.

[18] *Chavez-Vilchez*, para 63: "the effectiveness of Union citizenship would … be undermined, if, …, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus depriving him of the genuine enjoyment of the substance of the rights conferred by that status."

[19] Opinion, GA Bobek, para 31.

[20] Opinion GA Bobek, para 43, 44.

shared EU competence matches the concept of EU citizenship', without indicating that this should be decided without the support of the Member States.[21] The Court more narrowly decided that Member States cannot refuse the right of residence to carers of EU citizens who are minors. However, it should be noted that all governments had submitted that in the given circumstances, EU law would not be applicable. Consequently, the Court answered the precise question referred to it and in so doing, further developed the law, while at the same time being cautious not to overstep the line of Union and of its own judicial competences.

McCarthy and *Dereci* correspond to the rationale of caution, by preserving Member States competences for their purely internal situations. In both cases, the Court found that the situation was governed by national law and this did not interfere with the substance of either Art. 20 or Art. 21 TFEU.[22] The Court cannot overcome the distribution of competences between the Member States and the EU through case law, however, this certainly requires a very clear an even clearer definition of criteria to define when such a situation involving a Union Citizen can indeed be considered as purely internal. Yet the claim that Union Citizenship is a fundamental right does not require a jurisprudence that would transform Art. 20 TEU into a competence provision for the EU in purely internal situations.

The reasoning underpinning the case law indeed merges into a deeper normativity of a fundamental rights quality of Union Citizenship that is rooted in the protection of individuals that protects an established link between the individual and the Member State and the individual and the EU. It has already been pointed out that the Court's jurisprudence on Union Citizenship-as-status provides the guarantee of being on the territory of the European Union subject to its legal order. That comprises the right of a Union citizen to enter the Union territory (*Baumbast*),[23] the right of a Union citizen to return to one's own Member State (*Singh*)[24] and the right of a Union citizen to reside in one's own Member State (*Ruiz Zambrano*).[25] Professor Kochenov has pointed out these cases overcome the transboundary nature of a Union Citizenship that applies only where a citizen has exercised his right to move to *another* Member State.[26]

It is protection for Union citizens facing the threat of *de facto* physical exclusion from the EU territory that motivates this jurisprudence. The Court's recent jurisprudence further shores up this protection against physical exclusion through the fundamental-rights enshrined in the

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[21] Opinion of AG Sharpston, 30 September 2010, para 163, see also para 172 for a comparison with the 'incorporation' case law in US constitutional law.

[22] *McCarthy*, C-434/09, Judgment of 5 May 2011, para 48, the Court made clear that as an ational of a Member State, the person enjoys the status of Union Citizen under Art. 20(1) TFEU, including in relation to the Member State of origin; *Dereci*, C-256/11, Judgment of 15 November 2011, para 64.

[23] *Baumbast*, [2002] ECR I-7091.

[24] Case C-370/90, The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department, [1992] ECR I-4265. The Court bases the extension of protection in the situation of return to a citizen's home country in a situation that is similar to a situation for which the law provides and thereby protects Citizenship.

[25] *Ruiz Zambrano,* [2011] ECR I-1177.

[26] Dimitry Kochenov, "A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe", (2011) 18 *Col. J Eur. L.* 55.

Charter of Fundamental Rights of the European Union.[27] This rationale brings the fundamental right normativity to bear on protecting the family life and, in particular, the citizen-child against expulsion. To this effect are created and progressively reinforced the derived residence rights of Third-Country carers of children having Union Citizenship. The *Metock* and *Lounes* line of cases implicitly incorporate the fundamental right of the citizen to a private and family life enshrined in Art. 7 of the Charter.[28] *Rendón Marín* now expressly activates this fundamental right normativity in the interpretation of Art. 20 TFEU. Rendón Marín's situation must be assessed taking account of the right to respect for private and family life as laid down in Art. 7 of the Charter and for the rights of the citizen-child enshrined in Art. 24(2) of the Charter. The Court therefore narrows the public policy/security grounds for removing the carer.[29] In *Chavez*, the Court connects the Treaty-based right of the Union citizen-child with the fundamental right of the child guaranteed in Art. 24(2) of the Charter.[30] It also underpins it with additional effective procedural safeguards. These are fundamental rights of all persons, protecting every person under the jurisdiction of the EU or its Member States. Yet activating them within the scope of application of Union Citizenship turns it into a citizen right.

There is also agreement that Union Citizenship protects against legal exclusion through removing a Union citizen's nationality that entails the loss of Union citizenship. Such legal exclusion would result from a Member State removing its nationality, thereby automatically stripping the individual concerned of Union Citizenship. In *Rottmann*[31] the Court found that this is a matter of EU law. Rottmann, who had Austrian nationality, had acquired German nationality and as a result, lost his Austrian nationality. When the German authorities discovered that Rottmann had made false representations during the naturalisation procedure, they removed his German nationality. In its preliminary ruling, the Court found that the status as a citizen of the Union conferred by Art. 20 of the TFEU applies to this constellation. As such, in *Rottmann* the Court makes it clear that the removal of a Member State's nationality, because of its implications for Union citizenship, becomes a matter of EU law and not only of national laws. The consequence of this is that removal of the status follows different rules

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[27] Cf Nic Shuibhne, "Integrating Union citizenship and the Charter of Fundamental Rights", in D Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart, 2017) 209.

[28] Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, [2008] ECR I-6241, para 62: "if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed"; Case C-165/16, 14 November 2017, Toufik Lounes v Secretary of State for the Home Department (n.y.r.), para 52 [hereinafter *Lounes*]: "The rights which nationals of Member States enjoy under that provision include the right to lead a normal family life, together with their family members, in the host Member State."

[29] *Rendon*, para. 81, "Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. However, in so far as Mr Rendón Marin's situation falls within the scope of EU law, assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which, as has been pointed out in paragraph 66 above, must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter."

[30] *Chavez-Vilchez*, para 63.

[31] *Rottmann*, [2010] ECR I-1449.

than the conferral that is solely governed by national laws. In consequence, the national court must ascertain the principle of proportionality in the light of national and European Union law is observed.[32] The added value is that Union law criteria and in particular the rights in Union law that the individual will lose with its nationality provide a further standard that the national measure must comply with. How this proportionality test will be further developed, on the level of national legislation (concerning the proportionality of the law itself) and administrative measures in individual cases, remains to be seen. Interesting developments are to be expected from the pending case *Tjebbes and Others*.[33] The case concerns adults of Netherlands nationality and their children that had always lived in third countries. Advocate General Mengozzi accepts in his Opinion[34] that the proportionality review of a national law that leads to the loss of nationality under certain circumstances *ex lege* is performed *in abstracto* and without considering every possible individual circumstance, as this would replace the criteria that the national legislature has chosen. Crucially important is however that the individual has the option to influence the loss of citizenship: according to Netherlands law, a Netherlands national would only lose its nationality if living in a country outside the EU for more than 10 years. However, this period is interrupted if the person concerned has principal residence in the EU for a period of not less than one year or applies for the issue of a declaration regarding the possession of Netherlands nationality, a travel document (passport) or a Netherlands identity card, to demonstrate that there is a link with the Netherlands and the individual wishes to continue this. The person concerned thus has the option of retaining Dutch nationality, even without taking up residence, simply by applying for a renewed passport within the ten-year period. Consequently, the AG sees the situation of minors differently: they lose nationality as a consequence of the loss of nationality of one parent. Minors do not have the possibility to avoid that loss by applying for the relevant documents. Thus, according to the AG, the national law on losing nationality as far as minors are concerned is not compatible with the autonomy of their status of Union Citizenship in the light of the proportionality of the law.

Since *Rottmann*, the status of Union Citizenship is engaged by an individual losing *any* nationality of a Member State and *thereby* his or her Union Citizenship. The AG in the

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[32] *Rottmann*, para 55.

[33] Request for a preliminary ruling from the Raad van State (Netherlands) of 27 April 2017, Case C-221/17, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken*, 2017 OJ C 239/32. The referred questions read: "Must Articles 20 and 21 of the Treaty on the Functioning of the European Union, in the light of, inter alia, *Article 7 of the Charter of Fundamental Rights of the European Union*, be interpreted — in view of the absence of an individual assessment, based on the principle of proportionality, with regard to the consequences of the loss of nationality for the situation of the person concerned from the point of view of EU law — as precluding legislation such as that in issue in the main proceedings, which provides: (a) that an adult, who is also a national of a third country, loses, by operation of law, the nationality of his or her Member State, and consequently loses citizenship of the Union, on the ground that, for an uninterrupted period of 10 years, that person had his or her principal residence abroad and outside the European Union, although there are possibilities for interrupting that 10-year period; (b) that under certain circumstances a minor loses, by operation of law, the nationality of his or her Member State, and consequently loses citizenship of the Union, as a consequence of the loss of the nationality of his or her parent, as referred to under (a) above?" (emphasis added).

[34] Opinion of 12 July 2018. The discussion of the Opinion above is based on the French text, with the English translation not yet available.

Tjebbes case confirms that no further link with EU law other than the Citizenship is required. He then signals that Union Law requires proportionality between the interest of the State to set rules for the acquisition and loss of nationality and the interests of the individual concerned in maintaining links with the Member State and hence the EU. The additional protection of Union law provided by the proportionality test is tangible in the situation of loss of nationality. EU law increases the protection of the established link with the Member State because the individual has also received the promise of protection from the Union legal order in receiving Union citizenship, without replacing national law criteria for the continued existence of the link. The specific value judgment is that the loss of Union citizenship is more likely to be proportional in relation to individual circumstances, for instances in cases where the individual has deceived authorities in obtaining the nationality of a Member State or the individual has had the option to avoid the loss of nationality. Conversely, a much stricter proportionality test may be applicable in cases where individuals are not in a position to avoid the loss of Union citizenship.

