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Going *Home*? ‘European’ Citizenship Practice Twenty Years After¹

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Introduction

Where do European citizens eventually turn to go home at the end of the day? Does it matter whether they feel that they belong,² or whether they actually know what is ‘theirs’? This chapter argues that there is a considerable distance to be covered between formally stipulating citizenship on the one hand, and practically ‘owning’ citizenship,³ on the other. As the literature on norms research has demonstrated, the formal validity of a norm offers little guidance as to its social recognition, let alone its cultural validation. Yet, it is the latter normative segments, which matter with regard

¹ The allusion to the British blues-rock band *Ten Years After* is not accidental (compare their Woodstock song ‘I’m going home’). On the question of where citizens belong, compare, on the one hand, John Torpey’s book on the history of the passport where he introduces the important conceptualisation of citizenship as a practice of coming and going (Torpey 1997). On the other hand, compare the concept of birth right held by indigenous people, which indicates undisputable natural ties to the land where one is borne, and which carry with them specific obligations to that very part of land (Tully 2014).

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² “Close to two-thirds of Europeans feel that they are citizens of the EU (65% for the total ‘yes’), after a 6-point rise since autumn 2013. This increase is reflected in the “yes, definitely” answers that were given by more than a quarter of Europeans (26%, +6 percentage points), whereas the proportion of more moderate answers – “yes, to some extent” – has remained unchanged (39%). The feeling of EU citizenship has now reached its highest level since this question was first asked, in the Standard Eurobarometer survey of spring 2010 (EB73). Moreover, this is the first time that more than a quarter of Europeans have said that they “definitely” feel that they are citizens of the EU. Conversely, around a third of respondents do not feel they are citizens of the EU (34% for the total ‘no’, -6).”*Source*: Standard Eurobarometer 2014 (18), 28,

http://ec.europa.eu/public_opinion/archives/eb/eb81/eb81_first_en.pdf (assessed 19 Sept 2014)

³ Compare Haltern’s reference to Kahn regarding the importance of owning constitutional texts (Haltern 2003, citing Kahn 1999). The analogy is to Park and Vetterlein’s concept of „owning development“ (Park and Vetterlein 2009).

to whether or not a norm is accepted, understood and hence complied with. The contestations in the proceedings of the European Court of Justice's ruling in the *Rottmann* case⁴ demonstrate quite clearly that their quite detailed and extensive elaborations about the European normative order with its fundamental norms and standardised procedures, they remain largely confined to a legal environment. Meanwhile, the larger question about where European citizens are to turn at the end of the day, and under which conditions, is not as straightforward as the literature on citizenship in the context of modern state-building would suggest.⁵ As critical encounters they also demonstrate that over the past decades 'European' citizenship practice has challenged familiar assumptions about the institutional shape and location of nation-state authority. Both developments are related. The theory of contestation distinguishes four modes of contestation (arbitration, deliberation, contention and justification) in order to distinguish among four modes of contestation that describe contestations in the legal, political, societal and academic environments, respectively. The distinction matters for the research organisation of bifocal – normative and empirical – approaches.⁶

As citizenship practice unfolds, stateness – defined as the sovereign competence to initiate and control constitutionally defined borders and comply with sovereign obligations – is challenged⁷. Given that the main mission of 'European' citizenship practice⁸ over the past decades have been to encourage, manage and protect border crossings, citizenship practice has had an ongoing impact on European integration. Citizenship practice forges stateness and vice versa⁹. However the imprint of Union citizenship on this relation still remains to be fully grasped and properly understood, beyond legal terms. As Elizabeth Meehan has suggested, "the protection of citizens' rights may depend upon institutional pluralism and human diversity and not, as sometimes is argued (...), on political and social homogeneity."¹⁰ It is this

⁴ For the judgement of the Court (Grand Chamber) on 2 March 2010 in *Janko Rottmann v Freistaat Bayern* (hereafter: the *Rottmann case*), please see: http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2010.113.01.0004.01.ENG (assessed 15 Sept 2014)

⁵ Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (HUP, 1992).

⁶ For details on the theory of contestation and the four modes of contestation, compare Wiener (2014).

⁷ T. Biersteker and C. Weber, *State Sovereignty as Social Construct*. (CUP 1996).

⁸ Please note that when using 'European' in inverted commas, reference is made to Union citizens, as opposed to those Europeans who are not part of an EU member state (Wiener 1998, 16, fn. 8).

⁹ Jane Jenson, "Paradigms and Political Discourse: Protective Legislation in France and the United States Before 1914", (Canadian Journal of Political Science, XXII: 2, 1989) 235-58.

¹⁰ Elizabeth Meehan, "Political Pluralism and European Citizenship." (London and New York: Routledge. 1997) 69-85.

institutional pluralism, which has spurred the extraordinary story of European citizenship practice.

In the 1990s many lawyers considered the impact of the Maastricht citizenship article (Article 8(a)(e) TEC) as ‘thin’¹¹ while others saw more potential. Especially political scientists, sociologists or interdisciplinary lawyers who took a relational approach expected an – albeit gradual – however, more significant impact of Union citizenship.¹² Historical policy analysis of ‘European’ citizenship practice leading up to the Maastricht Treaty¹³ (hereafter: *Maastricht*), demonstrated that this expectation was shared by the central players involved in the process of conceiving and shaping the jigsaw of ‘European’ citizenship practice over time. Given that the main mission of ‘European’ citizenship practice¹⁴ as the politics and policy of developing citizenship in the EEC, EC and now EU since the early 1970s have been to establish a robust and acknowledged European identity based on the two policy packages of rights policy and passport policy (Wiener 1998), citizenship practice has had an ongoing impact on European integration. As this chapter argues, this integration has been mainly perceived as ‘integration through law’¹⁵. The question is therefore, was citizenship practice constitutive for normative change besides and beyond the law? And if so, who were the masters of ‘European’ normativity?

Looking back, it is important to keep in mind that despite this continuous process of ‘integration through law’ that culminated recently with the *Solange Reversed* proposal,¹⁶ and that facilitated an institutional environment, which is most suitable for forging the European normative order through a string of court rulings, opinions and learned commentaries, citizenship practice would not have been integrated into the Maastricht Treaty without strategic moves on behalf of a number of political players. The latter operated through the Commission, however they were not exclusively bureaucrats but also involved politicians operating through the

¹¹ Siofra, O’Lary, “*The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law*” (1995) CLR 32, 554-72 and Jessurun D’Oliveira, “*European Citizenship: Its meaning, Its potential* (Dehousse 1996).

¹² See Meehan 1993; Soysal 1994; Somers 1997; Shaw 1997; Wiener 1996; 1997; 1998.

¹³ The Maastricht Treaty was signed in Maastricht on 7th February 1992, and entered into force in 1993. For details, please visit: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1992:191:FULL&from=EN> (assessed on 15 September 2014)

¹⁴ Please note that when using ‘European’ in inverted commas, reference is made to Union citizens, as opposed to those Europeans who are not part of an EU member state (Wiener 1998, 16, fn. 8).

