EU Citizenship's New Essentialism

The Solidification of the Illiberal Union

Dimitry Vladimirovich Kochenov

05.05.2025 doi: 10.59704/452e3eca733be6a5

The Court of Justice of the European Union ruled that the Maltese citizenship by investment violates EU law: 'A programme of that sort amounts to the commercialization of the granting of the status of national of a Member State and, by extension, Union citizenship, which is incompatible with the conception of that fundamental status that stems from the Treaties' (para. 100). It reached this conclusion with reference to the systemic importance of EU citizenship, amounting to a raison d'être of the Union (para. 91) and its direct implications for the solidarity among the Member States (para. 101). No legal rule can justify the lack of solidarity and good faith presumption voiced in para. 100. The Court does not even attempt to invoke any. Other commentators found the absent reasoning "regretful" or missing: "have the constitutional guardians come off?", Martijn van den Brink asks. Instead, it walks through the rights of EU citizens (paras 86, 87, 88, 90). Establishes the fact that EU citizenship is indeed important (paras 89, 91) and presents nationality as a bond of solidarity and good faith (paras 96, 97). It then shares its view that the Maltese citizenship by investment is not it.

Make no mistake: the Court hints – for the first time – that EU citizenship bond is not only legal in nature. Citizenship has suddenly become a legal but also some other connection between a person and the state. In other words, the law is not enough to make one a citizen, as any such citizenship might fall short of 'solidarity and good faith' test at the EU level (para. 99). This newly-invented extra-legal rule put thousands of Europeans in limbo (see also my detailed analysis in EU Law Live).

The case is an ultra vires attack against the principle of solidarity. Solidarity at the heart of the Union as a community of values has always been an empowering liberal solidarity. In Commission v. Malta it mutated into the solidarity of essentialist nationalisms against the rights of European citizens. The EU citizenship story is well known and has been rightly hailed as a powerful defence of our rights against thoughtless red-tape and petty nationalisms, read 'thick identitarian demands'. This defence has never been rooted in thick identities, quite the opposite. In Micheletti, the Court protected an Argentinian with an Italian document from Spanish demands, precisely, to showcase a 'thick' Italian identity, which he did not have. Similarly in Zhu and Chen, the Court took the side of a billionaire Irish baby who has never visited Ireland and whose parents were, obviously, Chinese, thus offering EU citizenship protections against thick identity expectations. All this stands apparently reversed, hinting at the solidification of the illiberal European Union.

My task here is to locate some key steps marking this development and to offer a possible presentation of the recent decades of EU law in three broad steps, to show how we got where we are.

One: Hope and Protection

Today we still sometimes feel the appeal of the EU because the substance of its law is more liberal and accommodating than that of our Member States, fueling debates over reverse discrimination and falling within the scope of EU law. Many look up to EU law and wish to benefit from it, since otherwise one's family is destroyed and ugly discrimination makes life unbearable. Not always helping, the EU still offers hope in taming the obstructive nationalist/protectionist red-tape. This is the dominant trope of much of EU law literature from David Pickup writing in the 1980s to Alina Tryfonidou and Niamh Nic Shuibhne early in

this century. A friendlier Union still, with equality before the law and less discrimination between Europeans and 'others' did not quite take root, pace incessant efforts of the towering figures like Dora Kostakopoulou and Eleanor Sharpston.

Two: Justice deficit

The limits of EU's ability and willingness to be the force of good emerged over the last decade. Led by Charlotte O'Brien we were introduced to the plight of Europeans, who are not helped, but hindered by EU law: Unity in Adversity, citizens' deportations, de facto disappearance of permanent residence, disregard of the poor and those in need mark the Union as much as helping the free movers. All this showcased the second stage of EU law's development in this century: the Union of not-so-punishing indifference to the moral and ethical values our societies espouse. The Union of Justice Deficit. Even though not helping everyone and showing little respect to those thrown overboard, this Union offered, as Laurent Pech rightly established, a consistent story of the law as a way forward in the absence of democracy able to affect policy or throw scoundrels out. Our authoritarian liberalism hinged on ensuring robust compliance with the fundamental principles and the foundational promise, sketched out in Article 2 TEU boasting the force of law. Never mind democracy, the story went, the Rule of Law will be sufficient to preserve the promise of freedom and the protection of rights in the Union.

