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*European citizenship in quest of a political culture: supranational by law or transnational by politics?*

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# Secção I

## Investigação Científica\*

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## European citizenship in quest of a political culture: supranational by law or transnational by politics?<sup>1</sup>

### Cidadania europeia em busca de uma cultura política: supranacional através do direito ou transnacional através da política?

Evanthia BALLA<sup>2</sup>

**ABSTRACT:** The present article raises crucial questions regarding European citizenship. How has European citizenship been constructed and manifested within the legal and political domains of the European integration project, and how European citizens perceive their rights and duties across supranational and transnational manifestations of European citizenship? The main argument of this article is that European citizenship is constructed by European law in an ambiguous way, allowing for both supranational and transnational interpretations. Similarly, an individualistic conception of citizenship, as an earned status, rather than a vehicle for creating political culture of solidarity, justice, and inclusion, has been limiting the potential of the endeavour itself. The current work builds upon the foundations of political theory and employs a legal and political interpretive methodology.

**KEYWORDS:** European citizenship; European law; supranational; transnational; political culture.

**RESUMO:** O presente artigo levanta questões cruciais relativamente à cidadania europeia. Como é que a cidadania europeia tem sido construída e manifestada nos domínios jurídico e político do projeto de integração europeia, e como é que os cidadãos europeus percecionam os seus direitos e deveres nas manifestações supranacionais e transnacionais da cidadania europeia? O principal argumento deste artigo é que a cidadania europeia é construída pelo direito europeu de uma forma ambígua, permitindo interpretações supranacionais e transnacionais. Do mesmo modo, uma conceção individualista da cidadania, como um estatuto conquistado, em vez de um veículo para a criação de uma cultura política de solidariedade, justiça e inclusão, tem vindo a limitar o potencial do próprio projeto. O presente artigo baseia-se nos fundamentos da teoria política e utiliza uma metodologia interpretativa jurídica e política.

**PALAVRAS-CHAVE:** Cidadania europeia; Direito europeu; supranacional; transnacional; cultura política.

### Introduction

At the European level, a series of crises, including the 2009 sovereign debt crisis and the humanitarian refugee crisis, have accentuated concerns over the

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nature of European citizenship and have increasingly become central to academic discussions on European integration<sup>3</sup>.

Building on the preparatory work of the mid-1970s, the 1992 Maastricht Treaty introduced European citizenship, aiming to bring what had largely been regarded as an economic or "common market" project closer to the "people." European citizenship was envisaged as a key instrument for the politicisation and, ultimately, the democratisation of the European project, fostering a sense of shared European identity.

In addition, European citizenship was anticipated to be innovative, the first complete creation of a web of rights beyond the nation-state.<sup>4</sup> By showing that European citizenship, which is common to citizens of various nations states was feasible, it was suggested that it might also be possible to expand democratic politics beyond the borders of the nation-state, thereby breaking the connection between contemporary democracy and the nation-state. In other words, European citizenship and national identity were not necessarily conflictual notions in the European integration logic. On the contrary, European citizenship could contribute to shaping a European identity within what seems to be a post-national political project.

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<sup>3</sup> BELLAMY, Richard. Evaluating Union Citizenship: Belonging, Rights and Participation Within the EU. *Citizenship Studies*, 2008, vol. 12, pp. 597–611. <https://doi.org/10.2139/ssrn.1519910> last access: 10.05.2024. BELLAMY, Richard. The Theories and Practices of Citizenship. *Citizenship: Critical Concepts*, 4 Volumes, R. Bellamy & M. Kennedy-MacFoy, eds. Routledge, 2014. Available at: <https://ssrn.com/abstract=2348922> last access: 10.06.2024. BELLAMY, Richard, CASTIGLIONE, Dario, and SHAW, John. Citizenship and Its Discontents. In: Klosko, George, ed. *The Oxford Handbook of the History of Political Philosophy*. Oxford: Oxford University Press, 2015, pp. 450-472; OLSEN, Espen D.H. *Transnational Citizenship in the European Union: Past, Present and Future*. New York: Continuum, 2012. DAWSON, Mark. *The Governance of the EU: Fundamental Rights*. Oxford: Oxford University Press, 2017. HABERMAS, Jürgen. The European Nation-State: On the Past and Future of Sovereignty. *European Journal of Philosophy*, 1996, vol. 4, pp. 1-17. HABERMAS, Jürgen. The Future of Democratic Legitimacy in the European Union. *European Law Journal*, 2001, vol. 7, pp. 335-352. HABERMAS, Jürgen. *The European Union: A Political Union of Post-national Sovereignty*. Cambridge: Polity Press, 2017. JOPPKE, Christian. *Neoliberal Nationalism*. Cambridge: Cambridge University Press, 2022. SHORE, Cris. European Citizenship and the Quest for Legitimacy. *European Journal of Cultural Studies*, 2004, vol. 7, pp. 26-45. BAUBÖCK, Rainer. *Debating European Citizenship*. Springer, 2028 <https://doi.org/10.1007/978-3-319-89905-3> last access: 10.06.2024. SANGIOVANNI, Andrea. *European Citizenship and Social Justice*. Cambridge: Cambridge University Press, 2013. ERIKSEN, Erik Oddvar and FOSSUM, John Erik. The EU's Democratic Deficit and the Role of European Citizenship. *European Journal of Political Theory*, 2004, vol. 3, pp. 341-370.