¹⁵ U. Haltern, *Integration Through Law. European Integration Theory*. (A. Wiener and T. Diez. Oxford, OUP 2004) 177-196.

¹⁶ A. Bogdandy, et al., “*Reverse Solange - Protecting the essence of fundamental rights against EU member states.*” (2012) CMLR 49(2), 489-519.

Parliament or lobby groups¹⁷. Often these strategists collaborated across formal organisational and institutional boundaries in order to bring the jigsaw of European citizenship together through practice.¹⁸ Based on these practices and the clever moves through ‘windows of opportunity’ in the policy process, it was possible to stipulate Union citizenship in the Maastricht Treaty as a turning point after two decades of ‘European’ citizenship practice. Neo-functionalists and historical institutionalists have appropriately explained such moves as responses to “internal crises” that actually often generated “policy windows.”¹⁹ For example, citizenship policy was developed in order to strengthen European identity in the 1970s.²⁰

Yet, the policy window opened just prior to the Intergovernmental Conference (IGC) that prepared the Maastricht Summit in 1990, when German unification made an IGC on political union necessary, and the Spanish delegation managed to put citizenship onto the agenda.²¹ The materials had been drafted since the 1970s. At the time, citizenship policy was far from a neat bundle of strategies, instruments and policies, and could not be traced back to a single institutional place. It could, however, be located within the EU’s “embedded *acquis communautaire*,” with reference to first, the underlying idea of the nation-building power of citizenship, second, the routinized practices of border-crossing and their impact on a feeling of belonging, and third, the regulation of citizenship rights as the foundation of the organisational link between the individual and the polity.²² It consisted on two policy packages. The first is summarised by the day-to-day practices which all involved border crossing. These were already identified as the central instrument towards the establishment of Union citizenship prior to Maastricht. The corresponding policy objective was defined as *passport policy* package including all movement-related policies at the time. The second is characterised by the sum of policies, which inform rights politics. The corresponding policy objective was defined as the *special rights policy* package. Both packages were conceived following “the Copenhagen Summit and the two Paris Summits in the early 1970s” including the council agreement “to begin to institute

¹⁷ G. Ross, *Jacques Delors and European Integration*. (Cambridge, Polity 1995), A. Warleigh (2007)

¹⁸ For the detailed reconstruction of these practices see Wiener (1998a).

¹⁹ Compare Schmitter (2003; 2014) and Smyrl (1998); Pollack (2003); Bulmer (2008), respectively.

²⁰ See the document ‘On European Identity’ issued at the 1973 Copenhagen summit; *Europe Documents*, No. 779 (cited in Wiener 1998, 18 Fn 21)

²¹ For the reconstruction of this process, compare Wiener (1998a, Ch. 11) *Dusting off the Citizenship Acquis*, p. 252 ff.

²² For the concept of the ‘embedded’ *acquis communautaire* see Wiener (1998b) as well as Merlingen, Mudde and Sedelmeier (2000).

some new policy instruments. Among these were bits and pieces of ‘special rights’ and ‘passport policy’ that would eventually contribute to the creation of European citizenship.” (Wiener 1998, 85)²³ As citizenship practice unfolded in institutions across the Euro-polity, especially, in Brussels, European citizenship practice led to a gradual expansion of the citizenship *acquis communautaire* (Wiener 1998, 64 ff). The kick-off for citizenship practice was marked by a qualitative turn in the European integration process from the “Europe of materials” to the “Europe of citizens” in the early 1970s (Van den Berghe 1982, cited in Wiener 1998, 65-66).

Given the widening gap between two distinctly different perceptions of ‘European’ citizenship as constitutive for a new normative order of the Euro-polity, on the one hand,²⁴ and as an apparently rather elusive concept that comes mainly down to carrying a burgundy coloured passport, on the other, this chapter addresses the effect of these changes on the re-/constitution of normativity as the constitutional ‘home’ of European citizens. It is argued that at a time – some twenty years after Maastricht – when the fragmentation of citizenship rights has not only generated confusion among citizens but also with lawyers, the onus is on social scientists to bring the theoretical tools to bear which have been developed in order to generate a better understanding of citizenship and state-building. To that end, the following recalls the continuity of citizenship practice with reference to the two packages of ‘special rights’ and ‘passport policy’ and how they have contributed to the social construction of normativity.

The central point of this chapter will be to recall the constitution of normativity through the contestations about citizenship with regard to the cycle of contestation. In doing so it demonstrates an increasing lack of communication and mutual understanding between the quality of ‘European’ citizenship practice conducted through contestations at the ‘constituting stage’ of the cycle of contestation, on the one hand, and the perception of the substance generated by it in the absence of contestations at the ‘implementing stage’, on the other (compare Figure 1 Part Two). To develop this point within the historical context in which ‘European’ citizenship practice must be understood in order to understand the current debates

²³ For the respective documents that were constitutive for each of these two citizenship policy packages, please see the documents listed in Wiener (1998) chapters 4, 5 and 6, respectively.

²⁴ Compare for reference to such a distinct normative order especially the Advocate General’s opinion in the *Kadi* case and the *Rottmann* case, respectively; as well as the *Lisbon* ruling of the German BVG. All are addressed in more detail in the following sections.

about *Rottmann*, *Ruiz Zambrano*, *Kadi* among many others, the chapter proceeds in two further parts. The *first part* recalls the move towards the theory of citizenship practice, which was conceived as a heuristic theoretical device to address the puzzle of citizenship in a non-state in the early 1990s. To explore the answer to the leading question about the constitutional ‘home’ of European Union citizens, the *second part* addresses the effect of citizenship practice on the social construction of normativity. It examines moments in which fundamental norms are contested through citizenship practice based on selected rulings of the European Court of Justice (ECJ).

Part One:

Citizenship Practice Theory – A Heuristic Device

Following the first two decades of citizenship practice which saw the consolidation of both policy packages, was the goal to build a European community with citizenship as “one of the three supporting pillars of the new political project” of European integration in the 1990s.²⁵ In effect, even though the Maastricht Treaty had stipulated Union citizenship as “complimentary” and not replacing member state citizenship, the fact that citizenship rights had been included in the treaty of an international organisation reflected the gradual institutional fragmentation of citizenship rights. The broader historical perspective on this process reveals that this fragmentation may imply more far-reaching larger structural change, than the move through the Maastricht window of opportunity might have suggested: For this fragmentation follows a notable historical pattern of significant large structural changes²⁶. While citizenship rights were fragmented in the 17th century²⁷, they were bundled in the 1970s²⁸ and the 1990s indicated the critical juncture initiating a new period of

²⁵ This policy strategy was noted at the interinstitutional preparatory conference for the Intergovernmental Conference (IGC) leading up to the Maastricht Treaty. See SEC(90) 1015/2, 18 May 1990, p. 6 (cited in: Wiener 1998, 254).