Three: EU lawlessness law

The disastrous flop of Opinion 2/13 was among the first cracks in the foundations of this vision: if the Union is ready to use its 'structure' to push away our rights in a system where democracy is not on offer and only the law could protect us, how reliable is its promise of values? While the Rule of Law case-law has been fast evolving, the most important lesson from it opened the third stage of EU law in this century: the law at hand can essentially amount to a meticulously articulated evil law, borrowing Anna Lukina's trope, and the protections we hoped for are structurally sacrificed in the interest of the legal system's internal needs, what Sarah Ganty and I christened 'EU Lawlessness Law'. Rather than to tame the powers that be, the law appears to be put at the service political prejudice and is there to whitewash any actions, legal or illegal, in the name of short-term political expediency: from excluding accountability for EU's crimes against humanity to purging the ECJ of a member regarded unfavorably in some capitals with direct implications for the basic independence of the Court, as Graham Butler observed, following the ugly scandal at Kirchberg. EU lawlessness law is behind mass killings in the Mediterranean, torture at the EU's Eastern border and a general watering down of EU citizenship and other rights in the Union, inaugurating outrageous legal innovations, such as the presumption of guilt as part of EAW law as Petra Bárd has argued.

In search of democracy and the Rule of Law

Having sacrificed democracy to be governed by reliable and empowering technocratic law, Europeans are discovering that this law is not at all as benevolent as they thought and that the main guiding principle here is far removed from protecting their rights. Instead, it is confined to self-preservation of the supreme nature of the very legal system that is starting to fail Europeans in the first place. The phenomenon of 'Supremacy Rule of Law' has been born in a system where law-making is unaffected by elections and where the Rule of Law is not about keeping those in power accountable. An essential part of how such supremacy Rule of Law operates is sidelining any dissent. Absolute intolerance to the substance of any other legal system but EU law-proper, be it national, international or municipal-level law and any dispute resolution systems not subjugated to the ECJ's authority, no matter how vital. Remember Achmea, untying the hands of abusive governments to steal from investors in the glaring absence of the law in their own courts, where the ECJ took the side of proverbial Orbáns' defrauding Europeans.

Away with liberal tolerance

Absent democratic and legal checks on the Union's deeds, the last bastion remaining was the liberal toler-

ant promise of the EU's values in respecting diversity and taming the Member States in the interest of EU citizens' rights. The EU, however deficient, remained preferable to the narrow nationalist ideals of (some) Member States, a gulp of fresh air. Non-discrimination on the basis of nationality, free movement and the deployment of proportionality, among other principles, to protect some EU citizens, even if not always successfully, offered the picture of the EU which was still a liberating vision, compared with the individual Member States the Union was busy disciplining.

Commission v. Malta shatters this vision. Instead of fighting Member States in the name of a tolerant citizenship ideal and standing up for Europeans' rights, the Union, having said 'no' to democracy and the Rule of Law, now peddles petty nationalisms instead, instructing the Member States that there are citizens 'in law' only and also the 'true' citizens, benefitting from the 'bond of solidarity and good faith', which EU law requires: the presumption of the absence of this bond is at the heart of denigrating a group of Europeans in Commission v. Malta. Just like citizenship itself – in any liberal democracy – such bond is, surprise surprise, legal. By pretending otherwise through adding an extra-legal component presented as otherwise meaningless 'solidarity and good faith', the Court annihilates the added value of EU law and the heritage of non-discrimination on the basis of nationality: speaking Estonian or knowing a Slovak history curriculum, let alone surviving n years in Denmark cannot add the creation of a common working-living space. Freedom, as the EU offered it, has always been to disregard Member States' identitarian demands and stepping away from it is a betrayal of all EU citizens.

Now the Commission v. Malta's bottom-line is this: law is not enough to make a citizen in any national democracy. The EU will come and correct any liberal approach of this sort to impose an ideal of thick identity and belonging. For the first time in history the EU is at the service of an illiberal ideal. It is not only this ideal per se that is most shocking, given its complete disconnect from the letter and the spirit of EU law, but even more the EU's willingness to check compliance with this ideal among the national democracies. This is in complete disregard of the Treaty text and all the prior case-law from Micheletti to Zhu and Chen. In every practical sense this u-turn amounts to the introduction of the "genuine links" logic, unlike what some commentators, including Guillermo Íñiguez and Martijn van den Brink seem to claim. In any case, in the absence of the "genuine links" terminology from the wording of the judgment but not the spirit of the reasoning of the Court we are faced with what Petra Weingerl and Matjaž Tratnik would term "relevant links", which are equally arbitrary and illiberal in essence.

The constitutional implications of this case are quite significant. It hints at the further undoing of the Union's liberal heritage and original promise. The Union could thus pose a threat for the Member States, whose membership has been guided precisely by such a liberal promise. The same applies to Europeans who cannot subscribe to the new illiberal ideals and are unable to push the Union to change course in the absence of any continent-wide democracy. National liberal constitutionalism and the dignity of Europeans came under attack from Kirchberg.

