

Contents
Abbreviations

vii
iv

CHAPTER 1	Introduction: The role of European citizenship in the constitutionalisation of the European Union	
1.1	Context of the research	3
1.2	Research question	4
CHAPTER 2	Analytical framework and structure	
2.1	Introduction to the analytical framework	11
2.1.1	Context of research and main research question	11
2.1.2	Structure of the present chapter	11
2.1.3	Historical background and development of European citizenship in the Union	12
2.1.4	European citizenship: a constitutional concept or market citizenship?	15
2.1.5	Constitutionalisation and constitutionalism: What's in a name?	18
2.1.6	Constitutions	19
2.1.7	The rule of law in relation to constitutionalism	20
2.2	The constitutionalisation of the Treaties of the European Union	21
2.2.1	Constitutional developments in Community and Union law	21
2.2.2	Arguments against the constitutional nature of the European Union	23
2.2.2.1	The no-demos thesis	24
2.2.2.2	Citizenship, identity and alliance	26
2.2.2.3	Just an international organisation?	27
2.3	Constitutionalisation of the European Union in this thesis	28
2.3.1	Multi-level and composite constitutionalism in the European context	29
2.4	Structure, analytical framework and methodology of the thesis	31
2.4.1	Constitutionalisation in four constitutional elements	31
2.4.1.1	The division of powers	32
2.4.1.2	Common ideology	33
2.4.1.2.1	Fundamental rights	33
2.4.1.2.2	Democracy	35
2.4.1.3	Justiciability and hierarchy of norms	37
2.4.1.3.1	Judicial review in connection with European constitutionalisation	38
2.4.1.3.2	Constitutional primacy of Union law as constitutional element	39
2.4.2	Methodology and structure of the thesis	40

CHAPTER 3	The effect of European citizenship on the vertical division of powers	
3.1	Introduction: The division of powers and European citizenship	45
3.1.1	The vertical division of powers as constitutional feature	45
3.1.2	Aim and structure of the present chapter	46
3.2	The competences of the European Union and the scope of Union law	46
3.2.1	The principles of conferral, subsidiarity, proportionality and pre-emption	46
3.2.2	Complementary and negative competences	49
3.2.3	Beyond legislative competences of the Union	50
3.3	The scope of application of EU law in relation to the vertical division of competences	51
3.3.1	The relation between the competences and the scope of Union law	51
3.3.2	The scope of application of Union law	52
3.3.3	The scope of EU law in the case law of the Court on general principles of Union law	54
3.3.4	The scope of Union law with regard to the Charter of Fundamental Rights	57
3.3.5	Different legal consequences of 'the scope' and the 'competences' of the Union	61
3.4	How does European citizenship affect the vertical division of powers?	62
3.4.1	The scope and nature of Article 18 TFEU	63
3.4.1.1	Early case law on Article 18 TFEU	64
3.4.1.2	A citizenship interpretation of Article 18 TFEU	66
3.4.1.3	Personal scope of Article 18 TFEU	67
3.4.1.4	Migration as a precondition for the <i>ratione personae</i> ?	69
3.4.1.5	'Lawful' residence and the scope of Union law	71
3.4.2	The trigger of the material scope of Union law by European citizenship	73
3.4.3	Towards a restriction approach in citizenship cases	76
3.4.4	Indirect substantive rights for third-country nationals	79
3.4.5	Article 20 TFEU as a new route into the 'Promised Land'	81
3.4.6	The influence of Union citizenship on the application of economic freedoms	86
3.5	A spill-over effect: From negative to positive integration	91
3.6	Conclusion: How does Union citizenship affect the vertical division of powers in the European Union?	94

CHAPTER 4	The effect of European citizenship on common ideology: the protection of fundamental rights linked to European citizenship	
4.1	Introduction: fundamental rights and European citizenship	101
4.1.1	Constitutionalisation and fundamental rights	101
4.1.2	Universality of fundamental rights and European citizenship	102
4.1.3	Aim and structure of the present chapter	103
4.2	Equality linked to European citizenship	105
4.2.1	Equal treatment as a key element of citizenship	105
4.2.2	Equality in different sources of law	105
4.2.3	Equal treatment and European citizenship	107
4.2.3.1	Court-driven equality	109
4.2.3.2	Equal treatment and reverse discrimination	111
4.3	Linking European citizenship and fundamental civil rights	115
4.3.1	What are civil rights?	115
4.3.2	Civil rights and Union citizenship	116
4.3.2.1	The right to move within the European Union	118
4.3.2.2	The right to reside in the European Union	119
4.3.2.3	The right to family life and family reunification and European citizenship	122
4.3.2.4	European citizenship and the application of the Charter	125
4.3.2.5	Protective civil rights	127
4.3.2.5.1	Security and safety as rights for Union citizens in the Area of Freedom, Security and Justice	128
4.3.2.5.2	An Area of Freedom, Security and Justice 'offered' to Union citizens: concrete rights?	131
4.3.2.5.3	Where European citizenship and the AFSJ come together: tensions and challenges	133
4.3.3	Safety and security in third countries: Diplomatic protection of Union citizens	141
4.4	Social rights linked to European citizenship	143
4.4.1	European citizenship and social rights	144
4.4.1.1	The broader European socio-economic context	145
4.4.2	Social rights for Union citizens based on free movement and equal treatment	146
4.4.2.1	Solidarity and reasonable burden	148
4.4.2.2	'Real link' as a tool to balance solidarity between migrants and nationals	149
4.4.3	Social rights for non-migrants: services of general economic interest	154
4.5	Conclusion: European citizenship linked to fundamental rights protection in the European Union	159