<sup>4</sup> For more on the discussion on European Citizenship and human rights in the EU, see: MENÉNDEZ, Agustín José and OLSEN, Espen D. H. *Challenging European Citizenship: Ideas and Realities in Contrast*. 2020. DAWSON, Mark. *The Governance of EU Fundamental Rights*. 2017. DOUGLAS-SCOTT, Sionaidh and HATZIS, Nicholas, eds. *Research Handbook on EU Law and Human Rights*. USA: Edward Elgar Publishing Limited. 2017. DE BÚRCA, Gráinne. In *The Evolution of EU Law*, edited by Paul Craig and Gráinne de Búrca. "The Evolution of EU Human Rights Law." Oxford: Oxford University Press. 2021.

But how can citizenship be constructed without being tied to national identity? Habermas' in his essay on "Citizenship and National Identity", published in the aftermath of the fall of the Berlin Wall, argued that "*citizenship was never conceptually tied to national identity*".<sup>5</sup> In the French Revolution, the concept of "nation" was redefined from representing a traditional, ethnic-based notion to characterise the political identity of citizens in a democratic society. At this point, the republican concept of citizenship distinguishes itself from ethnic groups that exist prior to political structures.<sup>6</sup> On this basis, collective identification founded on common values, such as democratic ones, can be established; and it shall be based on "*the unity of a procedure to which all consent*".<sup>7</sup> This, in Habermas's view, can create a "constitutional patriotism" based on a liberal political culture that recognizes diversity and promotes peaceful coexistence. Habermas also states that:

*"As the examples of multicultural societies like Switzerland and the United States demonstrate, a political culture in which constitutional principles can take root need by no means depend on all citizens' sharing the same language or the same ethnic and cultural origins. A liberal political culture is only the common denominator for a constitutional patriotism (Verfassungspatriotismus) that heightens an awareness of both the diversity and the integrity of the different forms of life coexisting in a multicultural society."*<sup>8</sup>

In line with Habermas' "constitutional patriotism", Weiler has also defended that there can be a feasible commitment of the citizens to the rights and the responsibilities of a civic society separated from national identity<sup>9</sup>. In other words, it is possible for citizens to engage in multiple citizenships, based on various aspects of their identification to them, and there is no necessity of a single identity to make a common polity work. Accordingly, European citizenship insinuates a post-national, possibly post-state citizenship, and the beginning of a "cosmopolitan turn" grounded in values of solidarity and social justice.<sup>10</sup> In any way, European citizenship has been a unique project of a *sui generis* nature, like the European Union itself.

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<sup>5</sup> HABERMAS, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. 2nd ed. Translated by William Rehg. Cambridge, MA: MIT Press, 1996, p. 495.

<sup>6</sup> *ibid.*: p.p. 494-495.

<sup>7</sup> *ibid.*: p.p. 496-499.

<sup>8</sup> *ibid.*: 500.

<sup>9</sup> WEILER, Joseph H.H. *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*. Cambridge: Cambridge University Press, 1999.

<sup>10</sup> OLSEN, Espen D.H. 2012, p. 510; MENÉNDEZ, Agustín José and OLSEN, Espen D. H. 2020, p. 111.

But how has European citizenship been constructed and manifested within the legal and political domains of the European integration project and how European citizens perceive their rights and duties under European citizenship?

European citizenship, as constructed by European law, was designed to be supranational.<sup>11</sup> That is, European citizenship grants citizens' rights — including civic, political, social, and economic rights, as well as responsibilities that extend beyond national borders and function beyond the authority of a single nation. European citizenship is governed by European law, based on the principles of “subsidiarity” and “proportionality”.<sup>12</sup> It is also safeguarded by supranational institutions, that act regardless of national government's interests, in favour of the “people” of the European Union.

Hence, by serving as a means for further politicizing the European project, European citizenship has the potential to promote greater unity and identification with the project itself. In practice, though, citizenship has been manifested through transnational interactions based more on privileged status than on a rooted European polity. In reality, European citizenship isn't bound to a European political *demos* but rather it is tied to a collection of national *demos* - what Nicolaïdis calls “*demoicracy*”.<sup>13</sup> According to the latest Eurobarometer surveys, to the question “*What does the European Union symbolize to you personally?*”, nearly half of Europeans (49%, -1 percentage point since autumn 2023) associate the EU with the “*freedom to travel, study and work anywhere in the EU*”.<sup>14</sup> Hence, it is “internal market” rights not political ones, that come to primarily identify the connection to the EU, and consequently the nature of European citizenship. In other words, European Citizenship seems closer to what Kochenov described as “*a creature of EU law, with all the loved and hated features attributed to it in the*

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<sup>11</sup> For the purpose of this study, supranationalism is understood as a process that “takes interstate relations beyond cooperation into integration and involves some loss of national sovereignty” (see: NUGENT, Neill. *Government and Politics in the European Union*. 8th ed. London: Palgrave Macmillan, 2017, p.436).

