Truly a fundamental status?

EU citizenship gains in significance for the citizens who stay at home

By Jeremy B. Bierbach[1]

Introduction

The class of "incipient European citizens"[2] making use of freedom of movement, from the foundation of the European Economic Community, always was a rather exclusive club. Freedom of movement was already expressly denied to non-nationals of member states, with the specific goal of excluding those hailing from non-European colonies of the member states who might have rights of settlement in their respective metropoles without full nationality. But even for member state nationals, it was also practically accessible only to adults participating in the labor market, and specifically mainly to those workers in the academic/professional segment (in international work environments requiring multilingualism) and those in the practical labor segment (requiring less in the way of foreign language skills) of the labor market. The status of citizenship of the European Union still only largely codified pre-existing freedoms of movement.

However, the Court of Justice of the European Union has been developing EU citizenship, using Article 20 of the TFEU, as a 'right to have rights' for nationals of member states that is more than the right to become part of a cosmopolitan elite. This paper will show how this is a particularly exciting development in the Netherlands, a member state which in its own constitutional order does not accord many special protections to its own nationals, and how this is of particular significance to Dutch nationals with roots in former colonies. A comparison will be drawn to the development of the citizenship of the United States, in that federal order, into a source of civil rights for members of historically disenfranchised communities within states.

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[2] R. Plender, "An Incipient Form of European Citizenship," ed. F. G. Jacobs, European Law and the Individual (Amsterdam etc.: North-Holland Publishing Co, 1976), 39.

I intend to draw on my own (admittedly anecdotal) observations as a practitioner of immigration law in the Netherlands, whose legal system, due to its "monistic" incorporation of international, and therefore EU law, provides an excellent laboratory for testing the promise and the limits of EU citizenship (in a struggle with its political discourse representing the supposed will of the democratic majority, which is exceedingly hostile to immigration and to ethnic minorities within the nation). I will engage with Kochenov's description of citizenship as "passport apartheid"[3] by identifying elements of the legal definition of apartheid, in particular what the definition of the "people in question"[4] is, within which set of persons the imposition of apartheid is a crime, by adopting Guno Jones' suggestion that the boundaries of a citizenship discourse can cross borders to comprise "both motherland and colony".[5] EU citizenship, as a "duplex citizenship"[6] that already crosses borders within Europe, will be revealed to hold the potential to resolving at least one form of treatment that could be defined as apartheid.

In the preface to her book[7] exploring the history of race and rights in the United States prior to the Civil War, in particular how African Americans articulated their claims to citizenship in the form of legal struggles, legal historian Martha S. Jones recalls her work as a public-interest lawyer in New York City helping "New York's disproportionately black and brown poor people navigate legal culture". She recalls the Housing Court in Manhattan in the late 1980s and how, seemingly ironically, an encampment of homeless people had come into existence right next to it. But this was no accident, she notes, when one takes the history of the immediate neighborhood, one of the oldest in New York, into consideration. Prior to the Civil War, the Five Points, as it was known, was New York's most notorious neighborhoods, populated by

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[3] Dimitry Vladimirovich Kochenov, "Ending the Passport Apartheid. The Alternative to Citizenship Is No Citizenship-a Reply," *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 18, no. 4 (2020): 1525–30, https://doi.org/10.1093/icon/moaa108.

[4] J. Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press, 2020), 26–28.

[5] Guno Jones, "Biology, Culture, 'Postcolonial Citizenship' and the Dutch Nation, 1945–2007," in *Dutch Racism*, vol. 27, Thamyris/Intersecting: Place, Sex and Race, 2014, 317.

[6] Jeremy B. Bierbach, "Civis Duplex Sum: Two Layers of Citizenship in a Dialogue of Equality," in *Frontiers of Equality in the Development of EU and US Citizenship*, by Jeremy B. Bierbach (The Hague: T.M.C. Asser Press, 2017), 1–14, https://doi.org/10.1007/978-94-6265-165-4_1.

[7] Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America*, Studies in Legal History (Cambridge, United Kingdom ; New York, NY, USA: Cambridge University Press, 2018)., p. ix-xii.

immigrants and emancipated slaves, filled with brothels and dance halls. The neighborhood was razed by nineteenth-century reformers, and a new jail and courthouse building, The Tombs, was built as a site aimed to discipline the bodies perceived as sources of poverty and vice. The Tombs, in turn, was razed in the 1960s and replaced with a modern courthouse complex, where all of Manhattan's rental conflicts were henceforth to be adjudicated. Viewed historically, Jones writes, it should no longer be surprising that an encampment of homeless should adjoin the court complex. Whether "Five Points hustlers, inmates of The Tombs, or litigants making claim to housing rights, New York's most marginalized residents had always occupied this place".

I think a lot about this observation on the part of Jones in the course of my own practice as an immigration lawyer in the Netherlands. I also engage with the historical roots of immigration law on the steps of the courthouse, as a sometime scholar[8] who wrote a doctoral thesis on the subject of citizenship of the European Union, and a significant portion of my practice involves some kind of claim on the part of an EU citizen to be joined by a family member who is a third-country national, i.e. a national of a country outside the EU. I am therefore deeply conscious of the historical roots of EU citizenship and of the allocation of nationalities that determines whether one is a member state national, and therefore endowed with EU citizenship, or a third-country national, subject to immigration procedures.