2. Protection of Union citizens in the State-State relationship

The case law extends this protection of Union citizens against exclusion to non-extradition to a third State. *Petruhhin*[35] concerned an Estonian national resident in Latvia. The Russian Federation sought his extradition by Latvia for crimes allegedly committed by Petruhhin in Russia. Upon referral, the Court ruled that EU law constituted a bar to such extradition. Petruhhin had exercised his right to free movement under Art. 21 TFEU and hence, the matter was within the scope of EU law. The Court also found that under the right to non-discrimination on the ground of nationality set forth in Art. 18 TFEU the citizen benefited from the constitutional guarantee of non-extradition for Latvian nationals under Latvian constitutional law.[36] Non-discrimination meant that any different treatment of Petruhhin had to be proportionate, and that extradition to Estonia was a less severe restriction than extradition to Russia. Union Citizenship thus incorporates fundamental citizens' rights that constitutional law enshrines. Admittedly, this constitutional law protects absolutely against any extradition to a third country. Yet the Court achieved a similar level of protection, by additionally applying Art. 19(2) of the Charter, obliging the national court to scrutinise whether the citizen was facing the risk of inhuman or degrading treatment in the Russian Federation.[37] *Schotthöfer* illustrates this absolute link with the EU legal order.[38] The Union citizen there, the Austrian Adelsmayr, ran a 'serious risk' within the meaning of Art. 19(2) of the Charter of being subjected to the death penalty upon being extradited to Saudi-Arabia, outlawed by Art. 2 of the Charter. Germany therefore had to reject the request for extradition of Adelsmayr. These ruling links Union Citizenship with non-extradition from the EU territory as a whole. It demands from Member States to incorporate the protection that constitutional law offers to their own citizens to Union Citizens and this is underpinned by the protection standard of the Charter. The individual obtains a subjective right that is bolstered up by constitution law and Union law against the host State, to be not extradited and the legal link for this claim is Union Citizenship. This case law demonstrates how the concept of Union Citizenship receives its normativity from national constitutional law and the

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[35] Case C-182/15, *Aleksei Petruhhin*, Judgment of 6 September 2016 (n.y.r.) [hereinafter *Petruhhin*].
[36] *Petruhhin*, para 32.
[37] *Petruhhin*, para 51.
[38] Case C-473/15, *Peter Schotthöfer & Florian Steiner GbR v Eugen Adelsmayr*, Order of the Court of 6 September 2017 [hereinafter *Schotthöfer*]

Union Charter. It also illustrates that while it is a Union concept, Member States are obliged to ensure they meet the required standard of protection that their constitutions and Union law prescribe. The basis of this extension of Citizenship is the normativity of the fundamental right that the Charter enshrines.

In *Pisciotti*,[39] the Court has held that these protections also apply in the context of an EU extradition treaty. The USA had requested Germany to extradite an Italian national, Pisciotti, who relied on the non-discriminatory application of the guarantee of non-extradition of German nationals in Art. 16 of the German Constitution. The Court found that Pisciotti had exercised his free movement right under Art. 21 TFEU by stopping over in Frankfurt airport, opening the scope of application of that provision and of Art. 18 TFEU. However, Court's further analysis is focused exclusively on the right of Art. 21 TFEU, rather than non-discrimination. The Court found that extradition is an interference that must be proportionate to the objective of effective criminal prosecution. The Member State therefore has to choose the less restrictive means. Extradition to Member States pursuant to the European Arrest Warrant[40] is in principle the less severe restriction than extradition to a third State. Only if no such request is forthcoming, as it was the case in *Pisciotti*, then extradition to a third State is possible.

In a development of *Petruhhin*, *Pisciotti* provides protection of the citizen against extradition solely within Union Citizenship Law. This protection integrates the fundamental right normativity of the constitutional law of the Member States, but does not longer resort to it. The Union citizen is protected against such physical removal from the territory of the EU by virtue of Union Citizenship law, autonomously and independently of incorporated constitutional law of the Member State of residence. This protection solely depends on the citizen having exercised his or her right to freedom of free movement, but that exercise may be fleeting as in an airport stopover (*Pisciotti*) or even a planned journey (*Schotthöfer*)[41]. For the continued exercise of that right, the citizen must then meet the conditions that secondary law lays down.[42] Extradition of a Union citizen to a third State is unlawful, with the sole condition of a request forthcoming under the Framework Decision on the European Arrest Warrant. But Art. 19(2) of the Charter, prohibiting any extradition – or expulsion – to a third country where there the citizen faces the risk of inhuman treatment would still constitute an absolute bar even where no such request is forthcoming.

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[39] Case C-191/16**,** *Romano Pisciotti v Bundesrepublik Deutschland*, Judgment of 10 April 2018 (n.y.r.) [hereinafter *Pisciotti*].

[40] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, (2002) OJ L 190/1, 18 July 2002**.**

[41] *Schotthöfer*, para 21.

[42] Case C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, Judgment of 11 November 2014 (n.y.r.). This restrictive approach of the Court to economically inactive Union citizens has met with strong criticism, see Daniel Thym, "When Union Citizens Turn into Illegal Immigrants: The Dano Case", 40 *Eur. L. Rev*. 249 (2015); R. McCrea, "Forward or Back: The Future of European Integration and the Impossibility of the Status Quo", (2017) 23 *Eur. L. J.* 66 (2017)

II. Union Citizenship-as-fundamental right

The above discussion of the case law on Union Citizenship has shown status to yield a right to reside as well as certain limits on the indirect loss of Union Citizenship resulting from the removal of nationality. Treaty-based status, however, does neither fully explain the expansive jurisprudence, nor does it allow its consistent legal reconstruction having the normative quality of a fundamental right. This section thereore casts the novel perspective of Union Citizenship having the normative quality of a fundamental right

Fundamental rights own a specific normativity over other law, and the first step therefore will be to identify the specific fundamental right of Union Citizenship (1). This is the normativity of inclusion/non-exclusion into the EU legal order. This normativity can be shown to have two functions: it is explanatory and legal-reconstructive of the case law.

The second step is to identify the hard edge of that normativity that no-one can be excluded against their will from the protection that citizenship entails (2). Union Citizenship is protected against measures to remove it by the Member States or the European Union. Brexit becomes a prism on the nature of Union Citizenship precisely because it directly removes Union Citizenship, but not nationality.

While the Court is yet to take this step, the fundamental rights law of the European Union provides strong authority for it. The section first analyses the guarantees that the Charter of Fundamental Rights of the European Union sets forth for the rights of Union Citizenship (3). While there is no express guarantee of that citizenship itself, that is the logical consequence, compatible with the declaratory function of the Charter. The section then considers the general principles of EU law, as a complementary source of EU fundamental rights. The qualitative comparison of the constitutional traditions of the Member States supports Union Citizenship-as-fundamental rights, and so does European and international human rights law (4).

1. The normativity of Union Citizenship-as-fundamental right

Whereas the fundamental status quality of Union Citizenship is now well established and accepted, the cases cannot be satisfactorily explained by way of Union Citizenship as a status in the Treaty. The direction of travel of the decisions of the Court and the influence of the Charter warrant the need for those cases to be looked at from the frameset of an underlying consistent normativity instead of simply that of a status. The decisions instantiate the normativity of a fundamental right of Union Citizenship.

The normative conception of Union Citizenship-as-fundamental right secures the reliable inclusion of individuals in the EU legal order *and* their effective protection from exclusion. The individual is included in this legal order designed to enable individual self-determination and human dignity.[43] The dichotomy of inclusion and exclusion is sometimes and wrongly applied to different sets of persons. But this dichotomy really applies to a given set of people. These are included, and, as a corollary, protected against exclusion. That inclusion has strong connections with democratic self-governance. One is included in the legal order that one has had a chance to shape. Democracy in the European Union is based on the inclusion of citizens. This is powerfully expressed in Art. 14(1) TEU, which after amendment by the Lisbon Treaty provides that the European Parliament represents the citizens of the Union,

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[43] Case 26/62, *Van Gend en Loos*, [1963] ECR 2 (the creation of individual rights is the marker of the new legal order that the Treaty of Rome establishes).

rather than the peoples of the Member States. Union Citizenship embodies the promise by the European Union of protection when this inclusion is threatened.[44] Non-exclusion of individuals is the other side of their inclusion, against both physical or legal exclusion from that legal order and the territory over which it applies. The life choices of individuals based on Union Citizenship and the EU legal order can ultimately be protected only by the EU. This trust the European Union must answer in a manner commensurate with its organisation as a union of States, providing protection through internal and external action beyond its territory under its attributed competences.

Grounded in this normativity, Union Citizenship becomes the legal institution creating a direct relation between the individual and the European Union and its legal order.[45] Individuals are included in that legal order and protected from being excluded from it. This holds true regardless of Union Citizenship being acquired as 'ius tractum'[46] and derived from State nationality. This is only about construction of acquisition of that citizenship. It cannot tell us anything about the substance.[47] In fact, a comparative approach reveals that such models have been tested before in federal systems where the citizenship in the larger polity was derived from those of the smaller polities.[48]

The function of that normativity is explanatory of the direction of the case-law, it is reconstructive in that it provides a novel consistent framework, and it is normative in pointing beyond the established cases.