<sup>12</sup> Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality. See: EUROPEAN UNION. *Consolidated Version of the Treaty on the Functioning of the European Union - Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality*. Official Journal of the European Union, C 115, 9 May 2008, pp. 206–209. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F02> last access: 09.07.2024

<sup>13</sup> NICOLAÏDIS, Kalypto. *European Democracy and Its Crisis*. Journal of Common Market Studies, 51(2), 2013, pp. 351–369. See also BELLAMY, Richard. 2008.

<sup>14</sup> EUROPEAN UNION. *European Union*. April/May 2024. ISBN 978-92-68-15590-5. Available at: <https://www.europa.eu/eurobarometer>, last access: 09.07.2024, p. 82.



context of the current internal market paradigm of integration”.<sup>15</sup> On the other hand, citizenship involves a tension between a cosmopolitan perspective that sees it as a fundamental right, and promotes openness and equality beyond borders, and a nationalist perspective that treats it as a right that need to be earned.<sup>16</sup> Indeed, the EU Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States has established not only “*the conditions governing the exercise of the right of free movement and residence, as well as of permanent residence, within the territory of the Member States*”, but also specific conditions for the right of residence for periods longer than three months<sup>17</sup> and limits placed on those rights on grounds of public policy, public security and/or public health.<sup>18</sup> In this way, key principles of the cosmopolitan model, grounded on values of solidarity and social justice, have given way to a more pragmatic approach to European citizenship. At the same time, transnational activities beyond borders have not contributed to building a political culture sufficiently detached from the nation-state, nor have they rendered the nation-state obsolete.<sup>19</sup>

Under this prism, the main argument of this article is that European citizenship is constructed by law in an ambiguous way, allowing for both supranational and transnational interpretations. Similarly, citizenship is governed by a neoliberal governance model that fosters an individualistic idea of citizenship rather than a political culture of solidarity, justice, and inclusion.

The current work builds upon the foundations of political theory and employs a legal and political interpretive methodology. It aims to analyse the evolution of European integration, particularly in relation to the construction of citizenship within the European legal framework. The study prioritises the analysis of Treaty provisions and the rulings of the Court of Justice of the European Union as key sources of political and legal insights.

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<sup>15</sup> KOCHENOV, Dimitry. *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*. Columbia Journal of European Law, 2009, vol. 15, p. 225.

<sup>16</sup> JOOPKE, Christian. *Neoliberal Nationalism: A Critical Perspective*. Cambridge: Cambridge University Press, 2021.

<sup>17</sup> EUROPEAN UNION. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union to move and reside freely within the territory of the Member States. *Official Journal of the European Union*, L 158, 30 April 2004, p. 93.

<sup>18</sup> *Idid*: p. 87 – Article 1.

<sup>19</sup> See: HOFFMANN, Stanley. *Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe*. New York: New York University Press, 1966.



The narrative starts by discussing how European citizenship was firstly constructed as a status challenging traditional concepts of national sovereignty, offering a supranational legal and political framework, aligning with a cosmopolitan vision, and leading to the establishment of European citizenship by the Maastricht Treaty. Second, the focus shifts to the study of how European citizenship has evolved and manifested by law and in practice, in the post Maastricht era. It investigates whether free movement, and non-discrimination principle based on nationality, rather than political participation across EU Member states, have been the primary expressions of European citizenship. It also analyses how these rights strengthened the definition of an “earned” citizenship without necessarily forming a political culture that aspires solidarity, social justice, and inclusion. The article concludes by reflecting on the future of European citizenship and how it may evolve through a stronger European polity.

### **European personal status: A Supranational Status by law?**

The founding of the first European Communities in 1950s signalled not only a new era of pacific relations and cooperation among European nations, rooted in their shared interests for peace and stability following two devastating World Wars, but also the beginning of the socio-economic reconstruction of the nation-states themselves. The consolidation of the nation-state was made by broadening political participation, social and economic growth, and normative standards applicable to cross-border social and economic activities. By this way, participation in a European political order was also seen as a prerequisite for the rescue of the state itself.<sup>20</sup> However, while the powers of states were reasserted, they were also joining together.

The Treaty of Rome signed on March 25, 1957, creating the European Economic Community (EEC), already included references to the rights and duties of the workers of the member states, and in some cases, to all residents within the territory of the Communities, introducing the “non-discrimination” based on nationality principle. Article 48(2) of the Treaty states that the free movement of workers is ensured within the Community no later than the end of the transitional period; and “*shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration*

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<sup>20</sup> MENÉNDEZ, Agustín José and OLSEN, Espen D. H. 2020, p. 65.

and other conditions of work and employment". Moreover, Article 7 of the Treaty states that "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".<sup>21</sup> Further, a series of regulations were adopted that emphasized the rights and responsibilities of European Community nationals, including Council Regulation (EEC) No. 3, which aimed at coordinating national social security norms in order for the workers in cross-border professional activities to accumulate their social security contributions regardless of where they paid them, as well as benefits in the case of "illness", "maternity", "disability", "old age and death" (pensions), "work accidents" and "occupational diseases", "death benefits", "unemployment" and "family allowances."<sup>22</sup>

A European personal status and a special link between the EU and individuals - previously only related to their nation-states via citizenship - was established by European law. However, the normative force of this law still needed to be clarified.

