CHAPTER 9
THE EU'S CONSTITUTIONAL CORE

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National identity is *à la mode* in EU law. Ever since the Treaty of Lisbon enshrined the Union's obligation to protect the national identity of its Member States, we witness an impressive increase in the case-law and literature on the subject.[1] As it currently stands in Article 4(2) of the Treaty on European Union, the national identity clause allows Member States to justify restrictions to EU law based on their 'fundamental structures, political and constitutional'. The European Court of Justice has accepted the provision's role as a justification in recent cases, and Member States invoke it now with enthusiasm. Despite its ambiguity, national identity has become EU law's latest trending topic.

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1 *Inter alia*, L. BURGORGUE-LARSEN (ed), *L'identité constitutionnelle saisie par les juges en Europe*, Iredies-Pedone, Paris, 2012; F.X. MILLET, *L'Union Européenne et l'identité constitutionnelle des États Membres*, PhD submitted at the European University Institute, 2012; J.D. MOUTON, 'Vers la reconnaissance d'un droit au respect de l'identité nationale pour les Etats membres de l'Union' in *La France, l'Europe et le monde. Mélanges en l'honneur de Jean Charpentier*, Pedone, Paris 2009, 409; V. CONSTANTINESCO, 'La confrontation entre identité constitutionnelle européenne et identités constitutionnelles nationales: convergence ou contradiction? Contrepoint ou hiérarchie?' in *L'Union européenne: Union de droit, Union des droits. Mélanges en l'honneur de Philippe Manin*, Pedone, Paris 2010; A. VON BOGDANDY, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' (2003) 62 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 156; A. VON BOGDANDY and S. SCHILL, 'Die Achtung der nationalen Identität unter dem reformierten Unionvertrag. Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs', (2010) 70 *ZaöRV (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht)*, 709; C. WALTER, 'Europäische und nationale Identität in der Wechselwirkung: Überlegungen zur Integration durch Verfassungsrecht am Beispiel des Staastskirchenrechts' in W. Klüth, *Europäische Integration und nationales Verfassungsrecht: eine Analyse der Einwirkungen der Europäischen Integration auf die mitgliedstaatlichen Verfassungssysteme und ein Vergleich ihrer Reaktionsmodelle*, Nomos, Baden-Baden 2007; T. OPPERMANN, 'Nationale Identität und supranationale Homogenität' in *Die Herausforderung von Grenzen: Festschrift für Roland Bieber*, Nomos-Dike, Zurich/ St. Gallen 2007; S. RODIN, 'National Identity and Market Freedoms after the Treaty of Lisbon' (2011) 7 *Croatian Yearbook of European Law & Policy*; S. PLATON, 'Le respect de l'identité nationale des États membres: frein ou recomposition de la gouvernance?' (2012) 556 *Revue du Marché Commun et de l'Union Européenne*, 150.

The difficulties and challenges surrounding Article 4(2) TEU have already been addressed in this book and I will not deal with them. The purpose of this contribution is to complement the debate over the national identity clause by introducing a new variable that is frequently ignored. Whilst the national identity of Member States points at the constitutional core of each domestic legal order, I will prove how national constitutional cores are counterbalanced by the Union's own constitutional features. This paper will thus purport that the Union's legal order has created a constitutional core of its own, protected from international, European and national interferences. But the Union's constitutional core is also a reflection on which the national identity of the Member States projects itself. If one's identity becomes meaningful only through the identity of *the other*,[2] the same logic applies to the national identity clause: only by understanding the Union's identity, and thus its legal identity in the form of the Union's constitutional core, we can fully grasp the scope of the national identity clause.

This paper will narrate how the Union's constitutional core has been recently proclaimed by the European Court of Justice (hereinafter 'the Court') in Kadi,[3] and how it has come full circle in later judgments like Rottmann[4] and Ruiz Zambrano.[5] After formally declaring the existence of an EU constitutional core in Kadi, the Court has begun to bridge the Union's constitutional core with the notion of citizenship. I will thus argue that the Union's constitutional core is now formally channelled through European citizenship, a legal concept that holds the three normative ideals on which the Union is based: Democracy, Rights and Solidarity. As long as European citizenship guarantees the individual's enjoyment of the said normative ideals, EU law is bound to protect the essence of the statute of citizenship, even in situations that are strictly within a purely domestic context. It is under this framework that the EU's constitutional core must be understood, and it is precisely with this *raison d'être* that the Court has recently began to construe it through its case-law.

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2 On identity as a philosophical concept that relies on the passage of time and association to objects, see the classic work of E. Hirsch, *The Concept of Identity*, Oxford University Press, 1982 as well as J.E. Stets and P.J. Burke, 'A Sociological Approach to Self and Identity' in M. Leary and J. Tangeney (eds), *Handbook of Self and Identity*, Guilford Press, New York 2005.

3 ECJ 3.9.2008, Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-06351.

4 ECJ 2.3.2010, Case C-135/08 Rottmann [2010] ECR I-1449.

5 ECJ 8.3.2011, Case C-34/09 Ruiz Zambrano [2011] ECR I-0000.

1. THE EU'S LEGAL IDENTITY AND THE THREE NORMATIVE IDEALS

Any discussion over the paralegal aspects of the Union's identity can be approached from different angles. First, 'identity' can be identified with 'specificity' or 'singularity': what is special about the Union that makes it stand out from other organisations? Second, identity can point at the *common features of a societal group*, a portrait that empirically reflects, mostly through sociological methodology, the traits of a given community. Thirdly, and this is the approach I will purport in this paper, identity can be understood as an *existential* trait: what makes of the Union a Union, and what are the features acting as a genetic code that grant this organisation its *raison d'être*.

ID ~ existential trait

Building up on this last conception of identity, the existential features of the Union can be traced back to their historical, sociocultural, political and economic roots. Historically, the Union is the depositary of a shared past of which Member States and their previous political incarnations have been protagonists in war and peace over a period that stretches over two millennia.[6] In sociocultural terms, the peoples of Europe share ethnical traits and reflect a traditional attachment to common values, as well as to principles of religious, ideological and cultural tolerance.[7] The Member States of Europe, as well as the Union's political institutions, have embraced liberal democracy as a form of government, as well as the principles of market economies, albeit with strong redistributive mechanisms that ensure solidarity among the peoples and territories of Europe and its Member States.[8]

The Union's Treaties portray in legal terms the common features that comprise Europe's historical, sociocultural, political and economic roots. The Union embraces these features and uses them as the basis of its own constitutional framework, both in terms of input and output legitimacy. The common features justify Europe's political Union and act as a source of integration, but they also set the goals that both the Union and its Member States (the latter by way of the Union's policies) are set to achieve.[9] History, and particularly its more gruesome

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6 See, *inter alia*, J. CARPENTIER and F. LEBRUN (eds), *Histoire de l'Europe*, Seuil, 1992; N. DAVIS, *Europe: A History*, Harper, 2007; P. LONGWORTH, *The Making of Eastern Europe: From Prehistory to Postcommunism*, Palgrave 1997; and M. SALEWSKI, *Geschichte Europas: Staaten und Nationen von der Antike bis zur Gegenwart*, Beck, Munich 2004.

7 See, *inter alia*, G. CHILD, *The Dawn of European Civilization*, Knopf, 1968 as well as R.C OSTERGREN and J.G RICE, *The Europeans: A Geography of People, Culture, and Environment*, Guilford Press, New York 2004.

8 See F. SCHARPF, *Crisis and Choice in European Social Democracy*, Cornell University Press, 1991; B. EICHENGREEN, *The European Economy since 1945: Coordinated Capitalism and Beyond*, Princeton University Press, 2008.