This single-uniform normativity makes apparent that Union Citizenship is more than a bundle of rights that citizens hold. It provides the single overarching rationale. As such, it explains the direction of the case-law in expanding the scope of Union Citizenship beyond the expressly stipulated rights of citizens or its status. The Court relies on the normativity of a fundamental rights-based approach to Union Citizenship to ensure protection of Union citizens against their exclusion, where Treaty or secondary law do not provide this. That normativity drives the evolving case law precluding acts of exclusion through de-facto expulsion and extradition to a third state, but not to another Member State. Such acts not only exclude the Union citizen from the territory of the EU. They also exclude him or her from the EU legal order and submit them to another legal order that he or she has no say in making and that may diverge considerably from the values and guarantees of the EU legal order. The rationale of these cases becomes to underpin 'status' with an increasingly thick layer of general fundamental rights, ranging from the right to a family life to the right of the child, to tilt the balance towards non-exclusion.

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[44] Barnard, *supra* note 1, at 230.

[45] Reaching a similar conclusion that rights derive directly from EU citizenship and are not mediated by national law, Dora Kostakopoulou, "Scala Civium: Citizenship Templates Post-Brexit and theEuropean Union's Duty to Protect EU Citizens", (2018) 56 *J Common Market Studies* 854.

[46] Dimitry Kochenov, "Ius tractum of many faces: European citizenship and the difficult relationship between status and rights", (2009) 15 *Colum. J. Eur. L.* 169.

[47] See Anja Lansbergen and Jo Shaw, "National membership models in a multilevel Europe", (2010) 8 *I.Con* 50.

[48] See Dieter Gosewinkel, *Schutz und Freiheit? Staatsbürgerschaft in Europa im 20. und 21. Jahrhundert* (Suhrkamp, 2016) (citizenship of the new German state was derived from citizenship of one of its constituent *Länder* from 1871 up until 1913 when a uniform federal law on citizenship entered into force).

That normativity also permits reconstructing a coherent legal framework. That framework draws on the recognised threefold dimension of fundamental rights, which require the addressees to respect, to protect and to fulfil.[49] In the dimension of respect, all limitations imposed by public authority become subject to strict controls. Fundamental rights can, of course, be limited, particularly where there is a collision of rights of others or for recognised general interests. This requires proportionality of the measure taken. But fundamental rights also indicate an absolute limit to exclusionary action that cannot be overridden. Expulsion or extradition from the Union's territory may then conflict with the essence of the fundamental rights of the Charter. The Court in *Petruhhin* and *Pisciotti* accepts that non-exclusion can still be overridden for legitimate objectives of public policy. This limit is the absolute prohibition of expulsion or extradition to a third state where the citizen faces the threat of inhuman treatment, grounded in human dignity.[50] While the Court was not called upon on the facts of any these cases to say so, this reinforcing incorporation of Art. 19 of the Charter extends to the right not to be expelled by a collective measure equally repugnant to human dignity that the first paragraph enshrines.[51]This essence is grounded in the master fundamental right of human dignity, Art. 1 of the Charter. It marks a Union Citizenship of belonging to a legal order grounded in human dignity.

2. Protection against legal exclusion

Extradition or expulsion exclude the citizen from the protective EU legal order, removing him or her from the EU territory, Even more than physical exclusion, the exclusion that results from the legal removal of Union Citizenship is final. The Court has yet to rule on that aspect of protection against exclusion from the EU legal order that is the consequence of a removal of Union Citizenship.

Union Citizenship, in this constellation, demonstrates its normative-constructive function. Such removal does away with the basis for all the citizens' rights that the Treaty and the case law provide, to reside, to vote, and not to be expelled or extradited. The individual finds himself or herself cut off from much of the EU legal order, and a legal vacuum replaces the certainty this citizenship seeks to establish. As such, removing Union Citizenship is more than a change in status, it interferes with the promise of protection inherent in the concept of citizenship.

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[49] The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

[50] *Petruhhin*, para 56: "In that regard, reference must be made to Article 4 of the Charter which prohibits inhuman or degrading treatment or punishment and it should be noted that that prohibition is *absolute* in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter." Also Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of 5 April 2016, para 85.

[51] Art. 19 amalgamates two separate ECHR rights that functionally protect against exclusion: Art. 19(2) replicates Art. 3 of the ECHR that, as interpreted by the ECtHR, prohibits expulsion or extradition to a State where there is a serious risk of inhuman treatment. Art. 19(1) replicates Art. … Art. 19 does not expressly replicate Art. 3 of the Fourth Additional Protocol to the ECHR, which guarantees that no one shall be expelled from the territory of the State of which he is a national or be deprived of the right to enter its territory.

The protection can be relative in individual cases where the measure is backed by legitimate cause, proportionate and taken in a non-arbitrary procedure. Removal for legitimate reasons pertaining to the individual remains permissible and justifies the connection between the Citizenship and the nationality of a Member State. But protection must be absolute against collective measures that strip a group of people of their citizenship and the concomitant rights against their will. Such collective measures infringe the consented understanding of human dignity that precludes making people the object of public policies. Collective removal of Union Citizenship is impermissible, absolutely. What is the legal consequence of this fundamental right not to be deprived of Union Citizenship against one's will in an arbitrary or collective manner? Interference is unlawful and does not produce legal effect, and thus the individuals citizenship continues.

Such legal removal of Union Citizenship by Member States is the scenario of Brexit. Brexit is legally the decision of the UK to terminate the Treaties between it and the European Union. It is a State measure intended to remove Union Citizenship directly, rather than indirectly in the *Rottmann* scenario as the automatic consequence of the removal of its nationality by a Member State. It is collective measure that affects groups of people indiscriminately. It strips UK nationals of their Union Citizenship and for EU27 nationals on UK territory hollows out the substance, for many against their will or, like with minors, without them being able to assert their view.

Member States confer Union Citizenship through nationality, and must respect, protect and promote it. But where there they do not fulfil the promises that come with it, there the Union itself must protect its citizens. It provides that protection through judicial protection before courts, in the citizen-Member State and in the State-State constellations. But, as Brexit demonstrates, it also provides protection through political and legal action. The Withdrawal Agreement with the UK is such action, serving to preserve the rights of citizens, both of EU and of UK nationality in a new international law context after the departure of the UK.

3. The legal basis in the EU Charter of Fundamental Rights

This normative conception of Union Citizenship-as-fundamental right has a legal basis in the EU Charter of Fundamental Rights. Art. 6(1) TEU makes the Charter part of the binding primary law, located at the apex of the EU legal order and on par with the Treaties.[52] In its preamble, the Charter establishes the individualist, fundamental right grounded normativity of Citizenship of the Union.[53] Admittedly, on its wording, the Charter does not enshrine a fundamental right to Union Citizenship, or against removal or extradition. An immediate criticism could then relate to fact the Charter is supposed to have a declarative/declaratory nature and not to create new rights. Yet, the principal argument is that a fundamental right is a logical consequence of Union Citizenship and thus does not affect the declarative nature of the Charter. The Charter provides all the stepping stones, by making clear that rights of

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[52] Pilar Juarez Perez, '"La inevitable extension de la ciudadania de la Union: a proposito de la STJUE de 8 de Marzo de 2011 (Asunto Ruiz Zambrano)", (2011) 3/2 *Cuadernos de Derecho Transnacional*, 249-266 (Considering Zambrano as the first example of the Charter elevating Union Citizenship to the level of a fundamental right).

[53] Preamble, 2nd para: "it [the Union] is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union".

citizens have that quality. The precondition of having and retaining the status becomes implicitly guaranteed, as the essence of each of these rights.

Chapter V of the Charter enshrines specific fundamental rights held by Union citizens. These are *inclusive rights*. Art. 39(1) of the Charter guarantees the fundamental right of citizens to vote and stand for the European Parliament. Art. 45(1) of the Charter guarantees the fundamental right of all citizens, including the non-economically active, to reside in the territory of the Member States. Furthermore, in its Chapter II on Freedoms, the Charter turns the fundamental freedoms of the Treaty into fundamental rights of Union citizens. In Art. 15(2) of the Charter, Union citizenship is the basis for the guaranteed fundamental right to seek employment, to work, to exercise the right of establishment and to provide services in the Member State. Hence, the Charter provides a fundamental right quality to the rights that citizens hold under the Treaty that are status-based. The added normative layer can become operational. The judgment of the Court in *Delvigne* illustrates this. The Court there connects Art. 20(2)(b), 22 TFEU with Art. 39(1) of the Charter, the right to vote for the EP in another Member State. The Court also connects the institutional provision of Art. 14 TEU on EP elections with the fundamental right to universal suffrage set forth in Art. 39(2) of the Charter. [54] The result is that there is a fundamental right to vote in one's own Member State under the Charter that goes beyond what the Treaty provides.

Art. 52(2) of the Charter[55] provides the conduit between the two manifestations of the same right in the Charter and the Treaty. It re-inserts the interpretation of the Charter-rights into the corresponding Treaty rights and vice versa.[56]

The Charter does not enshrine citizens' rights against *exclusion*. But it contains general fundamental rights such as the right to a private life and the protection against inhuman treatment that provide protection against physical exclusion. These are general fundamental rights for all that are under the jurisdiction of the Member States or the EU, including citizens of the Union. These general fundamental rights become functional citizens' rights securing the residence that they are guaranteed.