The starting point: EU citizenship's roots in inclusion of member state nationals in freedom of movement

The "home turf" of EU law, so to speak, is when my EU citizen client is a national of a member state other than the Netherlands, i.e. when they are a *mobile* citizen (using the freedom of movement, currently provided for by Article 21(1) of the Treaty on the Functioning of the European Union). There, the citizen can make a reasonably strong legal claim to a right of legal residence for their family member (a spouse, child, dependent parent, etc.) that builds on the

[8] And I can express my gratitude to ACELG for allowing me to continue to have an academic affiliation, not least because of the access to the library and academic literature databases that allows me to continue my research.

foundations of secondary legislation that has been in place since 1961, in the context of the practical introduction of "freedom of movement of workers", one of the fundamental freedoms of the European Economic Community. At the time of negotiation of that first 1961 Regulation[9], Italy, the member state of the original Six that had the highest rate of unemployment and the greatest interest in securing favorable terms for its nationals who would be working elsewhere in the Community, had successfully negotiated for generous (and automatic) rights of residence for not only the nuclear family of the worker, but all of the worker's dependent relatives in the ascending and descending line, plus facilitation of rights of residence for other dependent relatives.[10]

When I assist clients in this area of EU law, I can recognize common traits in mobile EU citizens: something of a sense of adventure, making use of work opportunities in the Netherlands (either in the more academically or professionally educated sector of the labor market, where English is the lingua franca, or in practical or service professions or doing manual labor where language fluency is less important), or working as a freelancer or other sort of entrepreneur, or (ever since rights for economically *inactive* member state nationals had in 1990[11] been grafted, followed by the introduction by the Maastricht Treaty[12] of the status of "citizen of the European Union", on to the trunk of freedom of movement of workers) studying full-time at a Dutch university, retiring in the Netherlands to live off a pension, or simply enjoying life on the basis of independent financial resources.[13] In all cases, the EU citizen is obviously not bound to their home member state, and has the wherewithal (in the form of financial and social capital) to make use of freedom of movement.

The only need to get a lawyer involved at all, of course, has everything to do with the third-country national family member, for whom possession of the proper documents proving

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[9] Council of the European Economic Community, *Verordening No. 15 Met Betrekking Tot de Eerste Maatregelen Ter Verwezenlijking van Het Vrije Verkeer van Werknemers Binnen de Gemeenschap [Regulation 15/61/EEC]*, *Publikatieblad van de Europese Gemeenschappen*, vol. 61, 1961.

[10] Jeremy B. Bierbach, *Frontiers of Equality in the Development of EU and US Citizenship* (The Hague: T M C Asser Press, 2017), 242.

[11] Bierbach, 314–15.

[12] Bierbach, 316.

[13] The archetypes of economically inactive mobility in the EU, corresponding to the original 1990 Directives, were semi-jokingly described by scholars as "students, pensionados, and playboys".

their right of residence and right to work is a must. Somewhat less frequently, however, I do have to represent EU citizens *themselves* when their right to reside—even on their own—is being disputed, because the Dutch state claims that they are not working and also do not have sufficient financial resources to support themselves. What the Court of Justice of the European Union once momentously pronounced to be "destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for",[14] including for economically inactive citizens, was rolled back by the adoption of secondary legislation, the Citizenship Directive,[15] that established clearer and less forgiving conditions of economic self-sufficiency and obliged the Court to take a step back.[16]

There is another common trait of almost all of my mobile EU citizen clients, however: almost all of them are white. Of course, that is perhaps unsurprising, considering that a majority of Europeans are white (indeed, the concept of whiteness is essentially a European invention). But in my practice involving mobile EU citizens, I see a not-inconsiderable number of EU citizens who do not themselves hail from Europe at all, and they are white as well. This is no accident, and I will return to this point.

EU citizenship's tolerance of <u>exclusion</u> of non-nationals: the Netherlands as a case in point

As I noted, Italy pushed to include a broad definition of family members in the entitlement to freedom of movement. But Italy, desirous to reduce competition to its mobile workers as much as possible, was also a driving force behind a provision of early freedom-of-movement legislation aimed specifically to deny freedom of movement to denizens of non-European

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[15] "Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA Relevance)," Official Journal of the European Union § L 158 (n.d.); Bierbach, *Frontiers of Equality in the Development of EU and US Citizenship*, 348.

[16] Most notoriously in *ECJ Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, *C-333/13*, vol. C-333/13, 2014.

territories associated with the member states with a significant colonial history: the Netherlands and France:[17]

> This Regulation shall not affect the obligations of Member States arising out of special relations with certain non-European countries or territories, based on current or future institutional ties.
>
> Workers from such countries or territories who, in accordance with this provision, are pursuing activities as employed persons in the territory of one of those Member States may not invoke the benefit of the provisions of this Regulation in the territory of the other Member States.[18]

And the persons meant to be targeted by this restriction, of course, were predominantly Arab or non-white. In the end, perhaps to avoid the embarrassing prospect of having to deny rights to holders of member state passports solely on the basis of their appearance or place of birth, an uneasy consensus was reached to make the at least facially neutral status of *nationality* the key positive condition for being able to make use of freedom of movement. After all, perhaps the source of competition to its workers that Italy feared the most, the nearest and largest non-European territory of France, Algeria, was recognized by France as independent in 1962[19] and its nationals no longer had French nationality. The denizens of the remaining overseas territories of France were French nationals, just as the denizens of the two Caribbean countries

[17] Bierbach, *Frontiers of Equality in the Development of EU and US Citizenship*, 234–37.
[18] Council of the European Economic Community, *Verordening No. 38/64/EEG van de Raad van 25 Maart 1964 Met Betrekking Tot Het Vrije Verkeer van Werknemers Binnen de Gemeenschap [Regulation 38/64/EEC]*, *Publikatieblad van de Europese Gemeenschappen*, vol. 64, 1964., Art. 53(3)
[19] Bierbach, *Frontiers of Equality in the Development of EU and US Citizenship*, 237.