9 On the Treaties' ability to define goals, values and principles in a coherent fashion, see A. VON BOGDANDY, 'Founding Principles' in A. von Bogdandy and J. Bast, *Principles of European Constitutional Law* (eds), Hart Publishers, Oxford 2009, at 11.

episodes, reinforces the need of what the Treaty refers to 'an ever closer union among the peoples of Europe'.[10] Sociocultural traits, expressed in the Treaties as the 'cultural, religious and humanist inheritance of Europe', justify the Union's promotion of 'freedom' and 'equality'.[11] The foundations of the liberal-democratic State explain why the Union's internal organisation of powers is based on the principles of democracy, the rule of law and the protection of human rights.[12] In its origins, the Union was created to attain a common market, and it has therefore given special significance to the underlying principles of market economies. The Treaties thus insist on the importance of creating and effectively achieving 'a highly competitive social market economy'.[13]

The Treaties contain a two-fold mandate that calls simultaneously for the active *protection* and active *promotion* of the common features that comprise the Union's identity. Despite the provision's dispersion and lack of dogmatic consistency, the legal identity of the Union, understood as this two-fold foundational mandate, can be reduced to what I will label as the Union's three normative ideals. Under the three normative ideals, the Union expresses its foundations and its ultimate goals as a political organisation. The three normative ideals inform all of the Union's policies and actions, and assist the courts in the interpretation of the law. The three normative ideals comprise all the common features that make up the Union's identity and all the goals enshrined in the Treaties and designed to protect the said features. The three normative ideals can be expressed under the generic categories of Democracy, Rights and Solidarity.[14]

The constitutional core of the EU has been construed on the basis of these three normative ideals. However, the legal institution through which the core is gradually developing is not to be found in the Treaties' opening provisions. Articles 2, 3 and 4 TEU act as a declaratory statement of the three normative ideals, but they are provisions with no capacity to create autonomous rights. In Jimenez Zaera, the Court referred to former Article 2 EEC and stated that 'owing to its general terms and its systematic dependence on the establishment of the common market and progressive approximation of economic policies, *[the said provision] cannot impose legal obligations on Member States or confer rights on individuals*'.[15] The Court has not changed its view since then, and it continues

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10 See preamble of the TEU, paragraph 3, and Articles 1, 3(2) and 3(3) TEU.

11 See preamble of the TEU, paragraph 2, and Articles 2 and 3(2) TEU.

12 See preamble of the TEU, paragraph 2, and Article 2 TEU.

13 See preamble of the TEU, paragraph 9 and Article 3(3) TEU.

14 As it has been mentioned, this is an arbitrary choice of words that could work perfectly well under different headings. However, **I consider that Democracy, Rights and Solidarity comprise at its most abstract level all the values and principles enshrined in the Treaties.** In this line, see von Bogdandy, *cit. supra* n 9, at 12 et seq, referring to Equal Liberty, the Rule of Law, Democracy and Solidarity as the 'founding principles of supranational authority'.

15 ECJ 29.9.1987, Case 126/86, Giménez Zaera [1987] ECR 03697, at 11.

to highlight the lack of judicial enforceability of the opening provisions of the Treaty,[16] despite their ability to inspire the interpretation of other Treaty rules.[17]

Thus, the EU's constitutional core has obviously *not* become enforceable as a result of Articles 2, 3 and 4 TEU. Although these provisions reflect the three normative ideals and condition the interpretation of the Treaties, the Court has construed a legally enforceable protected core through another set of provisions intimately attached to the rights and duties of the individual. Since the three normative ideals reflect values of freedom and equality, it was expected that the Court would find a link between the three ideals and the status of European citizenship, reflection of the individual's rights and duties and its status in the European sphere. Through the provisions enshrined in Articles 18 to 25 TFEU, the Court has thus given the EU's constitutional core a legal instrument in which to incorporate the former's content, allowing it to become enforceable *vis-à-vis* any rule of international, European or national law. However, in order to understand why it is citizenship the institution that hosts the EU's constitutional core, we must first stop and briefly reflect on the tasks entrusted to European citizenship in a broader historical, political and social context.

2. CHANNELLING IDENTITY THROUGH EUROPEAN CITIZENSHIP

Despite its classical origins, the current understanding of citizenship is the product of the enlightenment and of liberal political thought, as it emerged in the course of the 18th century. Jean Jacques Rousseau, John Locke and Immanuel Kant are undoubtedly the intellectual fathers of the creature, and we owe them a notion of citizenship attached to democracy, liberty and rights,[18] rather than to the (Roman) attribution of status and privilege.[19] At its most generic, modern citizenship can be currently understood as a link between the individual and a political organisation that creates an individual statute protected by law, guaranteeing representative, accountable and redistributive government. A citizen holds rights and duties (it is

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16 ECJ 16.12.2004 Case 293/03, My [2006] ECR I-12013, at 29.

17 In ECJ 17.3.1993 Cases C-72/91 and 73/91, Neptun Schiffahrts AG [1993] ECR I-00887, the Court referred to Giménez Zaera, but deciding on the social objectives of now Article 151(1) TFEU, to state that 'the nature of a programme does not mean that they are devoid of any legal effect. They constitute an important aid, in particular for the interpretation of other provisions of the Treaty and of secondary Community legislation in social matters' (at 26).

18 Their contribution to political philosophy, and its impact on the notion of individual freedom and citizenship, can be found more particularly in ROUSSEAU's *The Social Contract*, Book II; LOCKE's *Two Treatises on Government*, Book II, chapter VII, and KANT's *The Metaphysics of Morals*, Part I.

19 On roman citizenship and its legal statute see the classic work of A.N. SHERWIN-WHITE, *The Roman Citizenship*, Oxford University Press 1939.

thus a statute *governed by law*), the exercise of which contributes to the legitimacy and proper functioning of the political community.

However, as a result of globalisation, the past decades have witnessed an alarming erosion of the modern conception of citizenship. Participation and representation (democracy) have been devalued in light of the extraordinary mobility of individuals. Political organisations have serious difficulties to accept participative rights of its citizens living abroad, and at the same time restrict those same rights to the foreign nationals they host.[20] Accountability and the enforcement of the law (rights) becomes a challenge in a borderless world, as rights and courts operate within the confines of a neatly defined territory.[21] The same applies to redistributive mechanisms that ensure equality among individuals and territories (solidarity), trapped within the territorial barriers of taxing and spending authorities, but with highly mobile subjects and corporations that swiftly escape from national boundaries.[22] The overall picture of modern citizenship is that of a venerable old institution, struggling with difficulty to catch up with events and the course of time.

The appearance of European citizenship in 1992 raised hopes of regeneration. Overall, the aim of European citizenship was and still is to balance and thus correct the pitfalls of our modern and yet eroded conception of citizenship.[23] The lack of representation and participation of individuals moving within the Union is now remedied at the municipal level, and the European Parliament expresses the will of the peoples of Europe through a direct election process.[24] EU law, a

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20 See, *inter alia*, D. Held, *Democracy and the Global Order*, Stanford University Press 1995; A. Ong, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty*, Duke University Press, 2006; T. Macdonald, *Global Stakeholder Democracy: Power and Representation Beyond Liberal States*, Oxford University Press, 2008 and E. Thomas, 'Who Belongs?: Competing Conceptions of Political Membership' (2002) 5 *European Journal of Social Theory*, 323.

21 See, *inter alia*, K. Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law*, Oxford University Press, 2009; J. Obermaier, *The End of Territoriality? The Impact of ECJ Rulings on British, German and French Social Policy*, Ashgate, 2009; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, 2011; P. Arnell, *Law Across Borders: The Extraterritorial Application of United Kingdom Law*, Routledge, 2011.

22 See, *inter alia*, F. Scharpf, 'The Viability of Advanced Welfare States in the International Economy: Vulnerabilities and Options', (2000) 7 *Journal of European Public Policy*, 190; R.A. Yonah, 'Globalisation, Tax Competition and the Fiscal Crisis of the Welfare State' (2000) 113 *Harvard Law Review*, 1573.

23 On the origins and foundations of European citizenship, see N. Reich, *Bürgerrechte in der Europäischen Union*, Nomos, 1999; S. O'Leary, *European Union Citizenship*, Kluwer, 1996; A. Lliopoulou, *Libre circulation et non-discrimination, éléments du statut de citoyen de l'Union européenne*, Bruylant, 2008 and A. Rosas and E. Antola (eds), *A Citizens' Europe: In Search of a New Order*, Sage, 1995.

24 See Article 10 TEU, stating in paragraph 1 that 'the functioning of the Union shall be founded on representative democracy'. Article 22 TFEU guarantees the right of every citizen of the Union residing in a Member State of which he is not a national 'to vote and to stand as a

legal order with direct effect and primacy over national legal systems, and the EU's judiciary, are the expression of the law's empire throughout the territories of the Union.[25] Social policy, cohesion policies and financial assistance mechanisms are the first steps towards a coherent redistributive system that aims to guarantee equality among the peoples and territories of Europe.[26] The provisions on European citizenship have touched all these points in a gradual fashion, addressing individual aspects either through Treaty reforms or the evolutive case-law of the European Court of Justice. The overall picture is that of a status of citizenship, ruled by law, that compensates not all, but many of the pitfalls of State citizenship.[27] These pitfalls reflect the three normative ideals mentioned in section I, Democracy, Rights and Solidarity, transforming European citizenship into an institution that channels the common features that compose the Union's identity, but also that compensates the Member State's inability to protect and guarantee the status of domestic citizenship to its nationals.