In the 60's, two European Court of Justice decisions came to define the normative force of EU law as having "direct effect" and "primacy" over national law<sup>23</sup>. More specifically, Van Gend en Loos ruling of 1963 indicated that European law has "direct effect" on Member states and that they are directly bound by its provisions.<sup>24</sup> In the Costa v Enel Case ruling of 1964, the European Court of Justice proclaimed the "primacy" of EU law over national laws<sup>25</sup>. In reality, as has been pointed out by Eriksen, the legal structure of the EU has been supranational

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<sup>21</sup> The original version in French states: Article 48(2). *Elle implique l'abolition de toute discrimination, fondée sur la nationalité, entre les travailleurs des États membres, en ce qui concerne l'emploi, la rémunération et les autres conditions de travail.* Document 11957E/TXT Treaty establishing the European Economic Community Available at: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT> last access: 10.07.2024

<sup>22</sup> EUROPEAN COMMUNITIES. Regulation No. 3 concerning the social security of migrant workers. *Official Journal of the European Communities*, 16.12.1958. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31958R0003> last access: 10.07.2024

<sup>23</sup> OLSEN Espen D. H. 2012, p. 34.

<sup>24</sup> The lawsuit concerned Dutch transport business Van Gend en Loos and the Dutch Customs Administration. In 1960, Van Gend en Loos imported German items to the Netherlands. The corporation disputed a customs tariff that violated Article 12 of the European Economic Community (EEC) Treaty, which prevented Member states from charging additional customs levies on imports from other members. The ECJ ruled in favour, establishing the principle of direct effect in European Union law.

<sup>25</sup> Costa, an Italian citizen owning Edisonvolta shares, opposed state attempts to nationalize the electric business. So, he tried to claim that Edisonvolta was his electric bill creditor, not ENEL, the new national firm. Costa argued that nationalization violated the Treaty of Rome. The European Court of Justice ruled in favour of Costa asserting EU Law Supremacy.

since the beginning of the integration process in the 50s and 60s<sup>26</sup>. For Menéndez and Olsen, the stimulus given to the community legislation in the 1960s and 1970s was also critical in moulding the “European personal status” into an “embryo of a supranational citizenship”.<sup>27</sup> The European Court of Justice in its *Costa v Enel* ruling clearly stated that: “...the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.”<sup>28</sup>

However, although the European personal status was still predominately economic/and market oriented, it did allow citizens from different Member states to integrate into their host society while migrant workers and secure economic and social rights on par with national workers.<sup>29</sup> Therefore, national welfare states, intra-Community commerce, and economic integration were reinforced. Then again, key ambiguities of EU law remained - following *Van Gend en Loos* and *Costa* rulings - as the underlying constitution of the European legal system was not a European constitution, but a collection of national constitutions.<sup>30</sup>

The possibility remained, however, that the new status would be evolved, encompassing not only socio-economic rights, but also civil and political rights, and consequently reinforcing social justice, and inclusion. In the 1970s, the principle of non-discrimination was further operationalized through regulations and directives that prohibited discrimination against individuals based on their nationality when accessing employment, services, and goods.<sup>31</sup> Nonetheless, this dynamic was obstructed after the severe consequences of two oil crises in 1973 and 1979, which demonstrated that labour income and capital income would not necessarily grow simultaneously.<sup>32</sup> As a result, a different understanding of the European personal status was moulded.

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<sup>26</sup> ERIKSEN, Erik O. *The Unfinished Democratization of Europe*. Oxford: Oxford University Press, 2009, p. 3.

<sup>27</sup> MENÉNDEZ, Agustín José; OLSEN, Espen D. H.. 2020, p. 62.

<sup>28</sup> Quoted in ERIKSEN, Erik O. 2009, p. 3.

<sup>29</sup> MILWARD, Alan. 1992. *The European Rescue of the Nation-State*. London: Routledge.

<sup>30</sup> MENÉNDEZ, Agustín José; OLSEN, Espen D. H.. 2020, p. 70.

<sup>31</sup> EUROPEAN COMMUNITIES. Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. *Official Journal of the European Communities*, L 45, 19 February 1975, pp. 19–20. EUROPEAN COMMUNITIES. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, and promotion, and working conditions. *Official Journal of the European Communities*, L 39, 14 February 1976, pp. 40-42.

<sup>32</sup> ERIKSEN, Erik O., 2009. DELANTY, Gerard. “European Citizenship: A Critical Assessment.” *Citizenship Studies*, vol. 11, no. 1, February 2007, pp. 63–72. DOI: 10.1080/13621020601099872.

However, in what ways was there a new understanding of rights?

Succeeding the second oil crisis in 1979, the growing influence of neoliberal and ordoliberal concepts, along with the apparent failure of “Keynesian” policies, led to a period of economic stagnation. In addition, decision-making based on unanimity, coupled with the different views and interests among Member states, limited progress in political integration.<sup>33</sup> In 1966, Hoffmann had already asserted that the nation-state remains “obstinate”, as national disparities across states impede complete integration.<sup>34</sup> The state of “Eurosclerosis” post oil crisis came to reaffirm Hoffmann’s analysis.