It is true that the Charter does not enshrine a specific right of Union citizen not be stripped of their citizenship. Yet, that is not necessary either. In fact, retention of the status of Union Citizenship itself is guaranteed, inherently, in each of these above rights. It is the basis for their exercise. The Charter brings with it general provisions, Chapter VII, that are integral to each right and define the permissible limitation on the exercise. In Art. 52(1), the Charter sets forth two such limitations that apply in turn.[57] Removing Union Citizenship is a limitation within the meaning of Art. 52(1) of the Charter of each right. Such limitation is subject to

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[54] Case C-650/13, *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde*, Judgment of 6 October 2015 (n.y.r.), para 42 [hereinafter *Delvigne*].

[55] It reads: "Rights recognised by [the] Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties."

[56] Explanations relating to the Charter, (2007) OJ C 303/17, which must be given due regard in interpreting it (Art. 6(1) TEU and Art. 52(7) CFR).

[57] It reads: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

proportionality and 'may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.' Yet, even such a limitation must also "respect the *essence*[58] of those [citizens'] rights".[59]
The Grand Chamber of the Court in the *Polish Justice* case[60] has just activated the essence of a fundamental right enshrined in the Charter as the ultimate limit for any limitation placed on it. The Court there stated that access to an independent court is the essence of the right of judicial protection enshrined in Art. 47 of the Charter. A systematic concern for the independence of the judiciary in a Member States therefore precludes any extradition to that Member State pursuant to a European Arrest Warrant. Neither the requesting nor to the requested Member State nor indeed the Union legislator may limit the essence of the right of judicial protection of the accused. Such limitation cannot be justified by outweighing general objectives of public policy.

Unlawful derogation of the status of Citizenship is equivalent to derogation of the essence of any fundamental right that Union citizens can hold. Even when it is argued that the status of Citizenship as such is not a fundamental right in and of its own, given that the possession of Union Citizenship is a constitutive element for the direct and indirect fundamental citizens' rights in the Charter, its removal interferes with those rights and their essence. For instance, if an opposition politician would lose nationality or Union citizenship to prevent him or her running for the European Parliament – this would surely breach Art. 39 of the Charter. Thus, removal of Citizenship would qualify as a violation of the Charter. The underlying status cannot be withdrawn lawfully.

This is particularly true in a situation where the Union citizen does not have the option to exercise any influence in relation to the possibility that Union citizenship is lost, in accordance with the case law as discussed in detail above. Furthermore, as with all fundamental rights, essence or core of each fundamental right is protected absolutely and cannot be restricted.[61] Each fundamental right has an essential content which enjoys enhanced protection. Interference with that essence cannot be justified.

The master norm of the Charter, the absolutely protected human dignity enshrined in Art. 1 of the Charter, reinforces the fundamental right not lose one's Union Citizenship without consent. Human dignity precludes treating people as mere objects of public authority. Ultimately, protecting human dignity by way of fundamental rights ensures that in case of conflict between law and political power, law prevails at the very least in the form of subjective protection that is has to offer in all western democracies. This human dignity

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[58] Emphasis added.
[59] This being said, the alternative argument can be made that this is further confounding the already difficult application of the primary law, see Nic Shuibhne, "Integrating Union citizenship and the charter of Fundamental Rights", in D Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart, 2017) 209, 294
[60] C-216/18 PPU, *Minister for Justice and Equality* (Défaillances du système judiciaire), Judgment of 18 July 2018.
[61] Art. 52(1) of the Charter corresponds to Art. 19(2) of the German Basic Law that also separately protects the essence of each fundamental rights. Further on the relation between proportionality and essence Manfred Stelzer, *Das Wesensgehaltsargument und der Grundsatz der Verhältnismäßigkeit* (Vienna: Springer, 1991).

manifests itself in the situation of Union citizens that have exercised their Treaty-bestowed right to move to another Member State trusting in permanency, but bear the consequences of a contrary public decision to exclude them from the protection of the Treaties having nothing to do with them or their actions. The emphasis on individual action and life choices chimes with the dominant principle of Union Citizenship law. This principle is that the reasons host State may invoke to terminate residence must be exclusively personal and must not be collective.[62]

This Union Citizenship as the essence of the citizens' fundamental right under the Charter is grounded in the European Convention on Human Rights (ECHR). Art. 52(3) of the Charter determines that the ECHR constitutes the minimum threshold of any corresponding right in the Charter. This threshold includes the jurisprudence of the ECtHR that shapes the rights of the ECHR. The CJEU must follow this jurisprudence and adopt a congruent interpretation of the corresponding Charter right. The ECHR does not contain a separate fundamental right of citizenship. Yet, the ECtHR has effectively developed an equivalent protection of status within the fundamental right to a private life that Art. 8 of the ECHR enshrines. The ECtHR adopts this reasoning in *Kurić*.[63] The case concerned the policy of «erasure», under which Slovenia removed 25 671 of its residents that had not obtained Slovenian citizenship from the register of permanent residents and transferred them to the register of aliens, following the country's secession from the former Yugoslavia in 1992 and the declaration of Slovenia's independence. These individuals were left without a right to lawfully reside on the territory of Slovenia. In *Kurić*, the Grand Chamber found that Slovenia had violated Art. 8 of the ECHR on the right to a family life, because (i) there was an interference through the denial of residence, (ii) which had no basis in Slovenian law, (iii) and that while the creation of a corpus of Slovenian nationals was a legitimate objective, (iv) it was disproportionate to deprive the applicant of their status that had given them access to a range of rights. The *Kurić* -Court thus interprets Art. 8 ECHR to protect the status of being included in the register against the collective measure of erasure on two levels. First, the mere fact that no procedure was put in place to settle the status for ex-SFRY citizens holding the citizenship of one of the other successor republics, but who had been lawfully residing in Slovenia prior to the independence declaration, created a legal vacuum violating Art. 8 of the ECHR. While that lack of a sufficient legal basis would have been sufficient to find an infringement of Ar. 8 ECHR, the Court deliberately examined whether the measure pursued a legitimate aim and was proportionate to it.[64] It acknowledged that the protection of the country's circle of citizens would be legitimate, however, the measure was not necessary in a democratic society violating Art. 8 ECHR given the radical repercussions of 'erasure' that removed the basis of all other rights of the individuals concerned. The Court protects the status precisely because it gives them access to a wide range of rights. The status is the basis of a set of rights essential for leading a private life in dignity, *specifically* under Slovenian law. Protection of fundamental rights begins at the very roots of these rights, the right to be included a particular legal order. Removing the status through as collective measure such as erasure violates the very essence of that right to a family life. It is important to note that the Court is not concerned with the prevention of statelessness as most applicants in *Kurić* indeed did have the nationality of another successor state.

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[62] Art. 27 of Directive 2004/38/EC.
[63] ECtHR Grand Chamber, *Case of Kurić and Others v Slovenia*, Application no. 26828/06, Judgment of 26 June 2012 [hereinafter *Kurić*].
[64] *Kurić*, para 350.

Art. 51(1) of the Charter specifies the addressees of that fundamental right. Accordingly, the EU is bound for all its institutions and in all its policies. That is important, in regard for instance to the interpretation and application of Art. 50 TEU and subsequently the Withdrawal Agreement that will become EU law. By contrast, according under Art. 51(1) of the Charter, the Member States are only bound by the Charter when implementing *other* EU law. Member States are implementing EU law in this sense when the *Treaty's* Union Citizenship provisions are controlling. The Court has adopted an increasingly broad interpretation of the Treaty's citizens free movement right that now even covers a merely planned trip to another Member State.[65] But going even further, in the *Rottmann/ Tjebbes* constellation, the interference with Union Citizenship itself constitutes the sufficient nexus. In that constellation, the Member States are always implementing the Treaty and therefore bound to respect the fundamental right to Union Citizenship.

4. The complementary basis in the general principles of EU law: the constitutional traditions of the Member States and international human rights law on citizenship

Post-Lisbon, the Charter, in line with the intention to enhance legal certainty, has been taking prime of place in the practical protection of fundamental rights against both the EU and its Member States. The Court applies the manifestation of a fundamental right in the written Charter over the unwritten general principles.[66] Yet, the Charter does not legally supersede or displace this other source of fundamental rights. Art. 6(3) TEU makes clear that the general principles of Union law continue to be a valid source. These sources have a mutually reinforcing effect.[67]

Under the formula developed by the Court and now laid down in Art. 6(3) TEU, the standard of constitutional law of the Member States and international human rights law form general principles of EU law**.** It has always been and continues to be the very conceptual presupposition of the general principles as source of EU fundamental rights that those fundamental rights enshrined in national constitutions can be transferred to the different normative environment of the European Union because the threats faced by individuals had become similar, and needed a fundamental rights limitation. The fundamental right to privacy and digital information is an example It was hatched originally in the context of the constitutional state, but was then transferred to the EU level and has become a very salient

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[65] *Schotthöfer,* para 21.

[66] This may also have to do with the legitimacy of having been adopted through the treaty-amending process, see Koen Lenaerts and José Antonio Gutiérrez-Fons, "The Place of the Charter in the EU Constitutional Edifice*"*, in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (Hart, 2014), 1560.

[67] For an understanding of the sources of fundamental rights listed in Article 6 TEU in a non-hierarchical, complementary relationship see Herwig C.H. Hofmann & Bucura C. Mihaescu, "The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test", (2013) *Eur Constitutional L Rev* 74; B.C. Mihaescu Evans, *"« Gaps » in protection stemming from the coexistence of fundamental rights' sources in the EU legal order*", (2016) *Cahiers de Droit Europeen* 141. Further Tacis Tridimas, "The general principles of law : who needs them ?*"*, (2016) *Cahiers de Droit Europeen* 149; S. Sever, "General principles of law and the Charter of Fundamental Rights" (2016) *Cah. Dr. Eur*. 167.

constraint on EU action.[68] Citizenship is not different. Also hedged in that context of a nation-State, it has now been transferred to the EU level and therefore the guarantees pertaining to it have also be transferred to the EU level. As it the for privacy, Union Citizenship also may need protection against action or inaction of the European Union, as well of the Member States when implementing EU law.