(Suriname and the Netherlands Antilles) in the Kingdom of the Netherlands[20] were Dutch nationals,[21] so the Regulation provision[22] would become something of a dead letter.[23]

Decolonization, to the extent that any of those countries populated by member state nationals became fully independent, would prove to be a double-edged sword. On the one hand, it is an admirable goal for populations who had lived for centuries under the yoke of European colonial powers to attain (ostensibly) full autonomy in the form of full statehood. But on the other, independence usually meant that member state nationals living in such countries were confronted with a stark choice of immigrating to the metropole to retain their rights of residence and (potential) entitlement to member state nationality, or remaining in the newly independent country, being assigned a new third-country nationality on a mutually exclusive basis. Such was the case with Suriname, where an arguably progressive Dutch government's enthusiasm for granting independence dovetailed[24] with the desire of Suriname's government, led by an Afro-Surinamese[25] prime minister, to become independent. Guno Jones, however, identifies the Dutch government's enthusiasm for Surinamese independence as being clearly

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[20] A quasi-federal order made up at the time of three countries, the (European) Netherlands, Suriname and Netherlands Antilles, based on the Charter of the Kingdom of the Netherlands of 1954. *See* Michael Orlando Sharpe, "Extending Postcolonial Sovereignty Games: The Multilevel Negotiation of Autonomy and Integration in the 2010 Dissolution of the Netherlands Antilles and Dutch Kingdom Relations," *Ethnopolitics*, April 9, 2020, 304, https://www.tandfonline.com/doi/abs/10.1080/17449057.2020.1726031.

[21] Bierbach, *Frontiers of Equality in the Development of EU and US Citizenship*, 238–39.

[22] Still in force, however, as art. 36(3) of today's Regulation 492/2011, which I see as something of a shameful historical blot on EU legislation and completely unnecessary if citizens of former colonies with separate nationalities are excluded from freedom of movement anyways.

[23] However, in my book I note how the United Kingdom, in order to gain the support of the Netherlands, in particular, for its accession to the European Economic Community, was pressured to for the first time create a definition of "British nationality" as a status entitling the holder to freedom of movement of workers, reserved to persons born in, or whose immediate ancestors were born in the UK proper, to the exclusion of British passport holders and Commonwealth citizens deemed to have more of a tie to (former) British colonies, despite still being entitled to a right of residence in the UK. In this sense, the restrictive and perhaps inoperable provision of the 1964 Regulation ended up being a template for precisely limiting the boundaries of an acceding member state's very body of nationals, making it significantly whiter. Bierbach, *Frontiers of Equality in the Development of EU and US Citizenship*, 392. See also Bierbach, 241–42., in which I identify this cutting-off of large numbers of persons from British nationality in the context of the UK's accession as the root cause of the Windrush scandal.

[24] Sharpe, "Extending Postcolonial Sovereignty Games," 305.

[25]Suriname is demographically extraordinarily diverse, and the two largest pluralities in Suriname's population are made up respectively of the South Asian Surinamese, descended from indentured laborers who came from then-British India starting ten years after the abolition of slavery in 1863, and the Afro-Surinamese, descended from enslaved Africans. The South Asian Surinamese tended to be against independence; the Afro-Surinamese were generally for independence, Sharpe, op.cit.

and squarely rooted in the failure of the Dutch government (i.e. of the European Netherlands) to find a palatable way to legally restrict the rights of entry and residence of fellow "Kingdom citizens" in light of the government's perception that mobility from Suriname had become a problem.[26] The mere talk of restrictions on such mobility, however, had already driven a considerable number of Surinamese to "vote with their feet" by moving to the metropole,[27] and the announcement of impending independence at the end of 1975 meant the further emigration of nearly half the population of Suriname to the Netherlands.[28]

Just as *inclusion* in freedom of movement in the European Community, later mobile citizenship of the European Union, coalesced around the possession of the nationality of a member state, the inverse concept, the sovereign right of states to *exclude* non-nationals from rights of entry and residence had long been actively promoted as a tenet of international law by, in particular, the United States.[29] This was by no means an inevitability, but after nearly a century of being claimed over and over, it graduated to an article of faith in the case law of the European Court of Human Rights:[30] a starting point of absolute denial of rights of residence for non-nationals, justified by political interests of a state, that could be ever-so-slightly offset by the exceptional existence of a "positive obligation" to foster "family life" (Article 8, European Convention on Human Rights and Fundamental Freedoms) between a national and a non-national.[31] Restrictions on rights of family reunification proliferated in Community member states in the 1970s, precisely in response to family reunification being politically perceived as a benefit