Beyond the specific Treaty rules that make up European citizenship, the status comprises a particularly protected content, as recently stated by the Court in the landmark Ruiz Zambrano case, a judgment I will deal with in detail later. This particularly protected content of European citizenship gives specific and coherent legal form, subject to protection before a court of law, to the three normative ideals previously mentioned. It is thus through European citizenship that the Union's legal core becomes legally enforceable, empowered with an autonomous content, a gradual and evolutionary character, and legal effectiveness. In the following pages it will be argued that the recent case-law of the European Court of Justice and the Union's recent constitutional developments, are good proof of how European citizenship has assumed this role, and of how this process contributes to reinforce the Union's legitimacy as well as the individual's link to a broader political community.

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candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State'.

25 The Court has repeatedly stated that 'the European Union is a Union based on the rule of law in which its institutions, bodies, offices and agencies are subject to judicial review of the compatibility of their acts, in particular, with the EU and FEU Treaties' (see, *inter alia*, ECJ 23.4.1986, C-294/83, Les Verts v. Parliament [1986] ECR 1339, at 23; Kadi, *supra* n 3, at 281; ECJ 14.6.2012, Case 533/10, Civad [2012] ECR I-0000, at 30). See M. Zuleeg, 'Die Europäische Gemeinschaft als Rechtsgemeinschaft' (1994) *NJW (Neue Juristische Wochenschrift)*, at 545.

26 See Articles 136, 151–164, 174–178 TFEU, as well as the Treaty Establishing a European Stability Mechanism, signed on 2 February 2011.

27 See F. De Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe' (2012) 5 *European Law Journal*, 701.

3. THE CONSTITUTIONAL CORE OF EU LAW: FOUNDATION, AUTONOMY AND CONTENT

3.1. FOUNDATION AND AUTONOMY

It has taken almost sixty years for the Court to proclaim the existence of a constitutional core of EU law. Sixty years in which EEC law first asserted its own authority *vis-à-vis* national legal orders, whilst Member States empowered the Communities and ultimately the Union through successive Treaty reforms that confirmed, one by one, the Court's boldest decisions. It has taken all these years to declare that EU law has immutable provisions, protected from other legal orders and from EU law itself. An evolution similar to the one that national Constitutional courts have piloted in the past decades *vis-à-vis* EU law, only that now it is the Court who is playing the tune.

The proclamation of the EU's constitutional core was made by the Court in the seminal Kadi case, a judgment of a momentous importance for many reasons, but mostly for declaring the existence of a constitutional core of EU law, in virtue of which 'no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order'. These principles are referred to as 'constitutional principles of the EC [now EU and TFEU] Treaty', and are immune to other provisions of EU law, and/or provisions of other legal orders (i.e. International law) holding legal effects by way of an EU Treaty provision. In the words of Allan Rosas and Lorna Armati, 'in Kadi, the ECJ confirmed and made more explicit a tendency discernible in previous case-law according to which the EU constitutional order consists of some core principles which may prevail over provisions of the Treaties and thus of written primary law'.[28] Kadi has thus proved how the EU constitutional order comprises a constitutional core, 'having a somewhat enhanced status as compared to other parts of primary law'.[29]

Those 'very foundations of the Community legal order' are the expression of the three normative ideals enshrined in Articles 2 and 3 TEU, now translated into enforceable rights through by way of European citizenship. However, the realisation of this link between the constitutional core proclaimed in Kadi and its inception in European citizenship after Ruiz Zambrano, needs a prior comment concerning the *autonomy* of European citizenship. If according to Article 20 TFEU the conferral of European citizenship depends on the previous attribution of State citizenship, we would thus face an accessorised statute, a mere appendix of genuine citizenship, to be granted, altered or withdrawn with

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[28] A. Rosas and L. Armati, *EU Constitutional Law. An Introduction*, Hart, 2011, at 43.

[29] *Ibid.*, p. 44. See also J.P. Jacqué, 'Primauté du droit international versus protection des droits fundamentaux' (2009) 1 *Revue Trimestrielle du Droit Européen*, 175–177.

the simple stroke of an administrative decision on the part of a Member State. However, this is precisely the conception of European citizenship that the Court has rejected. According to the Court, European citizenship does not only hold the legal substance of the EU's constitutional core, but it does so in an autonomous fashion *vis-à-vis* State nationality. Whilst State nationality is a precondition for the attribution of European citizenship, this link cannot turn into unilateral dependence on the former. Put in other words: State nationality entails European citizenship, but the content and scope of both statutes are mutually intertwined. This entails that European citizenship is autonomous *vis-à-vis* State citizenship, but each status can exert effects on the other and eventually protect itself. This outcome can be clearly seen in the Court's recent case-law.

In its judgment in case Spain/UK,[30] the Court held that Member States are entitled to confer on nationals of third-countries the right to vote and to stand as a candidate in elections to the European Parliament. The Court rejected Spain's argument, according to which only nationals of Member States were entitled to the right, on the grounds that Article 20 TFEU recognised such right to European citizens only. The Court did not embrace a broad interpretation of the concept of European citizenship, but it struggled to admit that Article 20 TFEU was not an exhaustive attribution of the right to vote and to stand in elections to the European Parliament. According to the Court, the right to participate in elections to the European Parliament can be extended to *other* nationals from third States, as long as they prove to have links with the host Member State, i.e., with the EU.

In Eman and Sevinger,[31] rendered on the same day, the Court applied the same rationale to nationals of Member States residing in a territory outside of the EU (Aruba, an Overseas Country and Territory but not a territory of the EU). The judgment acknowledged the Member States' margin of discretion in setting the conditions and procedures in elections to the European Parliament, but it also warned that the said conditions and procedures were subject to the principle of non-discrimination, as stated in Article 18 TFEU. Since the Netherlands recognised the right to vote of Dutch nationals residing in third-countries, but not of those residing in Aruba, the Court struck down the domestic electoral provisions and declared them contrary to EU law. Once again, State nationality could not govern on its own the conditions of a right so strongly attached to the status of citizenship as the right to vote. EU law exerts its effects over the way in which Member States rule on the terms on which national citizens, now as European citizens, are to exercise the rights conferred on them by the Treaties.[32]

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30 ECJ 12.9.2006, Case C-145/04 Spain v United Kingdom [2006] ECR I-7917.

31 ECJ 12.9.2006 Case C-300/04 Eman and Sevinger [2006] ECR I-8055.

32 On both judgments and the rupture between State nationality and European citizenship, see, *inter alia*, L. Besselink, Case Comment (2008) 45 *Common Market Law Review*, 800–803 and

These two judgments, issued in 2006, were the first and yet symbolic steps in a gradual emancipation of European citizenship *vis-à-vis* State nationality. The core decision came shortly after, in 2010, when the Court ruled in Rottmann[33] that Member States are not free to withdraw State nationality, since this decision entails the withdrawal of European citizenship. In a case concerning the withdrawal of German nationality to a former Austrian who had acquired German nationality on false grounds, the Court openly stated that the acquisition and withdrawal of State nationality could be subject to scrutiny in the light of EU law. In the case at hand, Mr. Rottmann ran the risk of becoming state-less, a situation that drew the Court to examine the case in light of the principle of proportionality as recognised in EU law.

The importance of the decision in Rottmann is difficult to overstate. Following the previous track of Spain/UK and Eman and Sevinger, the Court finally confirmed that European citizenship conditions directly not only the terms under which State nationality is put into practice (voting rights to the European Parliament), but also its very existence (acquisition and withdrawal).[34] This is what I referred to when I previously mentioned how each status exert effects on the other, and how they eventually protect themselves. By assuming a self-standing scope of protection, European citizenship has now become an autonomous status governed by law. In these conditions, the status is ready to assume a content of its own, including an essential content, under which it can host the constitutional core of EU law.