²⁶ C. Tilly, *Big Structures, Large Processes, Huge Comparisons*. (New York, Russell Sage 1984)

²⁷ T.H. Marshall, *Citizenship and Social Class*. (CUP 1950)

²⁸ Yasemin Soysal, *Changing Parameters of Citizenship and claims-making: Organized Islam in European Public Spheres* (Kluwer Academic Publishers 1997).

fragmentation.²⁹ If the historical pattern of large structural change holds, the post-Maastricht era of citizenship practice is likely to generate more fragmentation.³⁰

While much work on ‘European’ citizenship has focused on statistics establishing Union citizens’ identity preferences (usually interviewing individuals at home, and offering a choice of questions ranging from local, regional, national to European categorisations)³¹, we know less about the rights and obligations involved in the increasingly complex relationship between individuals and the polity that endorses their rights and that is obliged to protect them. Taking into account that citizenship is more than a status and therefore defined by movements of coming and going, or going and staying as part of temporary migratory moves³², the chapter assesses the impact of citizenship practice on the re-/constitution of normativity. Leading questions to this extent are: Where do European citizens belong at the end of the day? Which political body will safeguard their rights and protect them, given that both citizenship and sovereignty as the two pillars of modern state building have been fragmented in the process of ‘integration through law’³³. Such queries about citizenship touch upon the larger question about the meaning of contemporary constitutional norms in Europe and elsewhere, and how they contest, counter or re-enforce dominant narratives of global constitutionalisation.³⁴ The Maastricht treaty established a direct link between the citizen and the Euro-polity, for the first time³⁵, and despite the fact that voting rights have been practiced in European elections since 1979, still less than 50% of

²⁹ For distinct observations on these respective processes of change, see Marshall 1950; Soysal 1997; Wiener 1998, Ch. 9; Delanty 2007; for an overview see Wiener 2013, Table 1.

³⁰ This probability is sustained by more recent work on cultural citizenship and securitised citizenship (compare Delanty 2007; Guillaume and Huysmans 2014; Insin 2014).

³¹ Compare for example the *Eurobarometer* data sets over the past two decades, and which note, for example, that “(W)e can establish a hierarchy of these feelings according to their strength. For the Europeans polled, the strongest feeling of belonging is to a nation (94%), followed by a region (91%). Some way behind these comes ‘feeling European’; last, but growing fastest, there is feeling ‘a citizen of the world’.” (Eurobarometer 2010, 7, Future of Europe, 34); for other examples, see:

http://ec.europa.eu/public_opinion/archives/eb/eb81/eb81_en.htm

³² J. Torpey, *Coming and Going: On the State Monopolization of the Legitimate “Means of Movement”*. (Sociological Theory 16(3) 1997) 239-259 and Antje Wiener, *Towards Global Citizenship Practice?* Citizenship and Security: The Constitution of Political Being (London: Routledge 2013)

³³ M. Capelletti, M. Secombe and J. H. H. Weiler, *Integration through Law*. (Berlin, New York, Walter de Gruyter 1985)

³⁴ See generally on constitutionalism: contemporary constitutionalism (Tully 1995); global constitutionalism De Búrca (2009) and Dunoff and Trachtman (2009); and on European constitutionalism (Weiler and Wind).

³⁵ D. Curtin, *‘Civil Society’ and the European Union: Opening Spaces for Deliberative Democracy?* (Kluwer Law International 1997).

Union citizens think that their voice counts.³⁶ By revisiting ‘European’ citizenship practice this chapter’s objective is however limited to the first step of that more encompassing enterprise. It therefore explores the effect of ‘European’ citizenship practice, including both the pre- and post Maastricht decades, on re-/constituted normativity some twenty years after they were stipulated in the Maastricht Treaty.

To that end, the following section revisits the rationale underlying the development of the theory of citizenship practice, which had been suggested in order to explain the *puzzle* of citizenship in a non-state.³⁷ In doing so, it recalls the analytical move towards theorising citizenship as a practice – rather than a universal principle – and then recalls the development of this practice up to its current role as a standard concept to understand constitutionalisation that is increasingly unbound from modern stateness. In distinction from definitions of citizenship as a universal principle based on a contract between an individual and a state³⁸ or as a two-tiered concept of rights and identities³⁹, this move suggested a more systematic and consistent interrelation between universal assumptions about rights, on the one hand, and the influence of the struggle about these rights, on the other⁴⁰. The following recalls the rationale for developing a theory of citizenship practice as a heuristic device to explain the underlying motivation for Union citizenship in the 1990s.

The Puzzle: Citizenship of a Non-State

Two innovations followed from the stipulation of Union citizenship in the 1993 Maastricht Treaty. The *first* innovation consisted in the formal expression of a direct link between the individual citizen and the Euro-polity⁴¹. While historical

³⁶ After a sharp rise, more than four Europeans in ten now think that their voice counts in the EU, the highest level ever recorded for this indicator. Similar – though slightly less marked – increases were also measured in the two *Standard Eurobarometer* surveys conducted just after the 2004 and 2009 EP elections. See: *Standard Eurobarometer* 2014 (18), 33.

³⁷ NB: While the mere reference to the concept of citizenship in an international organisation is puzzling in and of itself; the puzzle is enhanced by non-English language terms of citizenship such as, for example, the German ‘Staatsbürgerschaft’ (literally: state-citizenship). Which is always including the direct link between the concepts of ‘state’ and ‘citizenship,’ respectively (compare Hobe 1998; Kadelbach 2003).

³⁸ J. Habermas, “*Citizenship and National Identity: Some Reflections on the Future of Europe.*” (Praxis International 12(1) 1991) 1-19.

³⁹ Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (HUP, 1992) and Yasemin Soysal, *Limits of Citizenship: Migrants and Post-national Membership in Europe* (The University of Chicago Press 1994).

⁴⁰ J. Jenson, “*All the World’s A Stage: Ideas, Spaces and Times in Canadian Political Economy.*” (Studies in Political Economy 36 1991) 43-72. and J. Tully, “*Struggles over Recognition and Distribution.*” (Constellations 7(4) 2000) 469-482.