[26] Guno Jones, *Tussen Onderdanen, Rijksgenoten En Nederlanders : Nederlandse Politici over Burgers Uit Oost En West En Nederland, 1945-2005* (Amsterdam: Amsterdam : Rozenberg, 2007), 233–34.
[27] Jones, 241–42. *See also*: Jones, "Biology, Culture, 'Postcolonial Citizenship' and the Dutch Nation, 1945–2007," 329–30.
[28] Sharpe, "Extending Postcolonial Sovereignty Games," 305.
[29] Karin de Vries and Thomas Spijkerboer, "Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights," *Netherlands Quarterly of Human Rights* 39, no. 4 (2021): 296–97, https://doi.org/10.1177/09240519211053932.
[30] de Vries and Spijkerboer, 299–300.
[31] *ECHR Abdulaziz et al. v. United Kingdom*, *Application Nos. 9214/80, 9473/81 & 9474/81*, 1985.

primarily for racialized member state nationals (naturalized “guest workers” and post-colonial citizens)[32] perceived as outsiders, indeed, as *formal* citizens but *substantive* aliens.[33]

In the Netherlands, to this day, the right of family reunification of Dutch nationals with third-country national family members is subject to strict requirements of the Dutch national sponsor having stable income from employment, the third-country national family member passing an examination of basic Dutch language and “culture” at a Dutch embassy or consulate in their home country, and indeed waiting in their home country for issuance of the required visa, rather than being able to wait for approval in the Netherlands.[34] Moreover, the only family members, as a rule, who are eligible for family reunification are those deemed to have the most intimate relationships with Dutch citizens in the context of the nuclear family: the spouse, civil union partner or unmarried life partner, and the (step-)children under 18. Third-country national spouses/partners and their (own) children are utterly dependent on the Dutch citizen spouse/partner for at least five full years before they can obtain an independent immigration status[35] (sometimes slightly less, just under four years, if they obtain Dutch nationality through accelerated qualification for naturalization).

Yet Community (later Union) law remained in the same place as it always had since 1961: a mobile Union citizen is not at all required to have stable income (at a minimum, a clear attempt at participation in the labor market, even with part-time paid work generating income

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[32] Bierbach, *Frontiers of Equality in the Development of EU and US Citizenship*, 288–89.

[33] Jones, “Biology, Culture, ‘Postcolonial Citizenship’ and the Dutch Nation, 1945–2007,” 319. calls this phenomenon the "alienage of citizens"

[34] Tellingly, bearers of at least seven third-country nationalities are prominently exempted from the requirement of taking that exam, and are also exempt from the preliminary visa requirement that the exam is attached to: the United States, Canada, New Zealand, Australia, South Korea, Japan and the United Kingdom. A recent court judgment from the District Court of The Hague, however, called into question whether the fact that an Ethiopian spouse of a Dutch national was subject to the exam requirement, while the aforementioned nationals are not, could be justified with “very weighty reasons” in the sense of Article 14 of the ECHR. District Court of The Hague, Haarlem location, 23 January 2023, ECLI:NL:RBDHA:2023:622. Indeed, it seems rather clear that bearers of the aforementioned nationalities are politically not perceived as racialized aliens, which accounts for why they are exempted.

[35] *See* the recent report by Betty De Hart, Younous Arbaoui, and Eef Verweij, “Heb Geduld: De Betekenis van Het Afhankelijk Verblijfsrecht in Het Dagelijks Leven van Huwelijksmigranten En Hun Partners” (Amsterdam: Platform Zelfbeschikking & Verblijfsrecht, 2022), https://acmrl.org/wp-content/uploads/2022/12/Rapport-afhankelijk-verblijfsrecht-def-5-12-2022-1.pdf.

insufficient for actual sustenance,[36] or job-seeking with promise of finding a job,[37] is sufficient), and the family the citizen can have with them is defined somewhat more broadly. On the one hand, while only members of the nuclear family (augmented since 1961 with the partner in a civil union, where such an institution exists, and same-sex spouses[38]), including (step-)children up to the age of *21* have an *automatic* right of residence with the Union citizen (subject to no preliminary visa requirements[39]); on the other hand, adult (step-)(grand-)children and elderly (grand-)parents(-in-law) are also included, subject solely to the requirement of proving their material dependence on the Union citizen in their home country,[40] and even dependent relatives outside that innermost circle[41] and partners in a stable relationship[42] are entitled to a facilitated admission procedure in which an examination of their circumstances is guaranteed. Finally, third-country national spouses and partners are protected from loss of their rights of residence in a host member state in the case of divorce or dissolution of a partnership, as long as the marriage or partnership lasted 3 years, of which one year was spent in the host member state.[43]

The Netherlands as a laboratory for mobilizing EU citizenship against the effects of "passport apartheid"

The contrast between these legal orders intersected vividly with the denationalization of former member state nationals allocated to independent former colonies in the 1982 judgment *Morson*