3.2. THE PROTECTED CONTENT OF THE CONSTITUTIONAL CORE

In Ruiz Zambrano, the Court gave Article 20 TFEU, which proclaims European citizenship, an innovative scope by ruling out all national measures that 'deprive of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'.[35] This was not stated *obiter dicta*, it was the novel criterion that the Court employed for the very first time in solving whether

J. Shaw, 'The Political Representation of Europe's Citizens: Developments' (2008) 1 *European Constitutional Law Review*, 183–186.

33 See above n 4.

34 On the consequences of Rottmann and the decoupling between State nationality and European citizenship, see H.U. Jessurun D'Oliveira, 'Decoupling Nationality and Union Citizenship?' (2011) 1 *European Constitutional Law Review*, 149; and G.R. De Groot and A. Seling, 'The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters' (2008) 1 *European Constitutional Law Review*, 152–154. On Rottmann, see also the collective piece edited by J. Shaw, 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?'(2010) *EUI Working Paper RSCAS*.

35 Ruiz Zambrano, *supra* n 5, at 42.

Belgium was in breach of EU law for not issuing a residence permit to the parent of two infant Belgian nationals. Furthermore, neither the two infants nor their parents had ever exercised free movement, and all the relevant facts took place within Belgian territory. It was a purely internal situation, but the Court considered that the traditional criteria of free movement of persons did not apply. The 'substance of the rights' attached to the status of European citizenship was at stake, and that merited on its own right the application of the Treaties.

The guarantee of the 'genuine enjoyment' of the 'substance of the rights' attached to European citizenship is an autonomous standard of scrutiny based on Article 20 TFEU.[36] It does not refer to the individual rights conferred by the Treaties or secondary legislation, but to the *substance* of the *rights*, the totality or a significant number of rights. As I previously stated, this is a legal criterion through which the EU's constitutional core becomes enforceable before courts of law.

The content of the constitutional core is currently in the making. Despite its foundations on Article 2 TEU as a result of the three normative ideals, the Court has once again proceeded in a gradual fashion. First, the existence of the constitutional core was disclosed in Kadi. Next, citizenship acquired autonomy and assumed self-standing legal attributes, followed by the recognition of a protected essential content in Ruiz Zambrano, thus blending the constitutional core with the substance of the rights attached to European citizenship. But what does exactly amount to a breach of the substance of such rights, and thus to the breach of the EU's constitutional core?

So far, in light of the Court's case-law, the constitutional core protects, via Article 20 TFEU, two aspects intimately attached to the status of European citizenship. First, it protects the very *existence* of the statute, impeding Member States, even in purely internal situation, to undergo arbitrary deprivations of the statute. And second, the constitutional core protects citizens from strategic and/or structural breaches of fundamental rights.

3.2.1. *Protection of the* existence *of the statute*

In Rottmann and Ruiz Zambrano, the Court clearly stated that Article 20 TFEU, in contrast with Article 21 TFEU that concerns free movement of persons, can be relied on by EU citizens when the status of citizenship is put into question by a

[36] On the autonomy of this standard of scrutiny, see K. LENAERTS, '*Civis Europaeus Sum*: From the Cross-Border Link to the Status of Citizen of the Union' in P. Cardonnel, A. Rosas. and N. Wahl, *Constitutionalising the EU Judicial System, Essays in Honour of Pernilla Lindh*, Hart Publishers, 2012, at 226: 'contrary to the traditional approach, Ruiz Zambrano stresses that a link with EU citizenship may exist in spite of the absence of physical movement across the border of the home Member State'.

Member State. Whilst Rottmann concerns national decisions that entail a formal deprivation of the status of citizenship, Ruiz Zambrano deals with domestic measures equivalent to a *de facto* deprivation. In both cases, the Court put an emphasis on the fact that the situations did not raise traditional scenarios of movement or trans-frontier links, thus shifting the interpretation from Article 21 TFEU (free movement) to Article 20 (attribution of citizenship). Both decisions reflect the Court's concern with the very existence of the statute of citizenship, and thus do not require any transfrontier link in order to trigger its application.

3.2.1.1. No arbitrary *de iure* deprivation of the statute

First, EU law protects the existence of the statute *vis-à-vis* national measures which formally entail the withdrawal of nationality, and thus of the statute of European citizenship. This was first stated in the Rottmann case, the facts of which were as follows: Mr. Rottmann, an Austrian national, requested German nationality but breached German law when submitting his application: when questioned by the German authorities about his criminal record, he falsely stated he had none. Once having acquired German nationality and having lost his Austrian nationality, the German authorities discovered Mr. Rottmann's ruse and initiated procedures with the purpose of withdrawing his newly acquired German nationality. Based on these facts, and questioned by the German Supreme Court on the compatibility of the said withdrawal with EU law, the Court reminded its long-standing case-law, according to which it is for the Member States 'to lay down the conditions for the acquisition and loss of nationality'.[37] However, the Court followed its reasoning stating that 'the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter'.[38] Under this specific light, the Court came to the conclusion that Mr. Rottmann, having lost his previous Austrian nationality, was in a position 'capable of causing him to lose the status conferred by Article [20 TFEU] and the rights attaching thereto'.[39]

It is important so underline how the Court emphasised that the application of Article 20 TFEU was the result of 'a situation' that fell within the scope of EU law 'by reason of its nature and its consequences'.[40] Here the Court is hinting at what would become its 'substance of the rights' test in Ruiz Zambrano, and it comes very close to it when it argues that the loss of nationality entails that a European citizen will 'lose his status of citizen of the Union and thereby be *deprived of the*

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37 See Cases ECJ 7.7.1992, C-69/90 Micheletti and Others [1992] ECR I-4239, at 10; Case ECJ 11.11.99, C-179/98 Mesbah [1999] ECR I-7955, at 29; and Case ECJ 19.10.2004 C-200/02 Zhu and Chen [2004] ECR I-9925, at 37.

38 Rottmann, *supra* n 4, at 41.

39 *Ibid*, at 42.

40 *Ibid*.

rights attaching to that status'.[41] However, and here is the main difference with the Ruiz Zambrano case, the facts of the Rottmann case concerned a national decision of formal withdrawal of nationality. Overall, the Court is stating that *de iure* deprivations will entail an automatic withdrawal of the status of European citizenship, and that circumstance suffices to be scrutinised in the light of EU law in order to protect the very status, as conferred and assured by Article 20 TFEU.

3.2.1.2. No arbitrary *de facto* deprivation of the statute

The second strand derived from Article 20 TFEU does not focus on formal withdrawals of the statute, but *substantial* deprivations, national measures that entail, *de facto*, the loss of the statute of European citizenship. This was outlined by the Court in its judgment in Ruiz Zambrano, where for the first time it developed its 'substance of the rights' test. The case concerned two minor infants of Belgian nationality, whose Colombian parents resided in Belgium for several years without a residence permit. After having worked and paid social security allocations throughout its illegal stay, Mr. Ruiz Zambrano was forced to leave the country (deprived of all social security rights). The Court's reasoning, despite its brevity, is very straight-forward: Mr. Ruiz Zambrano's forced departure from Belgium would lead to a situation where his children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, the Court adds, Mr. Ruiz Zambrano's children 'would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union'.[42]

The 'substance of the rights' test is also grounded on Article 20 TFEU, not Article 21 TFEU. The Court is cautious to take its decision on the former and not the latter provisions, since all the facts in the Ruiz Zambrano case were purely internal: the children were Belgian, their father resided in Belgium, and the decisions at stake were enacted by the Belgian authorities. No transfrontier link existed, and therefore the judgment departed very consciously away from the Treaties' free movement provisions.[43] Making a reference to its recent decision in Rottmann, the Court confined its interpretation to Article 20 TFEU, thus confirming that the issue at stake concerned (like Rottmann) the very existence of the statute, and not the exercise of one of its rights (i.e., free movement of persons). This time, the test concerned national measures that entailed *de facto* the deprivation of the status of EU citizenship (note how the judgment states that the exercise of the rights would, '*in fact*', become impossible).

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41 *Ibid*, at 46. See also D. Kochenov, 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe' (2011) 18 (1) *Columbia Journal of European Law*, 55–109.