⁴¹ D. Curtin, “*Civil Society’ and the European Union: Opening Spaces for Deliberative Democracy?*”

analyses of European citizenship practice – following Charles Tilly and TH Marshall – had always emphasised that the individual and the polity were linked through citizenship practice, and that this link was therefore constitutive for citizenship, the legal stipulation of that direct link placed citizenship squarely in a new legal context. At the time, it indicated that beyond the individual/state relationship as the familiar constitutive relationship, which was constitutive for the emergence of modern nation-states, now citizenship practice has been extended to include the additional individual/non-state relationship between each member state citizen and the Union. This new dimension of citizenship practice has created a space where citizen/state relations were gradually changing. While modern citizenship consisted in the bundle of Marshallian citizenship rights, *i.e.* civil, political and social rights⁴², the emerging ‘European’ citizenship practice fragmented this model. “Common understandings of citizenship were dramatically challenged when citizenship was established within a supranational context in the Treaty of European Union (TEU) in 1993. The union is not a nation-state. Nonetheless citizenship policy making has been part of European Community and now Union (...) politics for over 20 years.” (Wiener 1998, 4)

The *second* innovation was the fragmentation of rights, access and belonging which ensued through the – albeit complimentary – addition of citizenship rights. While the conditions of *access* to political participation remained limited to the realisation of voting rights in national and European Parliament elections as well as the nationally granted constitutional rights of political participation, the pursuit of fragmented rights policy through the courts and the development of a feeling of belonging continued to evolve consistently: The change of citizenship *rights* evolved largely unnoticed by the public. Yet it was carefully and often keenly observed by lawyers who distinguished between ‘working’ citizens (moving across borders within the Euro-polity) within the European market sphere, and subsequently cases of ‘residing’ citizens (following the move across borders) claimed their rights with the court system.⁴³ Cross border movement thus mattered to both the lawyers and the policy makers. While the pro-integration minded lawyers like were pushing for the constitutive reference of border crossings (compare AG Maduro’s opinion in the *Rottmann* case, for example), crucially, integration sceptics like the ECJ took great

(Kluwer Law International 1997).

⁴² T.H Marshall, *Citizenship and Social Class* (CUP 1950).

⁴³ Compare *Marschall*, *Kalanke*, *Kreile*, *Martinez Sala*, *Grzelczyk* as well as the *Rottmann* and *Ruiz Zambrano* and other cases that are commented on in other chapters of this volume.

care to avoid that reference (compare the ECJ's ruling in *Rottmann*). Policy makers involved in the pre-Maastricht decades of citizenship practice designed the passport policy package relying on the constitutive power of that citizenship practice. Everybody involved in the process was quite aware of the fact that “identity is made at the border” (Hofius 2014). And the issue of *belonging* to the European Union remains contested, as pollsters in their wisdom continue to ask European citizens whether they thought of themselves as Europeans, while elsewhere belonging was constituted through citizenship practice on an everyday level, and largely unnoticed to such questioning.

It is precisely this cultural practice, which matters for the social construction of normativity in any polity, for it is the crucial yardstick for sustainable normativity. While the *Opinion* in the *Rottmann* case reflects this condition, the ruling seeks to avoid it with its reference to the principle of proportionality. So does the Treaty. Thus, according to Article 9 TEU, the principles and provisions of Union citizenship is defined thus:

“In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”

The conditions are detailed in Part II TFEU, which is titled “Citizenship and Non-Discrimination”. Here Article 20 TFEU details (and slightly revises the stipulations formerly stipulated by Article 17 EC in the Nice version of the EC Treaty) the status of Union citizenship as follows:

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

While this establishes Union citizenship in addition to national citizenship, in the *Rottmann* case the citizenship practice of the European Court of Justice – and especially their Advocate General – clearly noted that a kind of “European citizenship” is a third thinkable form of citizenship. The roots of this third citizenship in the European Union are expressly cultural and derived from participating in cross-border inter-national exchange. It's function as a potential legal concept and,

relatedly, its political relevance are not to be underestimated. For, as Advocate General Poiares Maduro detailed in his Opinion,

“The *derived character of Union citizenship* in relation to nationality of a Member State flows from its *being construed as an ‘interstate citizenship’* which confers on nationals of a Member State rights in other Member States, in essence the right of movement and residence and the right to equal treatment, and also vis-à-vis the Union itself.” (Para 16 (emphasis added))

The Opinion continues to develop that interstate citizenship thus:

“... by making nationality of a Member State a condition for being a European citizen, the Member States intended to show that this new form of citizenship does not put in question our first allegiance to our national bodies politic. In that way, *that relationship with the nationality of the individual Member State constitutes recognition of the fact that there can exist (in fact, does exist) a citizenship, which is not determined by nationality.* That is the miracle of Union citizenship: It strengthens the ties between us and our States (...), and, at the same time, it emancipates us from them (...).”⁴⁴

And the Opinion continues by highlighting the state-building impact of ‘European’ citizenship practice with reference to the autonomy and authority that is bestowed onto the European political order through as a result.

“Access to European citizenship is gained through nationality of a Member State, which is regulated by national law, but, like any form of citizenship, *it forms the basis of a new political area* from which rights and duties emerge, which are laid down by Community law and *do not depend on the State.* This, in turn, *legitimises the autonomy and authority of the Community legal order.*” (Para. 23 (emphasis added))

This language suggests that two decades post-*Maastricht* citizenship practice has been constitutive for the re-/constitution of a normative order in the Europolity, and, that this order is actually legitimised through – the fragmented practices and presentations of – European citizenship. This finding sides squarely with the social science expectations that were offered in the 1990s (see this chapter’s introduction). However, the quoted normative order is hardly visible in political terms. While the quasi-constitutional normative home of European citizens is thus taking shape, its

⁴⁴ Para.

accessibility remains elusive to most Europeans. As the *Rottmann* case reveals, “this reference for a preliminary ruling raises for the first time the question of the extent of the discretion available to Member States to determine who their nationals are.”⁴⁵ Beyond that, the Advocate General’s Opinion emphasises that the imminent call for “clarification of the relationship between the concepts of nationality of a Member State and of citizenship of the Union” stood for a question which “to a large extent determines the nature of the European Union.”⁴⁶ It is this relationship between citizenship and stateness, which has only gradually come to the fore of European integration theories. Yet, it has been constitutive for ‘European’ citizenship practice since the early 1970s, that is, both prior and after the first stipulation of Union citizenship with the 1992 Maastricht Treaty.⁴⁷ It is interesting to note the ECJ’s decided hesitation to follow the AG’s opinion in the *Rottmann* case. The chapter will elaborate in more detail on the implications of this when comparing pre- and post-Maastricht citizenship practice with reference to the cycle of contestation in Part Two of this Chapter.

Citizenship Practice Theory

Generally, citizenship practice specifies the relation between individual and polity in societal contexts ranging from ancient Greek city-states via modern nation-states to late modern non-state polities such as the European Union. If the concept’s impact as a constitutive element in forging the central authority of modern states is acknowledged following the major literature on state-building⁴⁸, then the impact of ‘European’ citizenship practice, is expected to matter equally, albeit, this time establishing a challenge to modern understandings of stateness. In addition to the constitutive universal elements of citizenship practice (*i.e.* the individual, the polity

⁴⁵ See *Rottmann* case, Para 1.