CHAPTER 5	The effect of European citizenship on the common ideology in the European Union: democracy and political rights	
5.1	Introduction: citizenship, political rights and democracy in the European Union	167
5.1.1	Aim and structure of the present chapter	167
5.2	Political rights and democracy as part of the common constitutional ideology	168
5.2.1	Political participation as part of citizens' rights	168
5.2.2	Democracy as part of the constitutional common ideology of the European Union	169
5.2.3	Connection between political rights and democracy	170
5.3	Democracy in the European Union	171
5.3.1	Criticism of democracy in the European Union	171
5.3.1.1	The relationship between democracy, legitimacy and accountability	171
5.3.1.2	The democratic deficit: criticism of the Union's model of democracy	172
5.3.1.3	Views on European democracy from a national constitutional perspective	173
5.3.1.4	No demos, no democracy?	175
5.3.2	Specific political rights for European citizens	176
5.4	The connection between European citizenship, democracy and political rights	177
5.4.1	Electoral rights regarding the European Parliament	177
5.4.1.1	On the personal scope of electoral rights regarding the European Parliament	178
5.4.2	Electoral rights regarding the national elections of Member States	182
5.4.3	Electoral rights regarding municipal elections	186
5.4.4	The right to submit complaints to the European Ombudsman	190
5.4.5	The right to petition to the European Parliament	194
5.4.6	The citizens' initiative	195
5.4.7	Good governance and the role of civil society	198
5.5	Conclusion: the connection of European citizenship with democracy and political rights	201
 CHAPTER 6	 The effect of European citizenship on the justiciability and constitutional primacy of Union law	
6.1	European citizenship in the European judicial context	207
6.1.1	Constitutionalisation of the Union: primacy and justiciability of Union law	207
6.1.2	Aim and structure of the present chapter	208

6.2	Judicial review in the European landscape	209
6.2.1	Cooperation between courts: the Court of Justice and national courts in a multilevel context	209
6.2.2	Direct effect and primacy of Union law: obligations for national courts	209
6.2.3	The preliminary reference procedure as a cornerstone of judicial cooperation	211
6.2.4	Dialogues between the Court of Justice and national constitutional courts	214
6.3	European citizenship and justiciability in the European Union	216
6.3.1	Direct effect of Union citizenship provisions	216
6.3.2	Effects of direct effect of Articles 20 and 21(1) TFEU on justiciability	219
6.3.2.1	Illustration from national court practice: the effect of <i>Ruiz Zambrano</i> in Dutch case law	222
6.3.3	Shift in judicial review due to 'personal circumstances test' of citizens of the European Union	226
6.3.4	Constitutional impact of the 'personalised' proportionality test	232
6.4	The effect of European citizenship on the 'constitutional primacy' of Union law	236
6.4.1	Hierarchy and constitutional primacy within the European Union	236
6.4.2	The impact of European citizenship on the constitutional hierarchy of norms in the European Union	238
6.4.2.1	Tensions between primary Union law and secondary Union law	238
6.5	Conclusion: the impact of European citizenship on justiciability and constitutional primacy	243

CHAPTER 7 **Conclusions: the effect of European citizenship on the constitutionalisation of the European Union**

7.1	The concept of European citizenship in the constitutional context of the European Union	249
7.1.1	An open field...	249
7.1.2	European citizenship and constitutionalisation	250
7.1.3	Citizenship in a multi-layered European legal order	250
7.1.4	European citizenship: constitutional concept or market-based concept?	252
7.2	The contribution of European citizenship to the constitutionalisation of the European Union	255
7.2.1	Vertical division of powers	256
7.2.2	Fundamental rights protection	257

7.2.3	Democracy	259
7.2.4	Justiciability and constitutional primacy and European citizenship	263
7.3	European citizenship and constitutionalisation of the European Union combined	264
7.3.1	Fragmentation and constitutionalisation	264
7.4	European composite citizenship	268
7.5	Outlook: the future prospects of European citizenship in a constitutional context	274
7.5.1	Where we are in the open field	274
7.5.2	More destinations, new paths to explore?	275
7.5.2.1	Challenges...	275
7.5.2.2	...and destinations ahead	278
	<i>Bibliography</i>	284
	<i>Table of cases</i>	306