42 Ruiz Zambrano, *supra* n 4, at 42.

43 K. Lenaerts, *supra* n 36, at 226.

The judgment in Ruiz Zambrano leaves many unsolved questions, the answers to which we can only speculate with at the present time. For instance, the *quantity* and *quality* of the 'substance of the rights' test is open to discussion. As for the quantity, does the test entail only the rights under the Citizenship chapter of the Treaty, or does it concern a broader number of rights, included those in the Charter (which has, it should be pointed out, a chapter on citizenship)? As for the quality, what is exactly the *substance* of the right? Does it refer to particularly severe breaches, or is it simply referring to the number of rights (a substantial number of infringed rights)? I would argue that the Court is neither alluding to quantity nor quality, but simply to structural breaches, the consequence of which is to deprive the citizen of the status itself. This appears to be a correct interpretation in light of the Court's following decision in Dereci, where it stated that 'the criterion relating to the denial of the genuine enjoyment of the substance of the rights [...] refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.' It thus follows that a breach of a right does not suffice, but a deprivation *tout court* of a considerable number of rights, and thus the context and consequences of each case must be analysed in detail.[44] In Ruiz Zambrano, as well as in Dereci, the Court is not pointing at a precise type or number of rights, it is simply looking at the facts. Once settled in Argentina, and after being forced to leave the territory of the Union, it is obvious that a minor infant cannot enjoy free movement of persons, of establishment, freedom to receive services, nor the rights provided in the Charter, inasmuch it only applies within the territory of the Union. What is therefore the point of being a citizen of the EU when the substance of the rights and obligations attached thereto, as a result of a Member State's decision, can not be enjoyed?

Also, it could be argued that Ruiz Zambrano limits its scope to Member State decisions on residence requirements. The Court would be thus rejecting national decisions entailing the impossibility to establish oneself in the territory of the Union, a circumstance that would logically be attached to residence and provisions of immigration law. However, if one follows the Court's argument with care, this should not always be necessarily the case.[45] Consider for this purpose the duty

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[44] This is also the opinion of K. Lenaerts, *supra* n 36, at 226: 'I believe that the rationale underpinning Ruiz Zambrano also applies to national measures the effect of which are to deprive an EU citizen of the genuine enjoyment of the substance *of some, but not all*, of the rights attaching to that status' (italics added).

[45] In this vein, see P. Mengozzi, 'Zambrano: an Unexpected Ruling' in P. Cardonnel, A. Rosas and N. Wahl, *Constitutionalising the EU Judicial System, Essays in Honour of Pernilla Lindh*, cit. n 36, at 244: 'the criterion of the 'substance of the rights' could find further applications in situations of absolute dependence from a third country national, not only for a Union citizen of young age, but also for adults or disabled persons who cannot provide autonomously for their own support. This same criterion could further be applied in situations where national measures have an impact, at least potentially, on the exercise of rights which the Union legal order attributes to its citizens, with a gravity comparable to that in Zambrano'.

of a Member State to provide its citizens with minimal standards of subsistence. The assurance of such a minimal standard derives from the fundamental right to dignity, a result that is also closely related to the protection of the right to life. However, in the case of minimal standards of subsistence, a Member State could be under the obligation to guarantee the *existence* of the individual in accordance with appropriate standards of dignity, as asserted by Article 1 of the Charter. In fact, Article 34 of the Charter recognises and respects the right to social and housing assistance, 'so as to ensure a decent existence for all those who lack sufficient resources'. Although the English version of Article 34 refers to 'decent existence', the authentic French version (as well as other versions) uses the term 'existence digne', a *dignified* existence.[46] The connexion with article 1 of the Charter is therefore self-evident, and the Court, in Kamberaj, has already applied Article 34 of the Charter when interpreting provisions of secondary law, precisely with the purpose of assuring minimal standards of subsistence to the individual.[47] Although the 'substance of the rights' test has not reached this point yet, nothing would impede future case-law from developing the scope of protection of Article 20 TFEU in this direction.

3.2.2. *Protection of the substance of the rights attached to the statute: no strategic/structural restriction of fundamental rights*

The Court has also stressed another dimension of the EU's constitutional core as worthy of judicial protection. In the case of fundamental rights, certain breaches thereof may also entail an infringement of the 'substance of the rights' attached to the status of European citizenship. With the Court's current case-law, breaches of a strategic nature may come under the 'substance of the rights test' in light of the judgment in Kadi. In addition, I will argue that a second form of breach may also be derived from the Treaties at the present time.

3.2.2.1. Strategic breach

In Kadi, the Court introduced a proviso that allows the Union to set limits to its international obligations, no matter their standing and effects vis-à-vis EU law. The exception relied on the relevance of fundamental rights, which were put by the Court, as it was outlined previously, inside the constitutional core of EU law. In the Court's own words, the obligation of the Union to give effect to its international obligations, in some cases even in detriment of primary law (as is the case in Article 307 EC) 'may in no circumstances permit any challenge to the

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46 'Existencia digna' in Spanish, 'menschenwürdiges Dasein' in German, 'esistenza dignitosa' in Italian, or 'waardig bestaan' in Dutch.

47 Case ECJ 24.4.2012, C-571/10 Kamberaj [2012] ECR I-0000.

principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights'.[48]

The underlying rationale of this case-law comes fully in line with the 'substance of the rights' test developed after Ruiz Zambrano. In fact, if the Court did not employ this term it probably has to do with the fact that Kadi was delivered three years before Ruiz Zambrano and two before Rottmann. Despite the differences in terminology, the Court is following a coherent road-map by claiming in Kadi not only that the constitutional core exists as such, but that the constitutional core is breached (and thus deserves protection) when strategic breaches of fundamental rights arise. This was exactly the case at hand in Kadi, because the measures under scrutiny were being defended by the Institutions and the Member States on the grounds of their immunity to judicial review. The Court, following its Advocate General, set aside the argument and highlighted the importance of jurisdictional control as a strategic feature of any legal order, a medium through which all other rights become enforceable.[49] Furthermore, in the specific circumstances raised in Kadi, an immunity from jurisdiction would have precluded the plaintiffs from all other courses of action, since the jurisdictional alternative before the United Nations could not guarantee in any way access to a full review of the contested decisions. As the Court noted, 'such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the [...] Treaty, appears unjustified, for clearly [the United Nations] re-examination procedure does not offer the guarantees of judicial protection'.[50]

Therefore, it is not simply the breach of a fundamental right, but a *strategic* one that entails the breach of other rights, what the Court is willing to protect as part of the EU's constitutional core. This is coherent with the idea that the genuine enjoyment of the 'substance of the rights' is not a matter of how intense or how many rights have been breached, but of the pragmatic outcome of the decision under scrutiny. If such an outcome entails a deprivation of rights that turns the

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48 Kadi, *supa* n 3, at 307.

49 According to Advocate General Poiares Maduro, at para. 31 of his Opinion, jurisdictional immunity 'would potentially enable national authorities to use the Community to circumvent fundamental rights which are guaranteed in their national legal orders even in respect of acts implementing international obligations. This would plainly run counter to firmly established case-law of this Court, according to which the Community guarantees a complete system of judicial protection in which fundamental rights are safeguarded in consonance with the constitutional traditions of the Member States. As the Court stated in Les Verts, 'the European Community is a community based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'. [...] In short, [this interpretation] [...] would break away from the very principles on which the Union is founded, while there is nothing in the Treaty to suggest that Article 307 EC has a special status – let alone a special status of that magnitude – in the constitutional framework of the Community.'

50 Kadi, *supra* n 3, at 322.

status of European citizenship ineffective and devoid of any possible content, then we are facing a breach of the 'substance of the rights' attached to such status. As I previously said, the fact that the Kadi judgment makes no reference to Article 20 TFEU does not question this reading of the decision: Kadi was rendered before Rottmann and Ruiz Zambrano, but the underlying rationale of all three judgments comes perfectly in line.

3.2.2.2. Structural breach

A second variant appears as an inevitable result of the protection of strategic breaches of fundamental rights, as seen in Kadi. If EU law discards individual actions that entail far-reaching restrictions with the potential of endangering the 'substance of the rights' attached to the status of European citizenship, the same should be said of actions entailing structural breach of the very status. This is the case of mass-infringements of fundamental rights through one or a series of numerous actions, whereby a Member State enacts or tolerates serious and reiterated fundamental rights breaches. If the case previously portrayed concerns individual breaches with potential systemic consequences, the present case refers to one or various breaches of a significant, and thus structural, scope, from the very outset of their enactment.