[36] *ECJ D.M. Levin v Staatssecretaris van Justitie*, vol. C-53/81, 1982.
[37] *ECJ R. v Immigration Appeal Tribunal, Ex Parte Antonissen*, vol. C-292/89, 1991.
[38] *ECJ Relu Adrian Coman et al. v. Inspectoratul General Pentru Imigrări*, vol. C-673/16, 2018.
[39] *ECJ Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, vol. C-127/08, 2008.
[40] *ECJ Yunjing Jia v. Migrationsverket*, vol. Case C-1/05, 2007.
[41] "Secretary of State for the Home Department v Muhammad Sazzadur Rahman and Others" C-83/11 (September 5, 2012).
[42] *ECJ Secretary of State for the Home Department v. Rozanne Banger*, vol. C-89/17, 2018. In the Netherlands, however, partners in a stable relationship with EU citizens, subject only to being able to provide adequate proof of the relationship, are fully assimilated to spouses and have an automatic right of residence.
[43] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance). Article 13

and Jhanjan,[44] in which two Dutch nationals were denied access to the Community law right of family reunification with their dependent, Surinamese (i.e. who only seven short years prior had still been Dutch nationals) parents, due to the fact that they were in a "purely internal situation", unexposed to Community law, as workers living and working in their own member state of nationality. This "reverse discrimination" against Dutch citizens, relative to the treatment of nationals of other member states, is a creature not of EU law, which claims to have no jurisdiction over the purely internal situation, but of Dutch (constitutional) law, which clearly tolerates the worse treatment of its own nationals; indeed, the Dutch constitution makes no enhanced human rights guarantees specifically for Dutch nationals, only guarantees of (formal) rights of political participation (the rights to vote for and be elected to Parliament and to be appointed to political office).

Yet at the same time, the Dutch constitution does provide for direct effect of provisions of international (and European) law that guarantee individual rights, even allowing courts of first instance to set aside provisions of Acts of Parliament that conflict with those provisions of international law. This means that the practice of Dutch lawyers, especially immigration lawyers, is essentially a constant tug-of-war against the Dutch state in Dutch courts about the proper interpretation and boundaries of provisions of international law. The Dutch state, for its part, aims to comply with provisions of international law benefiting migrants (or Dutch citizens with migrant family members) in as minimal as possible a way, almost never voluntarily going beyond the bare limits of those obligations.

The European Convention of Human Rights, in practice, has never been a terribly productive source of protection of family and private life in all but the most extreme situations, since Article 8 allows for a balancing of the right to family life against the public interest that is characterized by migrants getting very little benefit of the doubt. Family life that is initiated (through marriage or the birth of children) while the migrant is irregularly resident, or has only a very temporary right of residence, is generally not considered to be worthy of protection in the form of a right of residence for the migrant. One could characterize the tenor of that case law as

[44] *ECJ Morson and Jhanjan v. The State of the Netherlands*, vol. C-35+36/82, 1982.

"You ought to have known when you started that family life that you would not be able to stay, and there's nothing stopping you from continuing that family life in your country of nationality".

EU law, on the other hand, provides for much more muscular norms, uncharacterized by a balance against a member state's public interest, when EU citizens' autonomous exercise of rights of movement is at stake. Starting nearly a decade after *Morson*, the Court of Justice of the European Union did develop a line of case law[45] that made some inroads into the purely internal situation. When a member state national makes use of mobility, is joined by their family members who are beneficiaries of Community law, and then returns to their own member state, that return is also qualified as protected freedom of movement. It is no accident that the third prominent judgment of the Court reinforcing that right, with an even more generous protection of "freedom to return", was spawned by the movement of a Dutch national, Mr. Eind, to the United Kingdom in order to obtain a right of residence for his Surinamese daughter, followed by their return together to the Netherlands;[46] clearly Mr. Eind had been unable to satisfy the strict requirements of Dutch family reunification law.

I am most struck by a sense of injustice about the yawning gap between the protections for mobile EU citizens and "sedentary" Dutch citizens when I see in my office my clients who are Surinamese family members of Dutch nationals. They speak fluent Dutch, indeed they have roots in the Kingdom of the Netherlands that go back centuries, far longer than my own connection to the Netherlands (as an immigrant in 2001 from a settler-colonial state). If they are immigrating on the basis of Dutch family reunification law, I see how their entire right of residence in the Netherlands is brought to bear on, and utterly subject to the whims of, their intimate relationship to a single Dutch spouse or partner, while at the same time they are often socially embedded as adults in an enormous family network in the Netherlands comprising brothers, sisters, aunts, uncles, nieces, nephews, cousins, and even parents and grandparents, where not a single one of those other family relationships, nor all of them bundled together, creates entitlement to a right of residence.

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[45] ECJ The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department, C-370/90 (1992).

[46] *ECJ Minister Voor Vreemdelingenzaken En Integratie v R. N. G. Eind*, vol. C-291/05, 2007.

With other Surinamese clients, I pore over out-of-print books to determine if they might not actually, due to one of the vagaries of the way the Allocation Agreement of 1975[47] worked, with revisions though the 1990s, still be Dutch nationals after all, and if the Surinamese state might not have made a mistake by issuing them a passport. If still other Surinamese clients have mobilized EU law, often by means of a non-nuclear family member making use of freedom of movement to another member state[48] and moving back to the Netherlands, my legal work usually entails defending them against claims by the Dutch state that the (Surinamese-)Dutch national family member had not, actually, had the "genuine residence"[49] in the host member state, as defined by work or establishment of social networks in the host member state, that entitles them to their return to the Netherlands being regarded as protected freedom of movement that their family members fall under the aegis of.