As Gillingham explains, overcoming “Eurosclerosis” was seen as possible basically by unleashing a process that dissociates the compromise between labour stability and capital growth, and by adopting reforms that prioritise market flexibility and competition.<sup>35</sup> On this basis, economic liberties should be redefined, beginning with the freedom of movement of products. This approach aimed at renewing economies by fostering greater competition and efficiency.<sup>36</sup> The “founding mother of this new Europe” was Margaret Thatcher.<sup>37</sup>

In turn, in 1979, the Cassis de Dijon European Court of Justice ruling gave a new interpretation to the European personal status.<sup>38</sup> Indeed, by ruling that if a product is legally sold in one Member state, it should generally be allowed to be sold in other Member states, unless there are valid public interest reasons to restrict it (e.g., health and safety), the European Court of Justice associated European rights to private property and entrepreneurial freedom, accepting a uniform conceptual framework without reevaluating state regulations that might limit these rights. As a result, European personal status was no longer exclusively defined by reference to the post-war Democratic and Social state, but became

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<sup>33</sup>“Eurosclerosis” is a phrase coined in the 1970s and 1980s that refers to the economic stagnation and high unemployment that affected many European countries, due to overregulation, and significant welfare programs.

<sup>34</sup> HOFFMANN, Stanley, 1966, p. 863.

<sup>35</sup> GILLINGHAM, John. *European Integration, 1950–2003: Superstate or New Market Economy?* Cambridge: Cambridge University Press, 2003. 477.

<sup>36</sup> Ibid: p. 227.

<sup>37</sup> Ibid: p. 136.

<sup>38</sup> EUROPEAN COURT OF JUSTICE. 1979. Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (“Cassis de Dijon” case). ECLI:EU:C:1979:42. *European Court Reports* 1979, p. 649. Available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A61978CJ0120> last access: 10.07.2024

increasingly shaped by reference to private autonomy, and in particular, private property and entrepreneurial freedom.<sup>39</sup>

The Single European Act (SEA), signed in 1986, was a key milestone in European integration. It reinforced the commitment to free movement and non-discrimination based on nationality, principles that underpin the single market and paved the way for the Economic and Monetary Union (EMU).<sup>40</sup> In terms of political integration, the direct elections to the European Parliament, first held in 1979, marked a significant shift in the European integration process, introducing a more political dimension.<sup>41</sup> Building on this, the SEA advanced political integration by strengthening the European Parliament's powers through the new cooperation procedure, which enabled it to propose amendments; and by introducing qualified majority voting in internal market areas, though under certain conditions.<sup>42</sup> Thus, the SEA strengthened the transnational European personal status, rooted in economic activity, while fostering the early stages of political participation among citizens.

Under the single market paradigm, the European Court of Justice also gradually extended rights for groups beyond mere workers, such as holders of capital; for instance: tourists and entrepreneurs. In the Italian citizens' Luisi and Carbone case of 1984, referred to the export of banknotes from Italy to Germany and France for medical and tourism purposes, the European Court of Justice pointed to national legislation boundaries that constituted a breach of the freedom of movement of capital, *"the Court seemed to release the claimants from seemingly draconian national norms led to the strengthening the freedom of Europeans to move their capital freely"*<sup>43</sup>. The European Court of Justice presented this decision as contributing to the freedom of movement to buy goods, and receive services. As a result, the extension of rights to other individuals than mere workers foster transnational interaction. In addition, the Cowan v. Le

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<sup>39</sup> MENÉNDEZ, Agustín José; OLSEN, Espen D. H.. 2020. JOPPKE, Christian. 2021. SPAVENTA, Eleanor. "Earned Citizenship – Understanding Union Citizenship through Its Scope". In *EU Citizenship and Federalism: The Role of Rights*, edited by Dimitry Kochenov, Cambridge: Cambridge University Press, 2017, pp. 215–230.

<sup>40</sup> SHAW, Jo. "The European Union and Global Constitutionalism." In *Handbook on Global Constitutionalism*, 2nd ed., edited by Anthony F. Lang, Jr. and Antje Wiener, p. 490. Cheltenham: Edward Elgar Publishing, 2023. WIENER, Antje. *European Citizenship Practice: Building Institutions of a Non-State*. Taylor & Francis, 1998. Kindle edition, p. 213.

<sup>41</sup> See: SHAW, Jo. 2023 worries over identity Copenhagen European identity 1979.

<sup>42</sup> WIENER, Antje. 1998.

<sup>43</sup> MENÉNDEZ, Agustín José; OLSEN, Espen D. H.. 2020, p. 99.

Tesorier de la République ruling of 1989, in favour of the right of a British citizen injured in France to seek compensation for his injuries under French law, further reinforced the principles of equal treatment and non-discrimination based on nationality for EU citizens<sup>44</sup>; however, not regardless of certain criteria as migration (movement of EU nationals beyond borders) and/or capital.<sup>45</sup>

### **European Citizenship: what type of rights?**

The legal status of "citizen of the Union" was formally established by the Maastricht Treaty, signed in 1992. More specifically, Article 8(1) of the Treaty on European Union (TEU) states that: *Every person holding the nationality of a Member State shall be a citizen of the Union.*<sup>46</sup> In this context, the Treaty grants a set of rights and duties: to vote and run for European Parliament and municipal elections in the Member state of residence under the same conditions as nationals of that state<sup>47</sup>; to diplomatic protection in a third country (non-EU state); and the right to submit a petition to the European Parliament and to Ombudsman<sup>48</sup>; the right to good administration, including the right to communicate with any European institutions in one of the Member states' official languages and receive a reply in the same language<sup>49</sup>; and access to the documents from the European Parliament, Council, and Commission, under certain conditions.<sup>50</sup> Thus, a new stimulus to European economic and political integration came with the Maastricht Treaty.