⁴⁶ See Opinion of Advocate General Poiares Maduro delivered on 30 September 2009, Case C-135/08 *Janko Rottmann v Freistaat Bayern* (hereafter: the *Opinion*); for details see: http://curia.europa.eu/juris/document/document_print.jsf?jsessionid=9ea7d2dc30dbc4c4bc9fd42342aaafe4d93798da3292.e34KaxiLc3qMb40Rch0SaxuLbNn0?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=72572&occ=first&dir=&cid=1009310

⁴⁷ The final ruling of the Court (Grand Chamber) stated: “It is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality.” See: *Rottmann* case, p. 13

⁴⁸ C. Tilly, *Reflections on the History of European State-Making. The Formation of National States in Western Europe*. (PUP 1975) 3-83. and M. Hanagan, and C. Tilly, *Extending Citizenship. Reconfiguring States*. (Lanham, Md., Rowman & Littlefield 1999) and C. Joppke, *A Challenge to the Nation-State. Immigration in Western Europe and the United States*. (OUP 1998)

and the relation between both) its contingent and qualifying substance is defined by the three historical elements of rights, access and belonging.⁴⁹ The practice, which develops with reference to universal principles and through contingent enacting of distinct normative structures of meaning-in-use, allows for a reflexive incorporation of citizenship as a contested concept⁵⁰.

Modern citizenship was characterised along two functional dimensions of citizenship which were central to the construction of borders between states and within societies. The first dimension is about rights, including the civil right to free movement, the political right to vote, and the social right to access to education and the distribution of welfare. The second dimension is about identity and belonging to a particular national community. Both dimensions were linked to establishing the sovereign government of national states. Within the framework of political philosophy these dimensions are represented by the liberal and republican approaches to citizenship, respectively. Roughly, both approaches differ according to the liberal assumption that citizenship is about individual rights. These rights are universally derived and locally established. According to the republican approach citizenship is about the process of governing and being governed. This practice ultimately contributes to the establishment of a particular identity, which, in turn, makes communities distinguishable from each other.

Socio-historical approaches conceptualise citizenship as relational. They define citizenship as a developing institution, which is inter-related with the process of state building. They conceive of citizenship as a dynamic concept, which is constantly redefined by the tension inherent in the assumption of universal equality and the organisational imperative of coping with particularistic inequality. This tension has been identified most prominently in Marshall's work on citizenship. While it is important to realize that Marshall studied a large 'N' case, the case study did not perceive of changes in the institution of citizenship as from universal principles. On the contrary, according to Marshall, the developing institution of citizenship reflects societal practices. For he holds that,

“(T)here is *no universal principle* that determines what those rights and duties shall be, *but societies* in which citizenship is a developing institution create an

⁴⁹ For details and systemic overview on the constitutive and historical elements of citizenship, see Wiener (1998), Figures 2.1 and 2.2 on p. 22, and p. 26, respectively.

⁵⁰ W. B. Gallie, "*Art as an essentially contested concept.*" (Philosophical Quarterly 1956) 97-114.

image of an ideal citizenship against which achievement can be measured and towards which aspiration can be directed.”⁵¹

This perception of citizenship as a developing institution facilitates a crucial access point for the currently changing conditions of citizenship in the EU, in particular. In the process of European integration the debate over citizenship has changed focus. The interest shifted from improving conditions of equal access to social rights within a community, a debate which was most vibrant in the 1970s and 1980s, to access to political citizenship rights and borders in the 1990s.⁵² Accordingly, the politico-sociological debate focussed on the conditions for becoming a full member of a community⁵³, while international relations theorists⁵⁴ began to explore the role of citizenship with regard to maintaining or rebuilding “the border of order”⁵⁵.

Drawing on TH Marshall’s triad of rights that summarises the institutional setting and ideal perception of a societal frame that had developed over two centuries⁵⁶, *citizenship practice theory defines citizenship practice as the policy and politics that establish the terms of citizenship in a polity*⁵⁷. It thereby facilitates a new approach to citizenship that links the principle with the practice, thus taking account of an ongoing social process in which the terms of citizenship are contested and thereby re-/enacted and reconstituted over time. This bifocal perspective on citizenship thus draws on debates about citizenship as both a universal principle *and* its implementation as a contingent practice. Akin to the metaphor of the Wittgensteinian ‘thread’ it is to be understood as interweaving distinct fibres, and by spinning fibre upon fibre, the concept gains strength. In the process of this social construction, it is re-constituted thus maintaining continuity as a concept, while allowing for change. That change is enabled by the wide perception of citizenship as a contested norm in its three defining environments including academic, legal, and everyday practices. The point is precisely that “the strength of the thread does not reside in the fact that one fibre runs through its whole length, but in the overlapping of

⁵¹ T. H. Marshall, *Citizenship and Social Class*. (CUP 1950) 28; emphases added, AW

⁵² For the most important contributions to the early European citizenship literature, see Evans 1984, Closa 1992, Meehan 1993, O’Keeffe 1994, O’Leary 1995, Rosas 1996, Everson and Preuß 1995, Shaw 1997 and Kostakopoulou 1996.

⁵³ T. H. Marshall, *Citizenship and Social Class*. (CUP 1950) 28

⁵⁴ But see Tetreault and Thomas 2001 as well as the recent work on citizenship and security by Guillaume and Huysmans (2013).

⁵⁵ F. Kratochwil, “*Citizenship: The Border of Order*.” (Sage Publications 1994) 485 - 506.

⁵⁶ T. H. Marshall, *Citizenship and Social Class*. (CUP 1950)

⁵⁷ A. Wiener, *‘European’ Citizenship Practice. Building Institutions of a Non-State*. (Boulder, CO, Westview Press 1998) Chapter 2.

many fibres".⁵⁸ In that sense, citizenship requires thinking beyond the normative core, in order to grasp its contingent meaning, which is added on through practice. Crucially, each fibre is required for the thread. However, each fibre may be kept analytically apart, so as to become potentially unravelled by empirical research.

Conclusion of Part I

The purpose of this analytical move was to establish the analytical ground from which it becomes *impossible* to think citizenship in isolation from the practice putting it into place. This entwined perspective makes it possible to conceptually interrelate the normative dimension of citizenship as a fundamental norm with broad ethical reach, on the one hand, with the empirical and particularistic dimension of practice, on the other. Their relationship develops in tune and on a par, and is constituted through contingent interpretation. It thus facilitates a bifocal – normative and empirical – approach to citizenship as an ongoing practice, all the way up, and all the way down⁵⁹. Accordingly, the citizen-state relation has increasingly become understood as an organic relation, following Tilly's notion of the routinized link between the population and the state as the organisation that eventually assumed the political authority⁶⁰. Based on this deep-rooted interrelation and with reference to the theory of contestation⁶¹, the following *part two* of this chapter examines moments in which citizenship and sovereignty as fundamental norms of contemporary constitutionalism are contested. To that end, it is necessary to identify the citizenship practices that have developed over time. The account of these will be reconstructed with reference to contestations on the cycle of contestation (see Figure 1 below). The larger questions that follow from this account are whether and if so how the European constitutional narrative bears on global normativity,⁶² and secondly, what are the implications for rethinking citizenship⁶³?