Calling out the fake Europeans: from a 'wrong Jew' to a foreign dancer

This is because the Union is now there to replicate and reinforce, rather than mock and undermine, the petty nationalisms of (some) of its Member States at the supranational level, besides now adding its own supranational dimension to it. Finding that a legal status of citizenship is not about the law only has far-reaching consequences. It opens the gates to deploying extra-legal factors for othering and humiliation, rendering the protections of the legal status lawfully useless for those in need of its protection the most. Let us be clear: what the Court has done to a handful of Maltese citizens, could now be exploited further, damning other groups denigrating them as fake Europeans for extra legal reasons. You could be next.

Consider a handful of examples. My level of Dutch has never been checked by the Dutch authorities when I naturalized. Moreover, I do not think I actually need

this language to be successful in Hungary and Austria where I teach – am I a fake European citizen?

More than a million of Italians in Latin America got their passports by remote ancestry going back to a person they do not know – are they fake Europeans?

The absolute majority of the Member States do not connect legal residence with the checks of physical presence, unlike what the Court mistakenly implied (para. 108) – are they making fake EU citizens?

The famous Mr Abramovich, who took part in the first peace talks between Russia and Ukraine, although decried by some controversial Portuguese politicians as a 'wrong Jew' is nevertheless a Portuguese citizen – how fake is that? Does he possess the required 'bond of solidarity and good faith' unlike his Maltese friends?

The legendary dancer Baryshnikov, who accepted a Latvian passport from the authorities of a Member States building the core of its constitutional identity on the humiliation of its Russian, Ukrainian and Jewish minorities comes to mind too – is the maestro a fake European, presuming he does not share Latvian assumptions about nationality and lives in the US, where he escaped straight from the USSR?

Commission v. Malta clarifies that the Court of Justice took upon itself the task of answering all these questions, just as it has done in that particular case, and will do so on the basis of the 'bond of solidarity and good faith' between maestro Baryshnikov and Mr Abramovich and their Member States, not on the basis of the legal bond of nationality connecting them with the Member States in question.

This twist is not as new as I half-heartedly presented it, however. We know from Hanna Eklund and Peo Hansen and Stefan Jonsson how the EU started: the colonial enterprise was a project of strict racial segregation resting on the assumption that equality before the law should not be the starting point of its law. In other words, the Court's attack on liberalism and the raison d'être of the Union seems to be grounded in history. This history is inspired by what Hans Kundnani frames as 'Eurowhiteness' cosmopolitanism – the continental ethno-nationalism, which the EU now, just as at the inception of the project – enforces as its ideal. This could explain why a Greek passport holder from Australia, who has no connection to Greece other than the document, is better rooted in the 'bonds of solidarity' the Court is imposing on our democracies than a Saudi, Ukrainian, or Russian billionaire with a Maltese document. The ECJ's solidarity, unquestionably, is blood solidarity: a difficult ideal to peddle to say the least, but here we are.

Philosophy vs. law

A turn to philosophy alone could save the situation. Harry G. Frankfurt is right: 'One of the most salient features of our culture is that there is so much bullshit'. The Grand Chamber's bullshit even replaced the law, which seemed clear enough: Member States' nationals are EU citizens and solidarity between them ensures the protection of EU citizens' rights. Bullshit stands further amplified given that Ireland has been selling its citizenship from 1988 to 1998, throughout the negotiations off the Maastricht Treaty and beyond. Playing as if Malta is the first, as if we were facing something new, unknown to the drafters of EU citizenship is nothing but presuming a particularly lowly set of abilities for the reader of the Court's demeaning scribble: how can a founding idea of EU citizenship, attested to by consistent Irish practice, be invoked as a presumed violation of some 'thick' solidarity on top of the legal bond, which EU citizenship does not require, is the most intriguing question to ask the Grand Chamber and its Judge Rapporteur. This is always so with bullshit: it is a blunt attack on our intelligence.

As such case-law is proliferating, so are the dangers of the EU's illiberal turn in the absence of both democratic and legal checks on arbitrary power. The danger that the EU and its law poses to any liberal democratic project of inclusive constitutionalism rooted in the Rule of Law, democracy and the protection of human rights is growing. Strongly preferring bestselling philosophy over law, the Court does a huge disservice to the project of European integration, which still inspires millions. This could change overnight, and explaining the difference between the shameful EU lawlessness law and the venerable ideal of European Unity might be more difficult than our judges think.

The author was part of the expert team engaged by the Maltese government to provide legal advice on the issues of EU law in the context of the design of the first emanation of the Maltese citizenship by investment programme.

ABOUT THE AUTHOR

Dimitry Vladimirovich Kochenov

Prof. Dr. Dimitry V. Kochenov leads the Rule of Law Research Group at CEU Democracy Institute in Budapest and teaches at CEU Department of Legal Studies in Vienna.

SUGGESTED CITATION

Kochenov, Dimitry Vladimirovich: EU Citizenship's New Essentialism: The Solidification of the Illiberal Union, Verfassungsblog, 05.05.2025, doi: 10.59704/452e3eca733be6a5.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20250506-005159-0.