Constitutional guarantees are elevated to the EU level through a bifurcated mechanism. The second mechanism is the guarantee of non-discrimination. Art. 18 TFEU prescribes that fundamental right guarantees of a Member State for its nationals is extended, on a non-discriminatory basis, to all Union citizens. Art. 18 TFEU prohibits discrimination between Union citizens on the basis of nationality transfers to the EU level the specific guarantees against extradition to any other country and non-deprivation of nationality for its nationals that Member States constitutional law typically enshrines. As a result, Union citizen now enjoy those guarantees within the territory of the Union regardless of their nationality and even in the territory of their own Member State.

Constitutional and international human rights law give a clear matrix of citizenship. For conferral of citizenship there are several models with discretion for the State on the attribution of citizenship unquestioned. Yet, once it has been conferred, strict fundamental rights controls apply, restricting the powers of the State regarding removal of that citizenship collectively and also individually. But a second element of that matrix is the protection against extradition. National constitutional law protects citizens against both legal and physical exclusion from their legal order. Non-exclusion from a specific protective legal order is the rationale of those guarantee, and not just the prevention of statelessness. Member States constitutions that include the fundamental right of citizens not to lose their citizenship against their will also provide for the consequences of any violation. That consequence is the continued and uninterrupted citizenship.[69]

National constitutional law protects against the loss of citizenship, as fundamental right, in three situations: removal through a collective decision, removal through an individual decision, and removal through territorial changes. The first two guarantees react to the totalitarian experience and are therefore found in the family of post-totalitarian constitutions of the Member States. For example, Art. 16 of the 1949 German Basic Law[70] protects against deprivation of citizenship by general measures absolutely, while individual removal is subject to proportionate measures.[71] It also protects against extradition. Art. 26(1) and (4) of the Portuguese Constitution[72] considers citizenship to be a fundamental right that can only be

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[68] Case C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others*, Judgment of 8 April 2014 (nyr).
[69] See Art. 116(2)(2) Basic Law of Germany. It establishes that persons unlawfully stripped of their nationality are deemed not to have lost it if they took up residence again after 1945.
[70] English translation available at https://www.bundesregierung.de/Content/EN/StatischeSeiten/breg/basic-law-content-list.html
[71] Federal Constitutional Court of Germany, Case 2 BvR 669/04, Judgment of 24 May 2006, 116 BVerfGE 24.
[72] English translation available http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf.

removed in a very limited set of circumstances. Art.11(2) of the 1978 Spanish Constitution[73] recognises the fundamental nature of citizenship and explicitly bars the possibility of non-naturalised individuals being stripped of their Spanish nationality. § 8 of the 1992 Estonian Constitution[74] recognises the fundamental nature of citizenship and explicitly bars the possibility of non-naturalised individuals being stripped of their nationality. Art. 98 of the Latvian constitution precludes any extradition of its citizens. Article 9 of the Croatian constitution that came into force upon its accession to the EU in 2009 provides that a citizen of the Republic of Croatia may not be forcibly exiled from the Republic of Croatia nor deprived of citizenship, nor extradited to another state, except in case of execution of a decision on extradition or surrender made in compliance with international treaty or the EU *acquis communautaire*. This constitution also guarantees the Union Citizenship of Croatian nationals, arguably as a fundamental right.[75]

Constitutional law and practice of the Member States also demonstrates the human right quality of citizenship by preserving citizenships in the instance of territorial change. If the restrictions can be set aside on an individual basis, States are unable to deprive an entire group of its citizenship, even as a consequence of territorial changes. In particular, the UK citizenship law has adopted pragmatism and flexibility to respond to situations under which political and constitutional changes would otherwise have resulted in groups of individuals being deprived of rights which they had previously enjoyed. The UK has accorded to Irish citizens and to the citizens of Commonwealth countries rights equivalent to those of UK citizens. In the case of Irish citizens the continuing rights enjoyed extend to full freedom of movement to and from the UK and a right of abode there.[76] The same is true of those Commonwealth citizens who are granted the right of abode in the UK. German constitutional

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[73] English translation available at https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf.

[74] English translation available at https://www.president.ee/en/republic-of-estonia/the-constitution/.

[75] Art. 152 of the Croatian Constitution provides that: "Citizens of the Republic of Croatia shall be European Union citizens and enjoy the rights guaranteed by the European Union acquis communautaire, and in particular: … In the Republic of Croatia, all rights guaranteed by the European Union acquis communautaire shall be enjoyed by all citizens of the European Union." Official journal of the Republic of Croatia, Narodne novine (N.N.), no. 85/2010, 6 July 2010. English text of the Croatian Constitution is available at http://www.sabor.hr/fgs.axd?id=17074. Further Tina Oršolić, Constitutional provision on EU citizenship – the case of Croatia, available at http://ssrn.com/abstract=2030765.

[76] The status of Irish citizens resident in the UK was finally fixed by the Ireland Act 1949. Under that Act there was full recognition by the UK of complete political separation between the UK and the Irish Republic. But section 2 of the 1949 Act recognised that the Republic of Ireland was not (and is not) to be regarded as a foreign country for the purposes of UK legislation. So Irish citizens born, before 1922, in that part of Ireland which passed under the jurisdiction of the Irish Republic and who had not resided there throughout the intervening period were enabled to retain UK citizenship, and Irish citizens resident in the UK could acquire UK citizenship by registration. Irish citizens who resided in the UK, whilst remaining Irish citizens, were permitted to enjoy all the benefits of UK citizenship, including freedom to take up residence and employment in the UK, to vote in parliamentary elections and seek membership of the national legislature. This was described by the UK Government as "an exchange of citizenship rights" rather than common citizenship, HL Debates, 15 December 1948, volume 159 column 1101.

law provides another precedent for continuing citizenship despite territorial changes. The Federal Republic of Germany (West Germany), considered itself the continuer of the German state albeit on a smaller territory. The Federal Republic treated Germans resident in the German Democratic Republic as its citizens under the continuing German citizenship law of 1913. This citizenship could also be passed on to descendants.[77]

In fact, and importantly, the European Union in its practice has adopted this pattern of preserving rights conferred by its legal order in instances of territorial changes. The European accepts the principle, familiar from the law of international organisation, that boundaries are flexible. That means that losses of territory of a State leave its membership in the organisation unaffected. It remains the same member, but with a different territory. This rule of membership with flexible boundaries is subject to the caveat that the rights that individuals resident on this territory hold under EU law be preserved. In 1986, Greenland withdrew from the European Community after a referendum. The then European Community and Denmark concluded a treaty providing that the Treaties would cease to apply in Greenland while preserving the rights of Union citizens already resident there.[78] The explanatory memorandum of the Commission makes explicit that those Treaty-based individual rights ought to be preserved in the same manner as the acquired pension rights.[79] Finally, the practice of the European Union has also been to preserve national citizenships as much as possible in the event of the break-up of the home State.[80] This practice conforms with the international law principle that territorial change should not affect existing citizenships formulated in the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.[81] Art. 2 recognises an individual right to a nationality.[82] Art. 6 obligates the predecessor not to withdraw its nationality even if those nationals live now in a successor state, provided that the national has not acquired the nationality of that state or would otherwise become stateless. This puts it in the hands of the individual to retain their previous nationality. This is also the recent paradox of Catalonia where it was argued Spain could not withdraw the citizenship *en masse* to citizens of an independent Catalonia.[83]

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[77] Federal Constitutional Court of Germany, Case 2 BvR 373/83 (Teso), Judgment of 21 October 1987, 77 BVerfGE 137.

[78] Treaty amending, with regard to Greenland, the Treaties establishing the European Communities, [1985] OJ L 29/1, 1 February 1985. Art. 2 of the integral protocol on special arrangements reads "The Commission shall make proposals, …, for the maintenance of rights acquired by legal and natural persons during the period that Greenland was part of the Community". Greenlanders retained the right to a Danish passport and the ensuing rights under the Treaties.

[79] European Commission, Opinion, Status of Greenland, 2 February 1983, EC Bulletin, Supplement 1/83, p. 21.

[80] Danilo Turk, "Recognition of States: A Comment", (1993) 4 *Eur. J. of Int'l L.* 66 (1993) (Yugoslavia).

[81] Council of Europe Treaty Series No. 200, 19 March 2006, entered into force 1 May 2009.

[82] It reads: "Everyone who, at the time of the State succession, had the nationality of the predecessor State and who has or would become stateless as a result of the State succession has the right to the nationality of a State concerned, in accordance with the following articles."

[83] Mariona Illamola Dausa, Nacionalitat catalana i/o nacionalitat espanyola. I l'europea?, Revista d'estudis autonomics i federals 25 (2018) p. 93-128 DOI: 10.2436/20.8080.01.16, where it is argued European Citizenship evolved "to a new concept" which would restrict

International human rights law is a constitutive source of the general principles of EU law.[84] Art. 15 of the Universal Declaration of Human Rights provides that no-one may be arbitrarily deprived of his nationality.[85] This has entered into customary international law. The most authoritative recognition of that customary law quality is to be found in the judgment of the African Court on Human and Peoples' Rights in *Anudo*.[86] The Court there distinguishes between the competence of each state to confer its nationality and the limits placed on its power to remove that nationality once conferred.