The Treaties already refer to these situations in Article 7 TEU, a provision that gives shape to an infringement procedure against actions that entail 'a serious and persistent breach by a Member State of the values referred to in Article 2 [TEU]'. Note that a breach of Article 2 TEU suffices to trigger the procedure, and there is no need whatsoever of a trans-frontier link or a situation of implementation of EU law on the part of the Member State. This is a political remedy enabling the European Council, the Council, the Commission, and the European Parliament to start proceedings against a Member State disregarding the link of State action with EU law, and eventually suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State. The procedure has never resulted in concrete measures, although it was put into action in 1999 as a result of the People's Party arrival to power in Austria that year.[51] However, this procedure is non-justiciable for the individual. Those concerned by the measures presumably contrary to Article 2 TEU, and devoid of a direct link with EU law, cannot enforce the said provision before domestic nor European courts.

The Court has not yet addressed the possibility of including breaches of the kind envisaged in Article 7 TEU as part of the constitutional core of EU law, but the

[51] See W. Sadurski, 'Adding bite to a bark: The story of Article 7, EU enlargement, and Jörg Haider' (2010) 16 *Colum. J. Eur. L. (Columbia Journal of European Law)*, 385.

Kadi decision was quite clear when referring to the relevance of fundamental rights as ultra-protected rules of EU law, entrenched even *vis-à-vis* other provisions of EU primary law. Also, there are some authoritative voices claiming the judicial enforceability of structural breaches of fundamental rights, even in purely internal situations. In his Opinion in Centro Europa 7, Advocate General Miguel Maduro argued that these violations would bring about a breach of free movement provisions.[52] Writing in 2007, and thus before Kadi and Ruiz Zambrano, the Advocate General brought forward a proposal that still relied on some form of conventional link with EU law. However, the underlying rationale of the proposal is that of the 'substance of the rights' test: a serious breach of fundamental rights, this time a structural breach, so severe that it would deprive the European citizen of all incentive to enjoy the rights and obligations derived from the said status. In the Advocate General's own words:

> 'The scenario may seem unlikely at first sight, but I do not discount, offhand, the idea that a serious and persistent breach of fundamental rights might occur in a Member State, making it impossible for that State to comply with many of its EU obligations and effectively limiting the possibility for individuals to benefit fully from the rights granted to them by EU law. For instance, it would be difficult to envisage citizens of the Union exercising their rights of free movement in a Member State where there are systemic shortcomings in the protection of fundamental rights. Such systemic shortcomings would, in effect, amount to a violation of the rules on free movement'.[53]

More recently, and in the light of the latest developments of the Court, Armin von Bogdandy and a relevant group of scholars have also pleaded for a judicially enforceable action based on EU law, in cases of serious and persistent breaches of fundamental rights.[54] In what they term a 'Reverse Solange' test, in an outright reference to the German Constitutional Court's case-law on the limits of European integration, von Bogdandy *et al.* claim that the 'substance of the rights' test as enshrined in Ruiz Zambrano allows the EU to actively confront situations of structural breach of fundamental rights in Member States, disregarding the presence or absence of a link with EU law. In their view,

> 'Member States remain autonomous in fundamental rights protection as long as it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU. However, should it come to the extreme constellation that a violation is to be seen as *systemic*, this presumption is rebutted. In such a case,

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52 Opinion of Advocate General Poiares Maduro in Case C-380/05, Centro Europa 7, [2008] ECR I-349.

53 Opinion in Centro Europea 7, *supra* n 52, at 21.

54 A. Von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei and M. Smrkokj, 'Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States' (2012) 49 2 *Common Market Law Review*, 489.

individuals can rely on their status as Union citizens to seek redress before national courts'.[55]

Both contributions are good example of how a structural breach of fundamental rights is equivalent to a violation of the substance of the rights attached to the status of European citizenship. The practical consequences run parallel: the moving citizen does not move into a Member State where structural breaches of fundamental rights occur, and thus his rights and obligations derived from his status become affected (thus Maduro's proposal). On the other hand, the non-moving citizen is equally put at risk when its Member State undertakes action tantamount to a structural breach of fundamental rights, for the 'substance of the rights', in this case his fundamental rights, become effectively breached.

3.3. THE CONSTITUTIONAL CORE AS A LIVING INSTRUMENT, AND THE INSPIRING FORCE OF THE THREE NORMATIVE IDEALS

So far, it has been argued that the constitutional core of EU law is judicially enforceable after its proclamation in Kadi, and its content is restricted to the protection of the very existence of the status of European citizenship and the protection of strategic and/or structural breaches of fundamental rights. However, this does not imply that the content of the constitutional core stops at this very point, quite the contrary. The constitutional core of EU law is a direct consequence of the three normative ideals as enshrined in the Treaty on European Union in Articles 2 and 3, as well as in its preamble. Under the categories of Democracy, Rights and Solidarity, the Union conveys the contemporary pitfalls of Member States and State citizenship by guaranteeing those same ideals, and precisely because the Union is still developing and enriching the three ideals, the constitutional core of EU law evolves in the same vein. Thus, the Union's ability to develop the three normative ideals is directly proportional to the scope of the constitutional core's content. This can be seen in the present state of the law and in the Court's decisions commented so far.

Democracy, as the first normative ideal, is reflected in the protective measures that assure the existence of the statute of European citizenship, inasmuch a relevant number of rights and obligations attached to the said statute concern participation, representation and transparency before European Institutions (significantly the European Parliament) but also domestic national political institutions. Such is the case of municipal elections at the present time. However, future institutional developments enhancing the EU's democratic standing (and thus reinforcing the

[55] Von Bogdandy *et al.*, cit. n 54, at 491.

first normative ideal) would consequently expand the content of the constitutional core. For example, the refusal of a Member State to guarantee voting rights to its citizens residing in another Member State, could come under the constitutional core of EU law if the host Member State denies them voting rights as well. In such a situation, the EU citizen would find itself trapped in an electoral limbo, with no right of participation in either Member State.[56] If at the current state of EU law this scenario does not affect the 'substance of the rights' test, and thus Article 20 TFEU, future developments in the EU's democratic credentials would justify judicial enforcement under the scope of the said provision. The breach of EU law would not come under Article 21 TFEU, as a result of having exercised free movement within the Union, but of Article 20 TFEU for having violated the 'substance of the rights' attached to the status of European citizenship. In such a case, the citizen would find itself deprived of democratic participation rights in a Member State, but in the light of the relevance of national electoral processes when conforming Council majorities, of the growing responsibilities of national Parliaments in the EU's legislative procedure, as well as the right to participate in processes that allow parliamentary scrutiny of government action (included action in the area of European policy), a deprivation of the said rights would entail a breach of the 'substance of the rights' attached to the status of European citizenship.

The same applies to Rights, the second normative ideal that reflects adherence to law and to the imperative of individual freedom, a category that could appears in some legal traditions as the value of the rule of law, or the *Rechtsstaatsprinzip*. The inclusion of strategic and/or structural breaches of fundamental rights under the constitutional core of EU law is an obvious outcome of this normative ideal, as long as it points at unbearable decisions or actions that endanger essential tenets attached to the protection of human dignity. However, as the Union's ability to enforce its rules and to bind itself to pre-ordained rules and principles continues to develop, so will the constitutional core's need to reflect this normative ideal. This will entail going beyond structural and/or strategic violations of fundamental rights, and thus empower the Union to protect its citizens against other breaches, still of a serious character, but not necessarily of a systemic scope.

And of course, the centre-stage of future developments will take place under the normative ideal of Solidarity, by far the most underdeveloped of the three. The

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[56] See D. Kochenov, 'Free movement and participation in the parliamentary elections in the Member State of nationality: an ignored link?' (2009) *Maastricht Journal of European and Comparative Law*, pp. 210 et seq. as well J. Shaw, 'Citizenship: contrasting dynamics' in P. Craig and G. De Búrca, *The Evolution of EU Law*, 2nd ed, Oxford University Press, 2011, 591–593. Furthermore, the European Court of Human Rights, in Sitaropoulos and Giakoumopoulos vs. Greece (judgment of 15 March 2012) has declared that the loss of voting rights as a result of a residence abroad does not breach Article 3 of Protocol 1.