To the extent that their attempts to immigrate run aground due to the Dutch family member's lack of social and financial capital, or a diminished lack of ability to navigate complex legal situations, I am conscious of the ways in which the inheritance of slavery to this day still burdens especially Afro-Surinamese(-Dutch) people: "everyday and institutional racism and structural inequality in various areas of society", including in the educational system and the job market.[50] For a recent example of institutional racism: an analysis by the Dutch Human Rights Institute[51] revealed that victims of the so-called "child benefits scandal", persons who for years had received a modest supplementary benefit to pay for child care but then were wrongly accused of fraud by the Dutch tax authority and subsequently bankrupted by being forced to pay back tens of thousands of euros, would have been more likely to be targeted for a fraud

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[47] https://treaties.un.org/doc/Publication/UNTS/Volume%20997/volume-997-I-14598-English.pdf

[48] *If* they have the wherewithal to do so: indeed, making use of freedom of movement requires not only financial and social capital and know-how, but also an ability to at least temporarily break with dependence on facilities they rely on as residents of the Netherlands. Helena Wray, Eleonore Kofman, and Agnes Simic, "Subversive Citizens: Using EU Free Movement Law to Bypass the UK's Rules on Marriage Migration," *Journal of Ethnic and Migration Studies*, 2019, 1–17. identify the barriers to British citizens (when the UK was still in the EU) making use of freedom of movement for that purpose.

[49] *ECJ O. v Minister Voor Immigratie, Integratie En Asiel, and Minister Voor Immigratie, Integratie En Asiel v B.*, vol. C-456/12, 2014.

[50] Mitchell Esajas, "Waarom Anton de Kom generatie op generatie blijft inspireren," in *Wij slaven van Suriname*, by Anton de Kom, Vierentwintigste druk juli 2022 (Amsterdam: Uitgeverij Atlas Contact, 2022), 35–36.

[51] "Vooronderzoek Naar de Vermeende Discriminerende Effecten van de Werkwijzen van de Belastingdienst/Toeslagen" (College voor de Rechten van de Mens, September 2022), https://publicaties.mensenrechten.nl/file/d437f44c-9449-ba04-f425-b763a5848d85.pdf.

investigation if they were of “foreign” origin (as defined by a birthplace outside the European Netherlands or a second nationality), leading to a conclusion of indirect racial discrimination.

The contrast could not be greater when I assist an EU citizen who is not Dutch with the immigration procedure of their third-country national family member, especially when the EU citizen in question is a white person who is not even from Europe. Indeed, the most common nationality among such persons that I see, to return to my previous point about Italy, is Italian, since Italian citizenship law maintains a generous entitlement to Italian nationality, with few requirements of exclusivity, to almost anyone who can prove descent from an ancestor born in post-unification Italy. This means that the body of EU citizens includes millions of people outside Europe, mostly hailing from settler-colonial states like Argentina, Brazil, Venezuela, or Australia; indeed, when I see such a person, they inevitably also share the third-country nationality of the family member I am representing, as their intimate family relationship arose in that country, and the Italian national can (I usually presume) speak little to no Italian. Few demands are placed on the EU citizen of obtaining stable income or establishing social networks in the Netherlands, indeed, EU law grants them a high degree of autonomy in making those choices for themselves, in the interest of their “integration” (a term defined, in the context of free movement law, in terms of obligations weighing heavily on the host member state, and not so much on the individual[52]).

Lest I be accused of blaming Italy for everything: it was the claim of the Spanish government that such an individual hailing from Argentina was not “really” Italian, and therefore not a member state national entitled to freedom of movement, that gave rise to a judgment that contained still-sprouting seeds, in my view, for EU law to extend greater protection against deprivation of [the substance of] citizenship;[53] at the very least, this does mean that nationality of a member state, regardless of actual personal origin, is still a sacrosanct source of EU citizenship. Indeed, I do not cast aspersions on any individual’s possession of a nationality, but I do mean to point out the hypocrisy of the way member state nationalities are allocated, indeed how they are systematically denied to persons hailing from,

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[52] Kees Groenendijk, “Legal Concepts of Integration in EU Migration Law,” *European Journal of Migration and Law* 6, no. 2 (2004): 111–26, https://doi.org/10.1163/1571816042885969.

[53] *ECJ Mario Vicente Micheletti and Others v Delegación Del Gobierno En Cantabria*, vol. C-369/90, 1992.

in particular, former colonies whose populations were not significantly defined by European settlement. Kochenov is right to apply the term "apartheid" to this phenomenon in order to identify it as a phenomenon of racialization. Indeed, when one looks at the worldwide hierarchy of nationalities that are inevitably more powerful, in terms of rights to visa-free travel and settlement,[54] the population of those respective states are widely regarded as "white". It is a correlation that also has causation in the history of (de)colonization: notions of international law, developed precisely by European colonial powers, asserted a universal right to move and settle *for themselves*, and even to conquer by force and subjugate populations that resisted the arrival of traders.[55]