Admittedly, the *Anudo* case on its face is about the issue of statelessness which is not the case with the loss of Union citizenship. The Court refers to the prevention of statelessness as the rationale of Art. 15 UDHR. There is, however, space for analogy. The loss of rights it implies is not far from a partial statelessness. Statelessness is a human rights concern precisely because it signifies lack of the elementary protection of the individual that the State can and must provide. This rationale also applies to Union Citizenship. Union Citizenship ensures a specific protection that only the European Union, because and within the sphere of its conferred competences, can provide.

III. Three counterarguments

Attributing the normative quality of a fundamental right to Union Citizenship is a novel argument that departs from the consensus. For it to be convincing, it does not suffice to make the positive case. It is also necessary to confront potential or actual counterarguments. This section deals with and refutes three: that there is a categorial difference between national and Union citizenship (1), that nexus between EU membership of the state of nationality and Union Citizenship, Art. 20(1) TFEU is indelible (2), and that the collective democratic decision for joining and exiting the EU, guaranteed in Art. 50 TEU, means that no independent Union citizenships can be preserved. More radically, the second part of the article makes the case that since citizenship rights are fundamental rights, they can survive the UK's withdrawal from the EU. The most obvious argument against this proposition is that citizenship rights derive from the EU Treaties, so if those treaties cease to bind the UK then the rights must disappear as well. It is true that the rights which the Treaties give to individuals are powerful and far-reaching, but that does not in itself tell us anything about what happens when the instrument from which they originate is removed.

1. A categorical difference between citizenship of the state and of the Union?

Is there a categorical difference between citizenship of the state and that of the Union that would somehow mean that only the former but not the latter has the potential of acquiring the normativity of a fundamental right? It is unquestionably a fact that the EU at present remains an international organisation, and is not a State, and in that sense forms a different if not all

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Spain's possibility of withdrawing the citizenship of part of its nationals, particularly if they showed a will in keeping such nationality.

[84] Case 4/73, Nold KG v Commission, [1974] ECR 491, at 507

[85] Mirna Adjami and Julia Harrington, "The Scope and Content of Article 15 of the Universal Declaration of Human Rights", (2008) 27 *Refugee Survey Quarterly* 93–109.

[86] In the Matter of Anudo Ochieng, *Anudo v United Republic of Tanzania*, Application No 012/2015, Judgment of 22 March 2018, para 76.

easy to grasp category of public authority. But this does not mean that construction of membership in its legal order is impossible or categorically different. This organisation of sovereign Member States has, however, produced a legal order that is autonomous from both international law and the domestic law of the Member States and whose subjects are individuals (as well as the Member States). That creates the same need to determine the membership in it as it is the case of domestic legal orders.

In fact, Art. 20 TFEU itself denies categorical differences, and aligns the two concepts of citizenship on a functional if not ontological level. This is reflected in the wording. It distinguishes between nationality and national citizenship. In a tradition going back to Marshall and the concept of social citizenship that refers to the set of rights that citizens enjoy,[87] citizenship is the right to have rights, a right of inclusion in a specific legal order.[88] In the case of the European Union, a composite polity, that legal order is autonomous.

2. Is there an inseparable link between Union Citizenship and a State's EU membership in Art. 20(1) TFEU?

The fundamental right does not curtail the right of each State to decide on its membership in the EU and to withdraw from it, as enshrined in Art. 50(1) TEU. Hence, withdrawal of the UK from the Founding Treaties entails that its nationals will become third-country nationals. The article now addresses the primary counter-argument against the protection of Union Citizenship in a situation where a Member States withdraws from the Union. This counterargument is based on the wording of Art. 20(1) TFEU according to which 'every person holding the nationality of a Member State shall be a citizen of the Union'.[89] The provision does not explicitly address the situation of a Member State ending its membership. It has been argued that the provision sets forth two criteria which must be satisfied at any time: the individual must have the nationality of a Member State and the conferring State remains a Member. Admittedly, the provision can be interpreted in such way.

However, a different reading is not against the wording of Art. 20(1) and in addition, does meet the requirements of Union Citizenship as fundamental right that protects individuals against exclusion against their will. This section first reconstructs the analytic position of Art. 20(1) TFEU. This provision is not just on the status of individuals. It is also competence basis. It represents the competence of the Member States to confer their nationality, to which the Treaty attaches the automatic consequence of acquisition of Union Citizenship (1). This competence of the Member States can be limited for the benefit of individuals.

a. The competence of the Member States to confer and revoke Union Citizenship

The following discussion seeks to arrive at a clearer understanding of Art. 20(1) TFEU. For that purpose, an analysis of the provision identifies two possible concepts. One interpretation of this provision would be that it enshrines the rights of each Member State. These have the

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[87] T. H. Marshall, *Citizenship and Social Class: And Other Essays (Cambridge: Cambridge University Press, 1950).*

[88] Further Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2012), 129-170 (Transformations of citizenship: The European Union).

[89] Jean-Claude Piris, "Should the UK withdraw from the EU: legal aspects and effects of possible options", Robert Schuman Foundation, European issues n°355, 5 May 2015; Gareth Davies, "Union citizenship – still Europeans' destiny after Brexit?", European law blog, 7 July 2016.

right to determine the circle of their nationals and, hence, the right to determine who can be and who cannot be a Union citizen. But such an interpretation in terms of rights of States does not do justice to the structure of the Founding Treaties or to the principle of conferral.

Art. 20 TFEU denotes a division of competences between the European Union and the Member States.[90] This division follows the functional distinction between the concepts of nationality and citizenship in which nationality is the basis of membership and citizenship the fullness of the rights that members holds. To the Member States is allocated the competence of nationality, under Art. 20(1) TFEU, that is to confer their nationality entailing as its automatic consequence that Union Citizenship is conferred. The competences to define Union Citizenship rights are assigned to the European Union, which may also add to the rights listed in Art. 20(2) TFEU. Note that Art. 20(1) third sentence TFEU and Art. 9 TEU[91] separately guarantee the institution of citizenship – not nationality – of the Member States. This confirms the distinction between nationality and citizenship. To the Member States is reserved the competence to define the fullness of rights that pertain to their citizenship.

The Member States have the competence to confer directly their nationality and thereby indirectly Union Citizenship, but the reverse is not necessarily true. It is, of course, always problematic to conclude from a given power its reversal, the *actus contrarius* or the competence to revoke what has been granted. The fact that Member States nationality entails Union Citizenship does not have to mean as a matter of pure logic the competence of Member States to take other action to revoke Union Citizenship. There is no indication on Art. 20(1) TFEU that the Member States have the power or competence to revoke Union Citizenship in itself at will.

b. Limits

But even if one were prepared to take this step, then this competence of the Member States to revoke Union Citizenship is limited to safeguard the Union interest over its Union Citizenship. This interest in who is to be Union citizens is becoming increasingly clear and well defined. This interest first imposes limits on the competence to confer. The Court had noted already in *Micheletti* that while it is for each Member State to lay down the conditions for the acquisition of nationality, they must have 'due regard to Community law' when doing so.[92] More recently, the questions raised by the EU institutions relating to 'cash for passports' schemes that allow wealthy individuals to acquire Member State nationality speak of the same principle.[93] *Rottmann* articulates and operationalises a limit on the competence to revoke their nationality. There the interest in the status of Union Citizenship constitutively limits the competence of that Member State to remove its nationality if this would lead to a

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[90] Niamh Nic Shuibhne, "Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen when the Polity Bargain Is Privileged?", in D Kochenov (ed), *EU Citizenship and Federalism* (Cambridge University Press, 2017), 125-146.

[91] Art. 9 TEU reads: '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.'

[92] Case C-369/90, *Micheletti and Others v Delegación del Gobierno en Cantabria,* [1992] ECR I-4239, para 10.

[93] The Commission has formulated for 2018 a priority to "Safeguard the essence of EU citizenship and its inherent values; in 2017/2018 [it will] produce a report on national schemes granting EU citizenship to investors describing the Commission's action in this area, current national law and practices, and providing some guidance for Member States". *EU Citizenship Report* 2017, p. 14.

specific case of statelessness, that is the loss of the nationality of an EU Member State. *Lounes* now formulates a further limit, if implicitly. The Court there ruled that Union citizens retain their permanent right of residence in the host Member State if they naturalise there later. The rationale of effective free movement of citizens[94] limits the competence of the Member State to confer their nationality and by the same token to remove the rights if not the status of Union Citizenship. Ultimately, the rights of Union citizens limit all exclusive competences of the Member States. *Chavez* makes this clear. There, while expressly acknowledging that the Member States have the competence to determine the residence of third-country nationals on their territory, the Court made clear that the requirement in EU law to permit their continued residence to care for an Union citizen was a limitation on that competence. That limitation was a necessary consequence of the status of Union Citizenship entailing the right to reside in the territory of the Union.[95]

That Union interest is even stronger in the constellation of a Member State withdrawing from the EU. The limit becomes more powerful here where the Member State does not revoke its own citizen's nationality, but rather targets directly and exclusively the Union Citizenship. No Member State can remove Union Citizenship from all its nationals through collective action and the decision to leave the EU is not to be treated differently. As such, the departure of the Member State from the EU does not entail the loss of Union Citizenship acquired by individuals.

c. The removal of Citizenship through exit from the European Union

It is suggested here that Union citizens retain their Union Citizenship even if the State of which they are a national ceases to be a Member State. The proposition is that, once Union Citizenship has been bestowed by a Member State, EU law constrains how it can be removed. Admittedly, that interpretation of Art. 20 TFEU does not deal with the fundamental point that after a State ceases to be a Member State, the EU Treaties cannot oblige it to do anything at all, because they will no longer bind it. Two arguments support the here proposed interpretation, the fundamental rights normativity of Union Citizenship to which we turn first and the application of public international law which will be addressed under 3.