EU has given proof of its Member States' determination to share sovereignty in a variety of grounds, but the EU's mechanisms of redistribution of wealth are still at an early stage of development. This explains why the constitutional core remains silent when it comes to social security, social rights or taxation, instruments through which equality and fairness are secured.[57] The following years will prove crucial in this regard, as the Union slowly but relentlessly reinforces its powers over the Member States' fiscal policy, conditioning their power to tax and spend for the sake of the EU's economic and monetary policy.[58] The scope of the social dimension of the EU law's constitutional core depends on the Union's ability to succeed in enacting and implementing a new constitutional framework in the near future.

4. RESPONSE TO THE CRITICS

The constitutional core of EU law is not expressly recognised in the Treaties. In fact, the term 'constitutional core' has never been used by the Court, it is simply an expression I find particularly well-fitted to depict the current situation of the EU's *higher law*. However, it is undisputed that such a core exists, and the judgments I commented in section 3 of this chapter are good proof of how EU law has armoured itself with rules of self-protection that assure both its constitutional provisions and its citizens' rights. A debate over the existence of the core seems futile at this point, for its practical consequences can be immediately observed: Kadi forced the Council and Member States to reconsider the majority of its anti-terrorist measures;[59] Ruiz Zambrano has had immediate and very significant results in national immigration law;[60] and Rottmann reinforced the EU's ability to scrutinise domestic nationality provisions.[61] Furthermore, EU law has shown in the past that its founding principles can find unquestioned constitutional standing even in the absence of an express recognition in the Treaties. The

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57 See M. FERRERA, *The Boundaries of Welfare*, Oxford University Press, 2005, 205 et seq.; M. MADURO, 'Europe's Social Self: The Sickness Unto Death?' in J. SHAW (ed), *Social Law and Policy in an Evolving European Union*, Hart Publishing, Oxford 2000, 329 et seq.

58 The latest developments in this regard are well known and have been described in detail by A. DE GREGORIO MERINO, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis: the Mechanisms of Financial Assistance' (2012) 49 (5) *Common Market Law Review*, 1613; and M. RUFFERT, 'The European debt crisis and European Union law' (2011) 48 (6) *Common Market Law Review*, 1777.

59 On the practical consequences of Kadi, see the General Court's decision in Case T-85/09, Kadi [2010] ECR II-05177 and A. TZANAKOPOULOS, *Disobeying the Security Council. Countermeasures against Wrongful Sanctions*, Oxford University Press, 2011.

60 See, for example, the decision of 7 March 2012 of the Dutch State Council, implementing the Court's judgment in Ruiz Zambrano to the third-national parents of two infant Dutch nationals, despite the fact that the children could reside in the Netherlands with their grandparents (LJN: BV8631, Raad van State, 201105729/1/V1).

61 See J. SHAW, 'Rottmann in context', in J. Shaw (ed) 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?', cit. n 34, at 40 and 41.

principles of direct effect, primacy or state liability are unambiguous evidence in this regard.

Having reached this point, an efficient critique should not focus on rejecting the existence of the EU's constitutional core, but on questioning the Union's ability or wisdom to embrace it. In this regard, critical arguments are as plentiful as are powerful, and I will try to depict them all as well to provide a rejoinder. Some of the criticisms can be found in the literature, whilst others come to my mind and could be argued by the critics just as well. However, it will be argued that by addressing the criticisms the core does not appear to suffer the consequences, but rather the contrary: the weaknesses of the core give powerful arguments to reinforce even more still its standing and role in EU law.

4.1. COMPETENCE CREEP

4.1.1. The critique

A constitutional core of EU law involves the power of the EU or of EU rules to interfere in situations that are purely internal to its Member States. This can be seen in Ruiz Zambrano and Rottmann, whose facts could have easily driven the Court to oust both cases from its docket on the grounds of the absence of a link with EU law. Pushing the EU into purely internal situations implies that national competences, even in areas of their exclusive domain, have a serious potential of coming under EU scrutiny.[62] This critique can also be argued with specific provisions at hand, such as Article 4(1) TEU, which clearly states that 'competences not conferred upon the Union in the Treaties remain with the Member States'.[63] A red line that is further repeated throughout the Treaties, but also in the Charter of Fundamental Rights of the EU, an instrument of primary law that, according to its Article 51(2), 'does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'.[64] This provision

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62 See A. Tryfonidou, 'Redefining the Outer Boundaries of EU law: The *Zambrano*, *McCarthy* and *Dereci* trilogy' (2012) 18 *European Public Law*, 493; and, more generally, M. Poiares Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in C. Kilpatrick, T. Novitz, and P. Skidmore (eds), *The Future of European Remedies*, Hart Publishing, 2000.

63 See S. Weatherill, 'Competence Creep and Competence Control' (2004) 1 *Yearbook of European Law*, at 22 et seq.

64 On the limits of the Charter's application and Member State competence, see P. Eeckhout, 'The EU Charter of Fundamental Rights and the federal question', (2002) 39 (5) *Common Market Law Review*, 945; H. Kaila, 'The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States' in P. Cardonnel, A. Rosas. and N. Wahl, *Constitutionalising the EU Judicial System, Essays in Honour of Pernilla Lindh*, cit. footnote 43; and X. Groussot, L. Pech, and G.T Petursson, 'The Scope of Application of EU Fundamental

is of a special relevance in cases concerning strategic or structural breaches of fundamental rights, since they will fall under the EU constitutional core's scope of protection. Furthermore, the procedure provided in Article 7 TEU to ensure Member State compliance in situations of serious and persistent violations of fundamental rights, would prove that the Union counts with an instrument to fight severe violations in purely internal contexts, but only through the procedures provided therein. The 'substance of the rights' test, the application of which relies exclusively on the courts, would find no foundation on the current Treaties.

4.1.2. Response

The competence creep argument is easier to rebut than it looks at first sight, due to its excessive attachment to a textual interpretation of the Treaties. However, the history of European integration and of its legal order gives plenty of proof of how purposive and not literal Treaty interpretation has been the rule.[65] This tendency could have been rejected by Member States in successive Treaty reforms, but it has never been the case. In fact, Member States have continuously supported the Court's teleological approach to Treaty interpretation, included the Court's case-law on competence and legal bases, which is, as is well known, grounded on finality.[66] It is difficult to submit that there is no EU competence involved in a situation like Mr. Rottmann's, unless one is willing to admit that the status of European citizenship is subject to unilateral extinction on the part of a Member State. Of course, no provision in the Treaty expressly stops Member States from doing so, but it is obvious that a coherent interpretation of the Treaties precludes such course of action. And what is the point of fundamental rights protection if the Union and its Member States are able to 'externalise' their breaches (and assure State immunity) by way of international law? The Court's reasoning in Kadi is purposive as it struggles to align external action with the limits derived from the very aims of the Treaties. The Court is thus *not* expanding Union powers; it is, on the contrary, impeding Member States from eradicating the essential powers they have conferred through the Treaties to the Union.

Rights on Member States' Action: In Search of Certainty in EU Adjudication', Eric Stein Working Paper 1/2011.

65 On the goals-oriented methodology of the European Court of Justice, see the works of J.R. Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, Oxford University Press, 1993; and G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press, 2012.

66 In fact, the Court has developed a comprehensive theory of scrutiny based on the aims of the measures under scrutiny. According to settled case-law, 'the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure'. Furthermore, when the measure pursues two aims and if one of those aims is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis'. See, *inter alia*, ECJ 19.7.2012, Case C-130/10, Parliament v Council [2012] ECR I-00000, at 43; ECJ 6.11.2008, Case C-155/07, Parliament v Council [2008] ECR I-08103, at 35 and 36.

By clinging on to a strictly textual reading of the Treaties, the competence critique would drive the Union into denying its very foundations. This outcome proves that the competence critique is simply wrong and self-destructive, but it also invigorates the existence of the constitutional core: its creation and development is the result of conventional methods of interpretation of the Court, in this case of a traditional purpose-oriented approach to Treaty interpretation. What might at first sight appear as gold judicial law-making is, in fact, interpretation that struggles to assure the competences and objectives defined by the Treaties.