<sup>44</sup> Ibid: 2020, p. 99.

<sup>45</sup> SPAVENTA, Eleanor. 2017.

<sup>46</sup> Current Article 20 Treaty on the Functioning of the European Union.

<sup>47</sup> EUROPEAN UNION. Article 8 of the Treaty on European Union (TEU). Maastricht Treaty, *Official Journal of the European Communities*, 1992, C 191. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11992M%2FTXT>. EUROPEAN UNION. Article 22(1) of the Treaty on the Functioning of the European Union (TFEU). *Official Journal of the European Union*, 2007, C 306. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT> last access: 11.07.2024

<sup>48</sup> Article 8°- B and Article 8°- C TEU, respectively; currently article 24 TFEU, in accordance with Articles 227 and 228 TFEU.

<sup>49</sup> EUROPEAN UNION. Article 41 of the Charter of Fundamental Rights of the European Union. *Official Journal of the European Union*, 2012. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT> last access: 11.07.2024. Article 41. And is further supported by EUROPEAN UNION. Regulation (EC) No 1/58 on the implementation of Article 24 of the Treaty on European Union. *Official Journal of the European Communities*, 1958. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31958R0001> last access: 11.07.2024; currently Article 24(4) TFEU.

<sup>50</sup> Article 42 CFR and Article 15 TFUE <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A11992M%2FTXT> last access: 11.07.2024



The Treaty also established the European Union based on three pillars<sup>51</sup> and created the legal framework for the introduction of the euro as a single currency. The introduction of the co-decision procedure was a pivotal transformation in the decision-making process, as it established the European Parliament as a co-legislator in specific areas, thus enhancing the politicization of the European integration. Additionally, the European Court of Justice gained the authority to impose sanctions on Member states that violate Community law or fail to comply with its rulings.

The Maastricht Treaty aimed to shift European integration away from a predominantly functional focus on trade and markets.<sup>52</sup> It was an attempt to get closer to “*creating an ever closer union among the peoples of Europe*”. However, it left uncertainty and controversy over the role of citizens themselves in the creation of this Union. Indeed, a series of events demonstrated the change from a phase of “permissive consensus” over European integration to one of “constraining dissensus”.<sup>53</sup> For instance, the rejection of the Maastricht Treaty in French and Danish referendums clearly revealed that the people’s devotion to a *suis generis* project can be fragile. Similarly, a series of opt-outs by the United Kingdom (regarding the Social Chapter and the EMU) and by Denmark (concerning the EMU, CFSP, JHA, and even European Citizenship) also manifested concerns over different national preferences and democratic issues. According to Shaw, since then, “democratic deficit” claims over the gap among EU, its institutions, and its citizens, as well as concerns regarding the illegitimate undermining of national sovereignty, have underpinned the discourse on the EU’s political future.<sup>54</sup> In fact, these events, raised tensions inside the EU particularly over the question “*What is the final goal of European integration?*”. As Wiener explains:

*“These tensions which in the end contribute to the notion of democratic deficit as something akin to the genie which was let out of the bottle never to go back in again, seem to be part and parcel of ‘European’ citizenship practice.”*<sup>55</sup>

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<sup>51</sup> The “European Communities” (building on the existing Communities and managed according to the so-called “community method” (involving the EP) – hence, supranational in character; and areas of intergovernmental cooperation, namely the “Common Foreign and Security Policy” (CFSP); and “Justice and Home Affairs (JHA) Cooperation”.

<sup>52</sup> SHAW, Jo. 2023, p. 495.

<sup>53</sup> HOOGE, Liesbet, and MARKS, Gary. “A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus.” *British Journal of Political Science*, vol. 39, no. 1, 2008, pp. 1–23. DOI: 10.1017/S0007123408000409.

<sup>54</sup> SHAW, Jo. 2023, p. 495.

<sup>55</sup> WIENER, Antje. 1998, p. 214.



Both the supranational and transnational aspects of EU law failed to clearly define the ultimate purpose of European citizenship.

The Treaty of Amsterdam enhanced the EU treaty provisions on fundamental rights and the right to non-discrimination. Article 6 of the Treaty of Amsterdam states that the EU is based on “*liberty, democracy, human rights, and the rule of law*”.<sup>56</sup> This article also acknowledges the European Convention on Human Rights (ECHR), which strengthens human rights protections. Moreover, Article 13 – not present in the Maastricht Treaty - strengthened the EU's fight against discrimination and for equality.<sup>57</sup> Accordingly, the Treaty also handed to the institutions law-making power against discrimination, including race and sexual orientation.<sup>58</sup> The Treaty also advocated for a vision of “social Europe” and enhanced EU social fairness, non-discrimination, and the protection of human rights.<sup>59</sup> For the first time, the Treaty gives the Court of Justice jurisdiction over fundamental rights. Concerning the EU's decision-making in areas like justice, home affairs, security, immigration, asylum, and law enforcement, the Treaty transitioned these policies from intergovernmental collaboration to the supranational framework of the first pillar. While these innovations represent a noteworthy effort to strengthen the protection and broaden the scope of fundamental rights for the citizens of Europe, and thus also enhance the supranational character of citizenship, in practice, they have been regarded as merely supplementary to the existing rights framework, rather than essential tools for fostering a shared political culture and identification with the project itself.