Union Citizenship and the relating rights once bestowed in fact become independent from the Treaties, because they fall into a different normative category. Fundamental rights possess an altogether different normativity in which their legal value and continued bindingness is rooted. It is the specific norm-character that protects fundamental rights as subjective rights against political power. From this perspective of the normativity as fundamental right, the *Geltungsgrund* of Union Citizenship as such fundamental rights lies in the specific value of the norm which qualifies the fundamental right to protect the right holder. This nature stipulates necessarily and inherently that the right becomes independent from the reciprocity of the Treaties between the High Contracting States. The normativity is not horizontal between sovereigns, it rather is vertical between each sovereign and each individual under their jurisdiction.

The consequence of this argument is that this normativity binds not just the exiting State but also the remaining Member States. The remaining Member States are also prevented from denying that the nationals of the exiting State are Union citizens. The consequent obligations to give effect to this may differ, in detail, for the withdrawing and the remaining Member

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[94] *Lounes*, para 58 (logic of gradual integration underlying Art. 21(1) TFEU).
[95] *Chavez*, para 64.

States. The withdrawing Member State must not treat its own nationals nor those of the remaining Member States as having lost their Union Citizenship and the relating rights. The remaining Member States must not treat the nationals of the withdrawing Member State as having lost their Union Citizenship and the relating rights. Any limitations can only be imposed for a legitimate reason and in a proportionate manner.

3. The collective decision to (Br)exit and the rights of individuals

A third conceivable counter-argument relates to Art. 50 TEU. Art. 50(1) TEU now expressly recognises the sovereign right of a Member State pursuant to its internal decision-making to withdraw from the Founding Treaties, and to terminate the Treaties for the future. But does this provision also empower that Member State, availing itself of this right, to also terminate the Union Citizenships of its nationals as well as to curtail the citizens' rights of others on its territory? On closer inspection, Art. 50(1) TEU does not provide for such a power. Citizenship rights are, as other fundamental rights, not subject to the political decision of the majority.

a. The function of Art. 50(1) in its international law context

This becomes perspicuous when Art. 50 TEU is read in its public international law context, laid down in the 1969 Vienna Convention on the Law of Treaties ('the Convention'). Such contextual reading is indeed required. The fact that the Treaties are international law between the Member States may be surprising to those that have been advocating a constitutionalist reading. But that has always been the line of reasoning of the Court. The famous *van Gend en Loos* judgment of the Court emphasizes that the Treaties apply as international law between the States, although they also create rights and obligations for individuals.[96] The much discussed recent *Achmea* judgment of the Court restates this finding: between the Member States - as High Contracting Parties - the Treaties are traditional public international law creating rights and obligations for states.[97]

A right of States to exit from the European Union was, for the first time, contained in the Constitutional Treaty.[98] The Constitutional Treaty never entered into force, but much of its substance was retained by the Lisbon Intergovernmental Conference and converted into the Lisbon Treaty. That treaty amended the TEU, enshrining in Art. 50 the exit clause as drafted by the European Convention. The European Convention was very clear that it had drafted the clause closely following the template of Part V of the Convention for the withdrawal of a State from any treaty, including treaties constitutive of an international organisation.[99]

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[96] Case 6/62, *Van Gend en Loos,* 63] ECR 1, 12.

[97] Case C-284/16*, Slovak Republic v Achmea*, Judgment of 6 March 2018 (n.y.r), para 41 : 'Given the nature and characteristics of EU law mentioned in paragraph 33 above, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.'

[98] Art. I-59 of the Treaty establishing a Constitution for Europe, (2004) OJ C 310/1, 16 December 2004.

[99] Praesidium de la Convention européenne, Note du Praesidium à la Convention: Titre X – L'appartenance à l'Union, CONV 648/03, 2 April 2003, at http://www.cvce.eu/content/publication/2013/8/5/2551b42a-e0ce-49d4-857a-4325e1154e2e/publishable_fr.pdf.: "Finalement, l'Art. 46 relatif au retrait volontaire d'un État membre de l'Union est une disposition nouvelle. Elle reconnaît expressément la possibilité pour chaque Etat membre de se retirer de l'Union européenne s'ils en décide ainsi.

In its Part V, the Convention creates a template for the conditions, the procedure, and the consequences of a State Party withdrawing from a multilateral treaty. Art. 56(1) of the Convention requires that the substantive treaty contains explicitly the right for States Parties to withdraw, or that such right can at least be implied.[100] The State must notify its intention to withdraw, and withdrawal only takes effect upon expiration of the notice period, Art. 56(2). Art. 70(1)(a) of the Convention sets forth the first consequence of effective withdrawal that the Treaties shall cease to apply between the State and remaining Parties. However, Art. 70(1)(b) of the Convention provides rules to ensure that such exit shall have no retroactive effect.[101] Withdrawal "does *not affect* any right, obligation, or legal situation of the parties created through the execution of the treaty prior to [withdrawal]". [102] The withdrawing State and the remaining States Parties have to comply with the treaty after its end.[103]

Against this background, Art. 50(1) TEU sets forth the right and Art. 50(2) the procedure of a Member State to withdraw from the Treaties.[104] In other words, Art. 50(1) inserts the door, Art. 50(2) explains how to find the way to the door and Art. 70 of the Convention explains what the State can take with it – and what not. Art. 50(2) also provides the EU with an external competence to conclude an agreement with the withdrawing State on the arrangements.[105] Art. 50(3) provides for consequence of ending the applicability of the Treaties on the international law plane between itself and the remaining Member States for the future, following the template of Art. 70(1)(a) of the Convention. But there is a conspicuous lacuna, in that there are is no provision on the continuing rights and obligations.

La procédure de retrait s'inspire en partie de celle prévue dans la Convention de Vienne sur le droit des traités, tout en prévoyant la possibilité pour l'Union et l'État membre concerné de conclure un accord régissant les modalités de son retrait et établissant le cadre de leurs relations futures". The Praesidium had the role of lending impetus to the European Convention and providing it with a basis on which to work.

[100] Prior to the amendment of Art. 50 TEU, no right to exit was enshrined in the Treaties, and the prevailing literature denied that such a right could be implied, see Michael Akehurst, Withdrawal from International Organisations, (1979) 32 *Current Legal Problems* 143, 151; R.J. Friel, "Secession from the European Union: Checking out of the proverbial 'Cockroach Hotel', (2003) 27 *Fordham International Law Journal* 590, 601-09. For a comprehensive review of the practice see Gino Naldi and Konstantinos Magliveras, Human Rights and the Denunciation of Treaties and Withdrawal from International Organisations, (2013) 33 *Polish Yearbook of International Law* 95.

[101] Andre Nollkaemper, "Some Observations on the Termination of Treaties and the Reach of Art. 70", In I.T. Dekkers and H.H. Post (eds), *On the Foundation and Sources of International Law* (2003) 187; Francesco Capotorti, *L'extinction et la suspension des traités*, (1971) 134 *Receuil des Cours* 417.

[102] Emphasis added. The first paragraph deals with treaty-termination, but the second paragraph extends these rules to withdrawal.

[103] H. Ascenio, "Article 70", in Corten and Klein (eds), *Commentary on the VCLT* (Oxford University Press, 2009), para 4. The ILC Commentary leaves open as a merely doctrinal question whether the source of that obligation is the Convention or the substantive treaty.

[104] See Martin Waibel, The Brexit Bill and the Law of Treaties, EJIL talk, 4 May 2017, available https://www.ejiltalk.org/the-brexit-bill-and-the-law-of-treaties/.

[105] Further Christophe Hillion, "Withdrawal under Article 50 TEU: An integration-friendly process", (2018) 55 *Common Market Law Review* 29.

It cannot be construed as an implied restriction on Union Citizenship as status and Union Citizenship as fundamental right. That lacuna must be filled by resorting directly to Art. 70(1)(b) of the Convention. The applicability of Art. 70(1)(b) of the Convention has attracted controversial attention in the Brexit-context, either because Art. 50 TEU is said to derogate from Art. 70,[106] or because Art. 70 of the Convention is considered not to cover individual rights.[107] However, a closer analysis of the work of International Law Commission reveals that 'legal situation' was to be the default clause for rights of individuals created under the substantive treaty during its currency to survive. This also is applies to the Founding Treaties of the European Union. In other words, Art. 50(1) inserts the door, Art. 50(2) explains how to find the way to the door, Art. 50(3) tells us what happens when the door closes and Art. 70 of the Convention explains what the State can take with it on its way out – and what not.

b. The lacuna in Art. 50(3) on the consequences of withdrawal

Art. 70(1) of the Convention distinguishes the consequences that the withdrawal has for the future relationship between the withdrawing State and the remaining States, Art. 70(1)(a) and the consequences that the withdrawal decision has for rights, obligations and legal situations that were created during the time of membership of the withdrawing State, Art. 70(1)(b). The article now turns to the content of Art. 70(1)(b), determining the positions surviving the end of a State's membership in the international organisation.