4.2. LEGITIMACY

4.2.1. The critique

Another argument questioning the EU's constitutional core is built on the Union's lack of legitimacy to enact supra-primary law, something that the Treaties have never provided for and that it could render the Member States' national identity claims ineffective. A constitutional core is a normative and justiciable limit that is common in domestic legal orders, resulting from historical and political processes of a particularly pressing significance.[67] Germany's 'eternity clause' is the outcome of the country's fall into the abyss of Nazism and two consecutive world wars. Ireland's constitutional prohibition of abortion is the proof of a nation's firm attachment to certain fundamental rights (and values) in detriment of others. Austria's abolition of aristocracy reflects a conception of the republican form of State that its population is not willing to question. Overall, national constitutional cores are the result of a process of self-determination of a people, and it is open to question if the EU is the representation of such a process. Furthermore, the *no demos* thesis claims that the EU lacks the basic features of a genuine nation (mostly a common language) and it will always do, thus precluding from the very outset the premise of any European-democratic exercise of political self-determination.[68] Simply put, only democratically self-determined nations can legitimately claim a constitutional core. All the rest is chatter.

4.2.2. Response

It is a common and well-established feature of European integration that all its actions are instrumental to long-term political objectives. The history of integration is the history of the *méthode communautaire*, a way of operating in terms of short-term goals with a view set on long-term objectives. Functionalism

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67 See F.X. MILLET, *L'Union Européenne et l'identité constitutionnelle des États membres*, cit. n 1, at 143 et seq.

68 See J.H.H. WEILER, *The Constitution of Europe*, Cambridge University Press 1999, on the fallibility of the association between citizenship and *demos*, at 344-346.

as a means of governance impregnated the Community's policies throughout the fifties, sixties and seventies, and continued to be a trademark of European integration when openly political integration was embraced in the Maastricht Treaty.[69] One of the landmark novelties of the 1992 reform was the creation of European citizenship, a statute, as it was argued in section III of this paper, created to overcome the pitfalls of State nationality. This was one of Maastricht's most relevant innovations: the assumption of political integration, but through the means of a functionalist methodology. In a certain way, by complementing State nationality with European citizenship, Member States were blending the new and the old; instrumental policies and political goals, but now in a radically novel fashion.

European citizenship is thus a reflection of the Union's journey towards political integration, but still in functionalist terms. However (and here is the catch), by way of blending citizenship and functionalism, a reciprocal process of mutual empowerment takes place, one that shifts from functionalism to citizenship, and another from citizenship to functionalism. First, functionalism gives the statute of citizenship its gradual approach, its pragmatism and strong normativity. On the other hand, citizenship transfers onto functionalism the virtues of political legitimacy. A fractioned share of political legitimacy, but legitimacy after all. This combination explains why European citizenship becomes the means through which the EU's constitutional core becomes legally enforced. Precisely because all constitutional cores rely on strong normative justification, the EU anchors its core on a statute that aims to compensate the Member State's decaying capacity to ensure its people's self-determination. And precisely because European citizenship assumes fragmented contents that compensate domestic failings, the EU's constitutional core is fragmented too, reduced at this moment to very precise measures linked to the existence of the status and serious violations of fundamental rights. It thus results that the EU's constitutional core is not weakened due to a lack of legitimacy, but rather the contrary: its very existence reinforces national democracies and simultaneously empowers the European citizen. Far from questioning the Union's legitimacy, the constitutional core is a good example of how the Union derives its legitimacy as a result of a sophisticated process of interaction with national political and legal claims.

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[69] See G. MAJONE, *Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth*, Oxford University Press 2009, at 42 et seq.

4.3. SUBSIDIARITY

4.3.1. *The critique*

Another powerful objection concerns subsidiarity. Simply put, it argues that many of the decisions precluded by the EU's constitutional core are already outlawed by Member States in light of their internal legal orders. And when no protection is guaranteed by national law, other sources, such as international law, serve the same purpose, as is the case of the European Convention on Human Rights. Seen from this angle, a situation like Mr. Rottmann's was already solved by the 1961 Convention on the Reduction of Statelessness.[70] as was Mr. Ruiz Zambrano's under Article 8 of the European Convention on Human Rights. The same would apply to Mr. Kadi, as the recent judgment of the European Court of Human Rights in the case of Nada vs. Switzerland shows.[71] The cases covered by the EU's constitutional core will come, after all, under the scope of application of national constitutional provisions or international law. These rules will commonly be applied and eventually protected by the highest courts of the land (i.e. constitutional courts) and sometimes by international courts, like the European Convention on Human Rights. Furthermore, the implementation of decisions by these courts is subject to special procedures that assure their compliance by the concerned State. An EU constitutional core not only becomes a redundancy, but also an instrument of doubtful efficiency by comparison to the domestic rules and procedures available to the individual in his or her Member State.

4.3.2. *Response*

The subsidiarity argument is of special interest because it blends the legal with the empirical: the Union has an *obligation* to defer decision-making on Member States, but only if the latter prove to be the most *efficient* fore for implementing policy. Therefore, the key to subsidiarity is its reliance on an efficiency test that is difficult to evaluate in legal terms. As far as enforcement in concerned, it is hardly convincing to argue that domestic law can be better enforced than EU law. As is well known, EU rules benefit from the same enforcement rules as internal provisions and, according to well-established case-law of the Court, Member States are precluded from providing special and more beneficial rules to domestic remedies in detriment of EU remedies.[72] A similar reasoning applies to the highest standard of protection test: the fact that some Member States may protect

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70 Article 8(2)(b) of the Convention on the Reduction of Statelessness of 30 August 1961. See also Article 7(1)(b) of the European Convention on Nationality of 6 November 1997.

71 Nada vs. Switzerland, judgment of 12 September 2012 (Grand Chamber).

72 See, *inter alia*, Case C-231/96 Edis [1998] ECR I-4951, at 36; Case C-326/96 Levez [1998] ECR I-7835, at 41; Case C-78/98 Preston and Others [2000] ECR I-3201, at 55; and Joined Cases C-392/04 and C-422/04 i-21 Germany and Arcor [2006] ECR I-8559, at 62.

situations coming under the scope of the EU's constitutional core, is hardly an authority to refuse the EU from guaranteeing such a standard throughout the entire Union. Member States can feel free to undermine legal protection to certain situations that could fall under constitutional core scenarios. The existence of a European-based core precludes Member States from regressions of such a kind.

The Strasbourg argument is also weak. It should be reminded that the European Convention on Human Rights acts as a minimum-standard of protection instrument. Nothing precludes signatory States from going beyond the standard of protection set by the Convention and by its Court. Likewise, the EU stands in the same position,[73] and even more so after it becomes a party to the Convention. To argue that the EU's constitutional core is redundant because of the Convention could just as well be said of national constitutional courts that claim their internal constitutional cores *vis-á-vis* EU law. The existence of the European Convention should not prevent Member States, and by the same token the Union, from being active promoters of fundamental rights protection, and not simply observers of Strasbourg benchmarks.[74] This is the argument that explains why the Court has been willing at times to rule on cases that could have been solved by applying the Convention at the domestic level. The rationale behind this line of action is that the Union should not wait for Strasbourg, but assume its obligation to protect and promote fundamental rights. This is a reasoning that applies both to situations in which EU Institutions and Member States apply EU law.

Finally, and from an empirical point of view, it is arguable if leaving the final answer to Strasbourg and the domestic legal order is a more *efficient* scheme. It is open to question whether the European Court of Human Rights would have reached the solution of Nada vs. Switzerland if the European Court of Justice had not previous delivered its decision in Kadi. Similarly, when cases have been left to Strasbourg after the Court's refusal to apply a 'substance of the rights' test, the solution has finally come, but many years later. For example, in Centro Europa 7, the Court parted ways with Advocate General Maduro and solved the reference posed by the Italian Consiglio di Stato on the grounds of EU secondary legislation. It is true that the Court's decision in this case was made before Kadi, Rottmann and Ruiz Zambrano, but the outcome is self-evident: Strasbourg solved the case in 2012 and declared the breach of the fundamental rights to freedom of expression, four years after the Court's decision not to examine the fundamental rights argument.[75] Four years (and very costly procedures) that could have been

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73 In this regard, see Article 52(3) of the Charter and, in particular, C. LADENBURGER, 'The Interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions, Institutional Report', FIDE 2012, at 24 et seq.

74 See the Opinion of AG Sharpston in Case C-34/09. Ruiz Zambrano [2011] ECR I-01177, at 148.

75 ECtHR (Grand Chamber) 7.6.2012 Centro Europa 7 s.r.l. and Di Stefano v Italy.

saved applying a 'substance of the rights' test. Thus, the efficiency of purely internal remedies and its Strasbourg epilogue is more than questionable.