Olsen defends that what the Member states simply did was to include the “additionality” of citizenship in the Treaty: “*Citizenship of the Union shall complement and not replace national citizenship*”.<sup>60</sup> In addition, Article 18(2) (formerly Article 8a) reaffirmed the right of EU “*citizens to move and reside freely*

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<sup>56</sup> European Union. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. *Official Journal of the European Communities*, C 340, 10 Nov. 1997, Article 6 (ex Article F).

<sup>57</sup> *Ibid*: Article 13; current Article 19 of the TFEU, allows the EU to prohibit discrimination based on sex, race or ethnicity, religion or belief, disability, age, or sexual orientation). Enhanced Non-Discrimination Provisions: One of the most groundbreaking changes brought about by the Treaty of Amsterdam was the explicit strengthening of the EU's role in combating discrimination. The Treaty also strengthened the EU's commitment to ensuring equal pay for equal work and combating gender-based discrimination in the workplace and society.

<sup>58</sup> SHAW, Jo.1998, p. 304.

<sup>59</sup> It thus enabled the legal framework expansion through the Race Equality Directive (2000/43/EC) and Employment Equality Directive (2000/78/EC) to prohibit discrimination in employment and access to goods and services.

<sup>60</sup> OLSEN, Espen D.H. 2012.

*within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect*".<sup>61</sup> The Treaty mainly adjusted to the previous framework by involving the co-decision procedure in possible facilitations regarding the exercise of rights. The preamble did not evolve substantially as to promoting a notion of European identity either. On the other hand, in the 1990s, transnationalism of European citizenship became more pronounced through the European Court of Justice case law, regardless of dual nationality. For instance, according to the *Micheletti and Others v. Delegación del Gobierno en Cantabria* Court's ruling:

*The provisions of Community law on freedom of establishment preclude a Member State from denying a national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host State deems him to be a national of the non-member country.*<sup>62</sup>

Similarly, in the *Boukhalfa v. Federal Republic of Germany* case, the Court extended the scope of rights beyond the borders of the European Union.<sup>63</sup>

A novel institutional construction, the Convention on the Future of Europe, was established at the end of the post-Maastricht decade to establish a "bill of rights" that was crucial to the EU polity and its citizens. This document was the Charter of Fundamental Rights (CFR) of the European Union. The document did address a series of key issues related to citizenship, as dignity, solidarity, and justice. Nonetheless, it was formulated based on prevailing notions of European citizenship. A "neutrality" discourse on values, resulted in a lack of significant breakthroughs in constructing a political culture through citizen participation in the EU's constant transformation. Olsen claims that it was not a "*breakthrough for postnational citizenship in the EU*".<sup>64</sup> Indeed, European citizenship was shaped as a vehicle of integration through rights, primarily related to free movement, and à la carte political participation, rather than as a means of constructing identification with a European "*polis*" or "*demos*." For instance, Chapter IV: "Solidarity," primarily addressed workers and employers, social and housing assistance, and consumer protection, rather than fostering a political culture of humanistic values beyond borders.

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<sup>61</sup> European Union. Treaty of Amsterdam. *Official Journal* C 340, 10 November 1997.

<sup>62</sup> Court of Justice of the European Union. Case C-369/90, *Micheletti and Others v. Delegación del Gobierno en Cantabria*, [1992], ECR I-4329.

<sup>63</sup> Court of Justice of the European Union. Case C-214/94, *Boukhalfa v. Federal Republic of Germany*, [1996], ECR I-2253.

<sup>64</sup> OLSEN Espen D. H. 2012.

On the other hand, the Treaty of Nice, signed in 2001, was more of what Shaw describes as “a tidying up exercise”.<sup>65</sup> Its primary objective was to enhance the EU's flexibility within its decision-making processes to accommodate ten new Member states. Nevertheless, it also allowed for the strengthening of EU law enforcement through the enhanced Article 7 of the TEU, enabling sanctions on Member states to ensure they uphold EU values of democracy, the rule of law, and basic rights.<sup>66</sup> Once again, the Irish rejected the Treaty due to concerns about the erosion of national sovereignty, as well as concerns about the EU's rising technocracy and the effects of globalization on local communities and jobs.<sup>67</sup> In the same line of reasoning, the Treaty establishing a Constitution for Europe signed, and approved by the European Parliament, in 2004, was ultimately rejected in referendums in France and the Netherlands in 2005. In France, primary concerns were that a “Constitution” would compromise national sovereignty, coupled with economic worries, especially on the effects of globalization. In the Netherlands, voters expressed analogous fears regarding the possible erosion of national sovereignty. The notion of European citizenship was also a subject of contention.