Of course, the traditional legal definition of "apartheid" presupposes that the difference in treatment on the part of a violating state is based purely on racial characteristics, and not on nationality: indeed, apartheid is perceived as a grievous violation of the principle of equal treatment, by law, of all who share a common nationality. But it can be noted that even the South African architects of the original apartheid, seeing themselves as the legitimate heir of South Africa's colonizing states, merely considered themselves precisely to be toeing the line of a consensus among powerful countries that was developing in the context of decolonization. By defining African denizens of South Africa as "actually" nationals not of the Republic of South Africa, but of supposedly independent and autonomous "Bantustans" (and even transporting those allocated to such "states" by force to their "homelands"), the regime justified the pass laws and other restrictions on movement for those persons as being no different than what was going on with the independence of former (e.g.) British colonies, whose newly-minted nationals were denied access to the metropole, and with Portugal's practices of forcibly displacing populations within its colonies.[56]

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[54] Dimitry Kochenov and Justin Lindeboom, eds., *Kälin and Kochenov's Quality of Nationality Index: Nationalities of the World in 2018* (Oxford: Hart Publishing, 2020).

[55] de Vries and Spijkerboer, "Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights," 293–95.

[56] *See*, generally, Laura Evans, "Contextualising Apartheid at the End of Empire: Repression, 'Development' and the Bantustans," *The Journal of Imperial and Commonwealth History* 47, no. 2 (March 4, 2019): 372–411, https://doi.org/10.1080/03086534.2019.1605705.

EU citizenship develops a bright side for EU citizens who stay at home

"I believe that there can be no 'bright side' of citizenship," Kochenov writes.[57] Perhaps this is true, if our view of citizenship is limited to *nationality*, characterized by (largely) mutual exclusivity and restrictions on non-nationals: the "hard on the outside" part of Bosniak's characterization of the received conception of citizenship as "hard on the outside, soft on the inside".[58] And indeed, Jones notes that even possession of nationality, as shown in the Dutch case, does not guarantee unconditional inclusion in the Dutch-nation state[59] (i.e., there's little "softness on the inside"), when entitlement to such inclusion is primarily defined in terms of whiteness.

But I do believe that EU citizenship, on the other hand, as a duplex citizenship status attached to the nationality of a member states which has a more "permeable outside" and defines its "soft inside" differently than any one of those nationalities, does contain the seeds for subversion of both of these flaws of nationality-as-citizenship, and I will go on to demonstrate how. Indeed, freedom of movement, itself, even if it now goes beyond economic activities or "market citizenship", has proven to be a poor basis for a citizenship characterized by equality if that equality, in terms of a broad grant of autonomy to establish and maintain social and family networks, is only for those who cross borders. But as a notion, EU citizenship does contain a striving toward equality that the Court expressed in the *Grzelczyk* decision, which discursively informs its development, ideally toward closing the gap between mobile and sedentary (or "static") EU citizens in order to establish a "right not to move[60]".

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[57] Kochenov, "Ending the Passport Apartheid. The Alternative to Citizenship Is No Citizenship-a Reply," 1527.
[58] Linda Bosniak, *The Citizen and the Alien : Dilemmas of Contemporary Membership* (Princeton, N.J.: Princeton University Press, 2006), 4.
[59] Jones, "Biology, Culture, 'Postcolonial Citizenship' and the Dutch Nation, 1945–2007," 332.
[60] Sara Iglesias Sánchez, "A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement," in *EU Citizenship and Federalism: The Role of Rights*, ed. Dimitry Kochenov (Cambridge: Cambridge University Press, 2017), 371–93, https://doi.org/10.1017/9781139680714.016.

I will now go on to explore the development that I precisely find to be so encouraging, also against the background of some cases that I have been involved with. There is a line of case law of the Court, starting in 2010, that is developing rights of EU citizenship attaching not, as traditionally, to Art. 21(1) TFEU (the right of movement and residence in the Union), but to Art. 20 TFEU (the right to Union citizenship itself for all member state nationals). The first judgment of the Court to make use of this novel source of rights was *Rottmann*,[61] in which it declared that the loss of German citizenship, and therefore of EU citizenship, on the part of an individual who had already automatically lost his Austrian citizenship by becoming German, could in theory be subject to review against the proportionality principle of EU law.[62] But the second judgment on that basis, *Ruiz Zambrano,*[63] provided that in a situation where a young child was born with Belgian, and therefore EU citizenship, the deportation of that child's two third-country national parents *from Belgium* would effectively mean that that child would be forced to leave the territory of the EU, and therefore would be *effectively* deprived of "the genuine enjoyment of the substance of the rights conferred by virtue of" EU citizenship (i.e. despite at least formally still possessing a member state nationality, and therefore EU citizenship). Here the Court was, for the first time ever, confirming the existence of a right of residence for family members of an EU citizen in the heretofore "purely internal situation", a Belgian national in Belgium; indeed, it rejected a suggestion by Advocate-General Sharpston to resolve the problem by reference to freedom of movement.[64]

Predictably, the new *Ruiz* doctrine was applied at first only parsimoniously by the Dutch government, and also by the Dutch courts (including the supreme adjudicator of administrative

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[61] *ECJ Janko Rottmann v Freistaat Bayern*, vol. C-135/08, 2010.