Part Two:

⁵⁸ See Wittgenstein 2005 (1st ed.1953), 28; Para. 67

⁵⁹ J. Tully, "Struggles over Recognition and Distribution." (Constellations 7(4) 2000) 469-482.

⁶⁰ C. Tilly, *Reflections on the History of European State-Making. The Formation of National States in Western Europe.* (PUP 1975) 3-83.

⁶¹ A. Wiener, *A Theory of Contestation.* (Springer Verlag 2014).

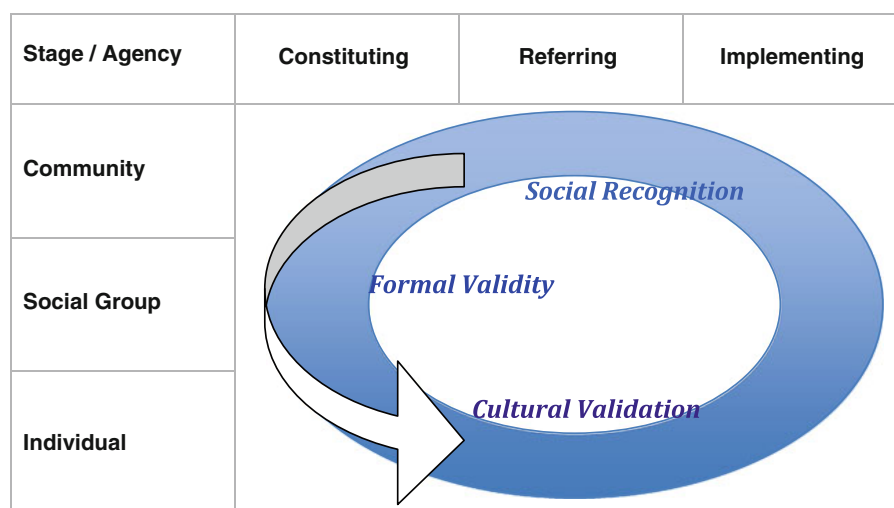
⁶² Compare for example Isiksel's argument on the reverse process, *i.e.* the influence of the *Kadi* case on the European constitutional architectonic, Isiksel (2010)

⁶³ J. Tully, *On global citizenship: James Tully in dialogue.* (London, Bloomsbury Academic 2014).

Re-/negotiating Normativity: Who has Access to Contestation?

The story, which led to the stipulation of citizenship in the Maastricht Treaty, clearly reflects these characteristics. It is endorsed by the further development leading up to the *Lisbon* ruling of the German Constitutional Court, which has been widely received as one of the most thorough assessments on the degree of deepening achieved through the institutional development of European integration, albeit in critical opposition to that process, especially regarding the impact and role of EU citizenship (compare Davies). To probe the re-/constitution of normativity that was part of this process, the following turns to a selection of court cases. These have been selected as moments in which the relation between the fundamental constitutional norms of citizenship and sovereignty has undergone further change, furthering the fragmentation of citizenship rights, and challenging the status of national states in the process. As this part will demonstrate, the ongoing fragmentation of citizenship rights goes hand in hand with shifting responsibilities. And this shift notably contributed to a widening gap between lawyers' interpretation of citizenship and its state-building quality (compare the AG Opinion in *Rottmann* and the *Rottmann* case cited above as well as the *Lisbon* ruling of the BVerfG and the *Ruiz Zambrano* case discussed below), on the one hand, and the perception of a loss of power on part of the ordinary citizens and political scientists, on the other hand. As the following seeks to demonstrate, this development reflected the increasing lack of communication and mutual understanding between the quality of 'European' citizenship practice conducted through contestations at the 'constituting stage' of the cycle of contestation, on the one hand, and the perception of the substance generated by it in the absence of contestations at the 'implementing stage', on the other (compare Figure 1 below).

Figure 1: The Cycle of Contestation



Source: Wiener 2014, Figure 2.1

In the process the constitutional ‘home’ of European citizens has become more elusive, and accordingly, the need for advanced institutional design towards more inclusive patterns of contestation rises.

In the following these contestations are analysed with reference to cycle of norm contestation, which reflects the re-/constitutive impact of groups, stages and segments in the process of norm contestation as a means of recalling contestations as the norm-generative practices in the process of European integration. While this summary draws on the experience with ‘European’ citizenship practice, the theory citizenship practice is central for understanding the re-/constitution of normativity beyond Europe. The constitutional literature distinguishes regular and cultural practices⁶⁴. Similarly, the theory of citizenship practice works with two types of practices. As the history of European citizenship practice reveals, at first the passport policy package had a much more consistent impact on integration due to its reputation as a functional rather than a politically motivated policy, which was particularly and masterfully put to use during the Delors decade⁶⁵. For example, the fundamental principles of European law, *i.e.* the freedom of movement of goods, capital and services, are all about border-crossing. That is, in any legal case it follows that “if it involves a foreign element, that is, a cross-border dimension” “it falls within the scope of *ratione materiae* of Community law” (compare AG Opinion in *Rottmann*, Para. 10). Notably, it was precisely for this reason that the ECJ’s ruling departed

⁶⁴ J. Tully, *J. Strange multiplicity: constitutionalism in an age of diversity*. (CUP 1995)

⁶⁵ G. Ross, *Jacques Delors and European Integration*. (Cambridge, Polity 1995)

considerably from the *Opinion*, thus reflecting an increasingly strict refusal to follow this cross-border logic and its constitutive implications for the Europolity and taking a decision that was potentially harmful for European citizens (compare Shaw et al. 2012; Kochenov and Plender 2012). However, in the aftermath of *Maastricht* the citizenship practices concerned with the rights policy package have started to become more influential. This shift towards rights did, however, little to narrow the gap between integration through law and integration along the societal and/or cultural dimensions. It is this insight, which the following section will address with the question about ownership of European normativity.

Contestations: Who Owns European Normativity?

As the previous sections have shown, the very focus of citizenship practice has demonstrated that citizenship is conceptually bound by the concept of the state. Accordingly, all contestations that have been generated through citizenship practice both pre- and post-Maastricht have been highly contested. To identify ownership of the normativity of citizenship, the following turns to the theory of contestation. I argue that, while lawyers may be the masters of Union citizenship (as contestations among learned scholars, the courts and the advocate general demonstrate), the normativity generated by these contestations accounts for little political weight, unless a wider group of actors is involved. This stands to be addressed.