The Treaty of Lisbon, which was signed in 2007, reviewed the overall structure of the treaties so that the basis for primary EU law is now the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU), removing the pillars distinction between the more supranational and more intergovernmental aspects of the EU's structure. It also established that the EU's Charter of Fundamental Rights had the same legal value as the treaties.<sup>68</sup> As far as the European citizenship is concerned, it remained tied to the long history of European integration as a project subjugated to the “internal market orthodoxy”<sup>69</sup> with some civil and political participation rights added to this “earned” European personal status. The transformation of citizenship did not

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<sup>65</sup> SHAW, Jo. 2023, p. 496.

<sup>66</sup> Hungary and Poland have faced criticism for undermining judicial independence and media freedom, prompting inquiries into the EU's capacity to maintain its principles. These cases illustrate the political obstacles to sanctioning Member states, complicating the application of Article 7.

<sup>67</sup> The sole citizens to have been presented with a referendum on the matter. Other Member states ratified the Treaty in their national parliaments.

<sup>68</sup> See also BALLA, Evanthia. “The EU Human Rights Paradigm: Re(politicizing) European Integration.” In *Crises of the Political and Human Rights: Critical Perspectives on the Common World*, edited by Silvério da Rocha-Cunha, Evanthia Balla, Irene Viparelli, Paulo Vitorino Fontes, and Rafael Franco Vasques, 2023. Humus edition.

<sup>69</sup> SPAVENTA, Eleanor. 2017.

seem to assimilate the lessons from the highly politicized treaties/and constitutional rejections. In fact, Irish voters also rejected the Treaty of Lisbon, although they later accepted it in a second referendum.

It is worth noting that, following the Lisbon Treaty, the Court of Justice of the European Union (CJEU) attempted to “stretch inclusiveness”<sup>70</sup> to non-EU citizens. For instance, in the Ruiz Zambrano case<sup>71</sup>, the CJEU ruled that third-country nationals do have rights of residence on EU territory, premised on links with Member state nationals that have fundamental rights as EU citizens do. However, although the Ruiz Zambrano ruling represents a crucial development in EU law, the doctrine it created provides rights for non-EU parents of EU citizens while unconsciously excluding other groups of non-EU citizens, particularly those who do not have EU citizen family members. At the same time, a Union citizen also needs to satisfy the criteria listed in Directive 2004/38, as we have discussed above.

The CJEU has also highlighted EU democracy. It is manifested in relation, for instance, to “*to the scope of the duties of the European Commission in responding to European Citizens’ Initiatives (direct democracy); in relation to appropriate means for implementing EU law within the member states (the balance between representative democracy and technocracy)*”.<sup>72</sup> However, these efforts, while crucial for addressing claims of a “democratic deficit”, are not sufficient for creating a political culture that could also foster a sense of “constitutional patriotism.” Indeed, the EU continues to be growing as a transnational and multilevel polity but without a ‘standard’ model of democracy. This situation has raised further concerns regarding the legitimacy of the EU, particularly considering the widening distance between its leadership and the populace. Should the EU persist in channelling greater resources into the development of a techno-economic project rather than a political one? It seems a risky methodology as it hinders the endless possibilities of building a new paradigm of solidarity, justice and inclusion inherent in European citizenship.<sup>73</sup>

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<sup>70</sup> MENÉNDEZ, Agustín José; OLSEN, Espen D. H.. 2020. 147.

<sup>71</sup> Court of Justice of the European Union. *C-34/09, Ruiz Zambrano*. Judgment of 8 March 2011.

<sup>72</sup> SHAW, Jo. 2023, 504.

<sup>73</sup> For a critical assessment of European citizenship see also: DELANTY, Gerard. "European Citizenship: A Critical Assessment." *Citizenship Studies*, University of Liverpool, Liverpool, UK, 30 May 2007. Available at: <http://www.tandfonline.com/loi/ccst20> last access: 10.08.2024.

## Final Remarks

Since the founding treaties, which initially granted special status to workers from Member states before creating a European citizenship, European law has focused on the economic “motor” of integration, prioritising “market” rights. Moreover, within the dominant neoliberal logic, European citizenship - whether in terms of the right to move or reside – has evolved largely as an “earned” status, based on an individual’s perceived worthiness and productivity. Under this prism, the aim of creating a political culture grounded in cosmopolitan values seems overtaken by a more pragmatic approach to European citizenship.

On the other hand, European citizenship also aimed to establish a framework of social and political rights, promoting a sense of belonging to the Union. In reality, however, it has been formed through an ambivalent set of norms that seem to aspire to supranationalism, yet, in practice, primarily extend transnational rights. The rejection of the treaties in several EU Member states illustrate the complex and often contradictory views held by citizens regarding European integration. Some see it as a project that advocates for universal rights and values grounded in non-discrimination, while others worry about the potential erosion of national sovereignty. However, the lack of citizen participation in EU integration sustains concerns over the democratic deficit and legitimacy, thereby limiting the full potential of European citizenship.

*“Today, there is no longer any conflict between the national identity of a European citizen and his or her European identity. But the problem is that this European identity is still underdeveloped in relation to the real evolution of the European community of destiny.”<sup>74</sup>*

Hence, the ambition of fostering a sense of “constitutional patriotism” remains unfulfilled.

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