Art. 70(1)(b) of the Convention contains two concepts defining its scope. The first is that certain positions – rights, obligations, and legal situations – become concrete legal positions capable of surviving the end of treaty. The second concept is that such position must have been created through the application, or execution, of the treaty by the Parties prior to the withdrawal taking effect.[108] It is generally accepted that obligations of the State continue, if these obligations were accrued during membership but fall due after the end of membership, particularly to make contribution to the budget of an international organisation.[109] By contrast, whether the status quo of *individuals* continues has been doubtful.[110] A canonical

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[106] UK House of Lords, European Union Committee, HL Paper 125, 'Brexit and the EU budget', March 2017, at 33 (arguing that financial obligations of the UK do not continue, nor, by implication, rights of individuals). Art. 70(1)(b) of the Convention is dispositive and indeed permits that a "treaty may provide otherwise". Yet, this wording puts the burden of argumentation is on the Party wishing to avail itself of a derogation that it was the intention of the Parties to derogate and effectively make the withdrawal have retroactive effect. But Art. 50 TEU does not indicate such intention.

[107] See UK House of Lords, European Union Committee, 10th Report of Session 2016–17, HL Paper 82, Brexit: acquired rights, December 2016, p. 25, referring to the evidence from Professor Vaughan Lowe QC (AQR0002 and AQR0003); European Parliament, DG Internal Policies, Study, 'The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27', PE 583.135.

[108] Sir G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius, 1986), vol. I, 403–4.

[109] MIGA Secretariat, Commentary on the MIGA Convention, at [73], available at https://www.miga.org/documents/commentary_convention_november_2010.pdf

[110] See UK House of Lords, European Union Committee, 10th Report of Session 2016–17, HL Paper 82, Brexit: acquired rights, December 2016, p. 25, referring to the evidence from Professor Vaughan Lowe QC (AQR0002 and AQR0003); European Parliament, DG Internal

interpretation of Art. 70 supports that it addresses the status of individuals through the default concept of 'legal situations' that have been created by States through their administrative acts.[111] To these legal positions in objective law can correspond 'rights' of individuals.

The 'legal situations' and corresponding 'rights' of citizens created during their currency survive Brexit, and must be respected by the UK and the remaining Member States as a matter of international law, *unless* the Withdrawal Agreement to be concluded pursuant to Art. 50(2) TEU provides otherwise.[112] As consequence, the extant positions of EU27 nationals in the UK and UK nationals in the EU are preserved, and these can exercise their Union Citizenship rights for a lifetime. The sovereign decision of a State to withdraw does not absolve it from the responsibility to still protect Union citizens who are living there, and neither are the remaining Member States absolved from their responsibility to protect nationals of that State remaining on their territory.

In this light of the international law of treaties, Art. 50 TEU must be interpreted. The explicit right to withdraw extends to the treaties, as binding international law, creating rights and obligations between States, but it does not extend to fundamental rights. The right can also be expressed as a power. The Treaty in this sense confers a power on the Member State to terminate the Treaty as between itself and the other the States.[113] But this express right to withdraw and the empowerment of each member state has clear limits. It cannot terminate or otherwise affect the Treaties' bindingness as between the remaining Member States in regard to all Union citizens, including those from an exiting Member State. The State's power does not reach the fundamental rights of individuals. The express right to withdraw does not comprise this element of the Treaties. These therefore continue. The interpretation of human rights treaties points in the same direction of being rights vested in each individual, that once conferred, cannot be taken away by a sovereign's decision. Hence, there is no implied right to withdraw from the IPCCR.[114] Nor must state succession affect those international human rights.[115] The involvement of fundamental human rights narrows the door through which treaty exit of a State can proceed.

Policies, Study, 'The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27', PE 583.135.

[111] For detailed analysis and argumentation see Petra Minnerop and Volker Roeben, "Continuity as the Rule not the Exception" (under review).

[112] Art. 70(1) accepts that its provisions apply "unless …the parties otherwise agree".

[113] For a deeper discussion of rights as powers in an institutional theory of law, see Neil MacCormick, *Institutions of Law* (OUP, 2009).

[114] General Comment No 26, Continuity of Obligations, UN Doc CCPR/C/21/Rev. 1/Add 8/Rev. 1 (1997) (no implied right to withdraw from the UN Covenant on Civil and Political Rights).

[115] See Opinion No 9 of the Badinter Commission in regard to the succession to the Former Yugoslavia, para 2 "The chief concern is that the solution [to the succession] should lead to an equitable outcome for …. the fundamental rights of the individual", reprinted in D. Turk, 'Recognition of States: A Comment', (1993) 4 *European Journal of International Law*, 66 at 89. China as the successor state to the UK became bound by the CCPR in regard to Hong Kong, P.M. Eisemann & M. Koskenniemi (eds). *State Succession: Codification Tested against the Facts* (The Hague: Martinus Nijhoff, 2000).

c. The role of withdrawal arrangements

In the event of a withdrawal, the Convention contains an implicit obligation for States parties to conclude new treaty making practical arrangements. These arrangements are to create legal certainty by clarifying the concrete positions that continue and by establishing enforcement mechanisms; they may also address all further matters that the concrete withdrawal may raise.[116] It is a consequence of the principle of consent that these arrangements may derogate from the rule of continuity.[117] The Convention rules on continuity apply, *unless* the substantive treaty itself or the later agreement of the Parties derogates from them. The introductory clause of Art. 70 of the Convention expressly permits such derogation. However, the wording makes clear that this will be the exception. The burden is on the State relying thereon to demonstrate that it was the intention of the Parties for the withdrawal to have such retroactive effect. In practice, derogation from Art. 70, in the treaty itself or in a later agreement is exceedingly rare.[118]

Art. 50(3) TEU indeed must be seen in this light. The Withdrawal Agreement envisaged there is primarily to create the legal certainty for the surviving rights of citizens, within the then governing international law environment after withdrawal, in which all the structural safeguards of the supranational EU legal order will no longer be available. The March 2018 draft of the Withdrawal Agreement seeks to reflect this standard.[119]

Still, any rights protected by Art. 70 of the Convention in conjunction with Art. 20 TFEU will be superseded by a Withdrawal Agreement adopted under Art. 50(2) TEU. The provisions on citizens' rights in the Draft Agreement, which have already been agreed between the EU and the UK, in particular falls short of protecting the citizenship rights of all UK nationals: they only preserve specified rights of particular categories of people that have exercised their rights. It follows that the Withdrawal Agreement removes certain rights, rather than preserve rights.

This may seem a startling proposition. It is true that international law would not erect to the parties negotiating such an agreement. The bar arises, however, from the normativity of Union Citizenship as a fundamental right. That normativity implies that Union Citizenship survives independently. If the Withdrawal Agreement curtails, then it constitutes a limitation arising in secondary EU law that needs to pursue a legitimate objective and be proportionate to this objective.

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[116] Second Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur, UN Doc A/CN.4/107 (ILC Yearbook 1957, vol. II), p 35, para. 6: "The termination of … the participation of a particular party, may give rise to a number of consequential issues. These will … be governed by the treaty itself if it provides for them, and if not, must be the subject of a separate agreement between the parties" (emphasis added).

[117] ILC Commentary, at p. 265.

[118] R. Wolfrum, *Völkerrecht*, Vol I-3 (2nd ed, Berlin: de Gruyer, 2002), 730.

[119] European Commission, Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 15 March 2018, Doc TF50 (2018) 33/2. For discussion of the implications of the UK withdrawal for Northern Ireland see Colin Harvey, *Brexit, Human Rights and the Constitutional Future of these Islands*, (2018) 1 EUROPEAN HUMAN RIGHTS LAW REVIEW 10.

Conclusions

This article takes up the debate on Union Citizenship at a juncture and takes it to a new, normative level. It chooses not to accept that Union Citizenship is merely a status that is conferred on individuals and remains at the discretion of States. Instead, the article has argued that Union Citizenship has the normativity of a fundamental right. As such, it institutionalises individual membership in the EU legal order. This article has spelled out that for individuals with Union Citizenship, the consequence is that they included directly in the EU legal order and the once established link must be protected against exclusion from this legal order, be it through expulsion, extradition or legal deprivation of citizenship. The case law of the Court, the Charter, and the constitutional traditions of the Member States and international law, support this analysis that Union Citizenship is more than at bundle of rights. Claims to protection against such exclusion are directly addressed to the European Union, and not mediated by the respective Member State of nationality. The home and host Member States are also obliged to protect the Union Citizen, and this remains true for a former Member State. The Union as a polity assumes the role of protector against threats that its citizens face, and which the Member States cannot alleviate.

Union Citizenship being not just a status but a fundamental right, which once conferred can only be taken away subject to strict proportionality, and not at all by collective measures, implies that existing Union Citizenships survive the collective decision of a State to end its membership in the Union, even if the rights contained therein may change. It is the withdrawal situation that pinpoints the legal choices available for a coherent conception of Union Citizenship in a situation where the collective decision of a State contravenes the rights that have been conferred on individuals. Thus, Brexit becomes the prism through which to see more perspicuously the individual conception of a citizenship above the State. This individual membership is not conditional on continued membership of a State in the Union, and hence, it is independent from the collective decision of a member State to remain a member of the Union and consequently, the contribution that the people of a Member State are making. While not strictly necessary, clarificatory action by the EU (and the UK) in the Withdrawal Agreement provides legal certainty and thus protection against the final exclusion from the EU legal order that would result from the legal removal of Union Citizenship. But those citizenships will also continue in the event that no such agreement is reached, operationalised through the international law of treaties that Art. 50 TEU references.

This normative conception of Union Citizenship has consequences and not all of them can be explored in detail in one article. One is that such inclusion of individuals into the EU legal order generates loyalty. As enshrined in Art. 20(1)(3) TFEU, primary loyalty – allegiance - is to remain with the respective Member State. But a secondary loyalty comes to lie to the European Union that protects citizens. As a possible corollary of that role the Union ultimately may have to determine the circle of those that it protects.