Before we turn to this examination it is important to recall two structural conditions, both of which could well be identified as unintended consequences of European integration, and both of which structure today's citizenship practice. The *first* is the beginning fragmentation of sovereignty as the most important fundamental norm in the history of state building, which was triggered with the *Van Gend en Loos* ruling. The *second* is the beginning fragmentation of citizenship that was formalised with the Maastricht Treaty some thirty years later. Given their quasi-constitutional quality, they have acquired a central position for the re-/constitution of European normativity. It is therefore important to establish the degree to which they are 'visible' to European citizens. This is done with reference to the cycle of contestation. A number of other rulings including the *Lisbon* ruling⁶⁶ of the German Constitutional

⁶⁶ BVerfG, 2 BvE 2/08 of 30.6.2009, paragraph numbers (1 - 421); for details please consult this

Court⁶⁷ offer further insights into the question about the ‘home’ that European citizens belong to in constitutional terms. Indeed, the *Rottmann* case, which was fiercely debated in legal circles yet little noticed in social science circles, let alone by common citizens,⁶⁸ demonstrates that while the formal validity is well defined, the meaning of both citizenship and sovereignty as two fundamental norms of modern state building still stands contested.

By definition change is an expected result of ongoing structural and organisational development in processes of globalisation, regional integration, international organisation that take place on a macro-level of international society. The related changes on the micro-level generate contestations that are rooted in background experiences, which are constituted through different cultural experiences⁶⁹. These background experiences have also been defined as the invisible “normative baggage” which accompanies individuals on border crossings. If unknown, a lack of fit with the normative baggage of others leads to clashes in international encounters⁷⁰. These are brought to the fore by examining cultural validation as one of three segments of norm contestation (next to formal validation and social recognition). Different from the amount of research conducted on the other two segments cultural validation is often overlooked by international law or international relations theories’ analyses of compliance with norms. More often than expected, however, we cannot deduce harmonisation of cultural meaning from large processes or major organisational changes. Instead, different background experiences shape distinct and often conflicting expectations of what a norm actually means.

The knowledge of the contested quality of citizenship allows for a more specific empirical assessment of the question about the masters of European normativity, based on the three “segments” of the citizenship norm (*i.e.* formal validity, social recognition and cultural validation) on a “cycle of contestation” by distinct “groups” (*i.e.* the community, social groups or individuals) as well as at

website: https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html

⁶⁷ German: Bundesverfassungsgericht (hereafter: BVerfG)

⁶⁸ This is confirmed by repeated discussions and inquiries at academic conferences and in political discussions: When asking an audience about their knowledge about the *Rottmann* case (not even specific details), usually the reply reveals a generally shared complete ignorance about the case. The past decade demonstrated the same for the much-debated *Kadi* case.

⁶⁹ Etienne Wenger, *Communities of Practice: Learning, Meaning, and Identity*. (CUP 1998). and Emanuel Adler and Vincent Pouliot, "International Practices" (International Theory 3 (1) 2011) 1-36.

⁷⁰ Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters*. (CUP 2008).

distinct “stages” of norm implementation (*i.e.* constituting, referring and implementing). Working together over time, these three elements constitute the cycle of norm contestation, which reflects potential contestatory moments or norms at any time and in varying constellations (compare Figure 1). It is through this ongoing interrelation within distinct societal settings that the constitutive and historical elements of citizenship practice allow for a practice-oriented approach to a normative concept. This approach purposefully entwines universal assumptions with contingent normative roots that are particular to the contexts of constituting, referring and/or implementing the citizenship norm. This cycle demonstrates the location of the state-plus actorship and indicates the stages and segments of norms that are relevant with regard to the re-/constitution of normativity. It draws on norm research in both the literature on European and global constitutionalism and the literature on norms in international relations.⁷¹

These negotiations involve a state-plus actorship, and therefore are conducive towards re-/constituting the image of the state as an actor with moral obligations. These obligations include, for example, the protection of citizens’ rights both inside political communities (*i.e.* in situations where constitutional or national law is breached) and *vis-à-vis* others who threaten to interfere from the outside (*i.e.* situations which are in breach with international law). It also involves the more broadly defined expectation of protecting a range of welfare state rights as well as the protection of fundamental rights of individuals as well as human rights obligations. The more citizenship is ‘unbound’ from the state through the fragmentation of citizenship rights as only one among many features of unbound constitutionalisation, the higher the challenge of modern stateness. The democracy literature defines “stateness” with reference to the concept of the recognition of state authority, for example, regarding the effect of border control, regulating migration and so on. Subsequently the focus on ‘stateness’ is motivated by situations that call for the remedy of problems of stateness⁷². While the following also works with a definition of ‘stateness’ as reflecting a state’s performance, this is not evoked in order to counter problems, but in order to understand how fundamental norms of governance are re-

⁷¹ Compare De Burca 2009; Peters 2009; Dunoff and Trachtman 2009; De Burca and Weiler 2012 for the former, and Manners 2002, 2006; Finnemore and Sikkink 1998; Risse et al. 2013 for the latter.

⁷² Z. Elkins and J. Sides, *Seeking Stateness* (2008) < <http://home.gwu.edu/~jsides/stateness.pdf>> and J.J Linz and A. Stepan (1996). "Toward Consolidated Democracies." (Journal of Democracy 7(2) 1996) 14-33.

/constituted through contestation. Accordingly, the focus is on state conduct as documented by the interplay of citizenship practice with the state and its institutions. Rather than considering contested state recognition as a problem of stateness, it is thus understood as a moment on the cycle of contestation and therefore as a contribution to the changing concept of stateness.

The *first* important set of citizenship practices occurred when Union citizenship was stipulated in the Maastricht Treaty in 1992. The ensuing puzzle resulted in the research question: How was it possible, given the historical role of citizenship as a state-building concept, that citizenship was included in the treaty (notably, not formally a constitution, if a quasi-constitutional treaty) of a non-state? According to the cycle of contestation, post-*Maastricht* involvement included mainly those actors who took part in the process of formal validation of the citizenship norm through arbitration (*i.e.* rulings, judgements and learned commentaries). By contrast, the cycle of contestation prior to *Maastricht* had involved contestations, which referred to the segments of social recognition and cultural validation, mainly through deliberation (*i.e.* involving players and non-state actors within international organisations and their fringes), in part through contention (including interest groups and advocacy groups in the drafting of the policy packages and the related instruments).

The *second* move that matters in order to assess the re-/constitution of normativity with reference to changing practices of stateness was the first step towards pooling sovereignty. That move took place following the ruling of the European Court of Justice in the *Van Gend en Loos* case in 1967.⁷³ A rather notable aspect of this ruling was the aloofness on the part of the political actors that lasted almost four decades. While the process of ‘integration through law’ was spurred by a cornucopia of ECJ rulings in the decades following *Van Gend en Loos*⁷⁴ the knowledge of its consequence as an irreversible step in the direction of fragmenting state sovereignty only came to the fore in the constitutional debates at the beginning of the 21st century.⁷⁵ And the most prominent debate about sovereignty ensued around the Treaty

⁷³ Judgment of the Court of 5 February 1963 in NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (hereafter: *Van Gend & Loos* case) Reference for a preliminary ruling: Tariefcommissie – Netherlands, case 26-62, see: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61962CJ0026>

⁷⁴ Compare Craig and De Burca (1998); Haltern (2003); Shaw 2006; Chalmers (2007).

⁷⁵ Compare Fischer 2001; Schäuble-Lamers Paper 2000 and so on.

Establishing a Constitution for Europe, and after its rejection, the ratification of the Lisbon Treaty, which revealed that, the one sovereign decision that formally remained for member states to take was really the decision to withdraw membership from the EU. As the *Lisbon* ruling notes with reference to the sovereign rights of each member state:

“The *safeguarding of state sovereignty* is said to be clearly expressed in the explicit recognition of the respect of national identity pursuant to Article 4.2 Lisbon TEU and in the *right to withdraw* from the Union pursuant to Article 50 Lisbon TEU.”⁷⁶

The German BVG ruling on Lisbon is particularly clear about the implications for member state sovereignty when it notes:

“The constitutional mandate to realise a united Europe, which follows from Article 23.1 of the Basic Law and its Preamble (... *Überstaatlichkeit* ...) means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration. *The Basic Law calls for European integration and an international peaceful order.* Therefore, not only the principle of openness towards international law, but also the principle of openness towards European law (*Europarechtsfreundlichkeit*) applies.”⁷⁷

Reference to the cycle of contestation in the aftermath of the Lisbon Treaty demonstrates that sovereignty norm’s formal validity was predominantly addressed by arbitration, involving actors within the legal environment of courts. The same practice is indicated by the reference to the cycle of contestation prior to Lisbon Treaty. That is, in this case notably the fundamental norm of member state sovereignty has been re-/constituted almost exclusively without the input of other modes of contestation beyond arbitration. Accordingly, deliberation in political contexts, let alone contention in societal settings were almost entirely absent. And even justification through academic debate (beyond the legal sciences that frequently overlap with those participating in arbitrations) has been scarce.

Conclusion of Part II

⁷⁶ Compare BVG *Lisbon* ruling 2007, opus cit. Para. 153; and TEU Articles 4.2 and 50, respectively (emphases added, AW).

⁷⁷ Compare BGG *Lisbon* ruling, opus cit. Para. 225 (emphases added, AW).

As the German Federal Constitutional Court noticed in its *Lisbon* ruling,⁷⁸ fundamental rights protection in the EU rests, according to the Lisbon Treaty on two grounds: The European Charter of Fundamental Rights and the *unwritten* fundamental rights of the Union (BVG 2009, p. 11 (71)). Both are sustained through Article 6, Paragraph 2 of the Lisbon Treaty, which empowers and obliges the EU to join the European Convention of Human Rights. The unwritten rights leave room for interpretation of the spirit of the law. Similarly the understanding that in order to warrant full enjoyment of the “virtue of their status as citizens” has first been emphasised by the ECJ’s *Ruiz Zambrano* ruling⁷⁹. Accordingly, it is necessary to fill the gap of unwritten fundamental rights protection in EU citizenship law (Article 20 TFEU) with the fundamental rights protection which is stipulated by Article 2 TEU. Crucially, Article 2 refers fundamental rights implementation to “an area of freedom, security and justice without internal frontiers” therefore conjuring the notion of “European legal space”⁸⁰. By referring to the European legal space in which all citizens – ought to – enjoy equal fundamental rights protection, yet, stating that the corrective measure of the EU will not apply as long as member states do not undermine the fundamental rights of EU citizens living on their territory, the proposal maintains the support for constitutional pluralism while avoiding the centralisation of fundamental rights legislation.

Conclusion

What do these investigations into citizenship practice reveal then? The chapter sought to demonstrate that while there maybe winners and losers in legal battles, on the one hand, and there maybe successful passages through windows of opportunity in the process of policy-making on the other, the larger question about European citizenship is not to be explained in terms of the outcome of a game. Instead, given the profoundly state building relevance of citizenship practice, and its constant contestation of the fundamental norms of citizenship and sovereignty – notwithstanding whether practices in the context of a nation-state or a non-state,

⁷⁸ BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421); for details please consult this website: https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html

⁷⁹ Judgment of the Court (Grand Chamber) of 8 March 2011. Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm), Case C-34/09; hereafter: *Ruiz Zambrano* case, details at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0034&from=EN> (assessed on 15 October 2014).

⁸⁰ *Ibid.*; p. 4

matters. For it is through these contestations that ownership of these very norms is constituted. As this chapter sought to demonstrate, while contestations have always been present, they often mattered more to one societal group than to another. Subsequently, the change of meaning of citizenship went largely unnoticed in moments of contestation which exclusively involved a selection of actors. As the reference to the cycle of contestation showed, the pre-Maastricht period of citizenship practice involved a much broader range of actors than the post-Maastricht period. Subsequently, the sense of ownership generated through contestation over citizenship has accumulated a considerable deficit in the post-Maastricht era. This comes despite the incredibly active debates among lawyers. While this finding reveals a lacking ownership of the citizenship norm among a broad range of actors, not all is lost. For if anything, the contestations over *Rottmann* and *Ruiz Zambrano*, as well as *Solange Reversed* and *Kadi* have demonstrated strong disagreements among lawyers. The onus is now on lawyers to reach out and engage in cross-sector contestations.

Following the presentation of citizenship practice theory as a heuristic device in part one the second part zoomed in on landmark rulings on rights and obligations with reference to the cycle of contestation. The part concluded, rather unsurprisingly, that the legitimacy of normativity has suffered from the lack of widening access to contestation beyond legal and academic contexts. By keeping the contestation to relatively small circles including the two more formal and less accessible of four modes of contestation, *i.e.* keeping to arbitration (in the context of courts) and justification (in the context of academic debate), rather than opening debates towards deliberation (in politics or the wider public sphere) and contention (in the context of societal groups).

The revision and critical discussion of European citizenship practice with reference to the cycle of contestation has helped reconstructing the involvement of distinct modes of contestation (arbitration, deliberation, contention or academic justification) in order to identify the diversity and reach of the involved actorship. Based on this, it becomes possible to identify, which experiences derived from that particular societal, political and legal background. Overall, the four modes of contestation are constitutive for the re-/constitution of normativity in the European Union. The theory of citizenship practice has been conceived as a heuristic device to understand the stipulation of citizenship in a non-state with Maastricht. The reference to citizenship practice and modes of contestation has revealed the degree to which

quasi-constitutional change in the EU remains distant from the everyday practicalities of citizenship practice. In conclusion, the chapter finds that a more balanced pattern of access to contestation would contribute to a widening of access to citizen participation, and thereby, contributing to a more readily acceptable constitutional home of 'European' citizens. While the potential path/s towards European citizens' ownership of fundamental European norms decisions and regulations has been identified with the help of the cycle of contestation, the out, their development remains long and winded.