[62] D'Oliveira, critically, and De Groot and Seling, supportively, identify this development as having been in the cards ever since *Micheletti*, *supra* n. 53, in which the Court said that "Under international law, it is for each Member State, *having due regard to Community law*, to lay down the conditions for the acquisition and loss of nationality." H. U. Jessurun d'Oliveira, "Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, Janko Rottmann v. Freistaat Bayern Case Note 1 Decoupling Nationality and Union Citizenship?," *European Constitutional Law Review* 7, no. 1 (2011): 138–49, https://doi.org/10.1017/S1574019611100073; Gerard René de Groot and Anja Seling, "Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, Janko Rottmann v. Freistaat Bayern Case Note 2 The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters," *European Constitutional Law Review* 7, no. 1 (2011): 150–60, https://doi.org/10.1017/S1574019611100073.

[63] ECJ Gerardo Ruiz Zambrano v. Office National d'Emploi, No. C-34/09 (March 8, 2011).

[64] Iglesias Sánchez, "A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement," 379.

law in the area of immigration, the *Raad van State*). Dutch nationality law, based as it is primarily on descent (*ius sanguinis*) only very rarely provides for the acquisition of Dutch nationality by a child of two non-Dutch parents. Since, therefore, as a rule at least one of a Dutch child's parents will themselves have Dutch nationality, the doctrine was only applied, and the non-Dutch parent would only get a right of residence, in situations where the Dutch parent was dead, in prison, out of the picture in the child's life or otherwise incapacitated as a caretaking parent. Otherwise, the deportation of the non-Dutch parent was deemed not to oblige the child to leave the territory of the European Union. Since the *Raad van State* consistently declined lawyers' suggestions to refer preliminary questions for further clarification, a number of lawyers representing parents of Dutch children deemed not to qualify based on *Ruiz* shifted the legal battle from immigration law to social security law, by appealing the denial of welfare benefits to those parents (due to their lack of a right of residence) to the Dutch social security tribunal, the *Centrale Raad van Beroep*. This court was in fact amenable to referring preliminary questions. The Court ruled in *Chavez-Vilchez*[65] that even if only one parent, the third-country national, were to be denied a right of residence, this could still have the effect, *considering the interest of the child's healthy development and equilibrium*, of forcing the child to leave the territory of the Union.

This judgment had immediate consequences, most prominently for third-country national parents of Dutch children in intact families. Indeed, I recall that the first positive decision I obtained on the basis of the new doctrine was on behalf of the mother of a Dutch child who had entered the Netherlands on a tourist visa together with her Dutch husband and child, for whom it was not preferable to have to go back to her home country to go through the exam and long-term visa procedure. (Without violating any obligations of confidentiality, I can say that the mother, whom we can call "A.", was white, had the nationality of a settler-colonial state, and that the family had no shortage of social and financial capital: indeed, the family had first resided in another EU member state, where the husband had had a job as an executive in a global corporation, then moved to a country outside the EU for another job the husband had,

[65] ECJ H.C. Chavez-Vilchez e.a. tegen Raad van bestuur van de Sociale verzekeringsbank e.a., No. C-133/15 (May 10, 2017).

after which they wished to return to the Netherlands.) Such a person would then easily be able to convert their so-called "*Chavez"* residence document for stay as the parent of the child into a full residence permit as the husband's spouse (considering the stable income of the husband), since the possession of at least some form of residence document exempted the holder from having to return to their home country and take an exam before applying for a Dutch residence permit.

The Dutch government would continue to seek out the boundaries of what the most minimal possible application of *Chavez* would require of it. In any case where the third-country national parent had a valid residence permit (or was suspected of having a right of residence) in any other member state of the EU, it was deemed that the Dutch child was not at all being "forced to leave the territory of the EU" if the parent was denied a right of residence in the Netherlands. (In particular, this limitation most prominently affected parents of Dutch children who had an asylum-related right of residence in another member state.) And for parents of Dutch children in broken families, especially third-country national fathers with an irregular immigration status, it was often an uphill battle to provide the type of documents (e.g. legally binding co-parenting agreements, in the absence of cooperation from the Dutch parent) and statements from third parties to prove that they shared in "specific care responsibilities" for the Dutch child in such a way that the Dutch child could be considered to be sufficiently dependent on the third-country national parent. And finally, as implied before, even if the parent could get a "*Chavez"* immigration status, it was considered to be a temporary immigration status that did not entitle the holder to applying for Dutch nationality by naturalization or applying for a permanent residence permit: indeed, the Dutch government considered that the rights of residence based on Art. 20 TFEU of such a parent were strictly limited to the duration of the child still being a minor, and would expire (like Cinderella's stagecoach turning into a pumpkin) as soon as the child turned 18.

It would take yet another change of strategy on the part of a lawyer, and another choice of basis in EU law, to provoke further preliminary questions to the CJEU from yet another forum. E.K. was the Ghanaian mother of a Dutch child, who applied for a long-term resident permit, i.e. a permanent residence permit on the basis of Directive 2003/109, a legislative instrument of EU

law applying solely to third-country nationals. She could in fact satisfy the rather strict requirements the Dutch government imposes for such a permit: she had passed the full civic integration examination (requiring A2-level fluency in Dutch for speaking, listening, reading and writing, and also correct answers on an exam about Dutch "culture") and had stable income (as a rule, defined as a long-term employment contract with a guaranteed minimum monthly salary of about 1500 euros). And she had legally resided in the Netherlands with her "Chavez" status for over five years. But her application was denied on the basis of her residence status being considered by the Dutch government to be residence "solely on temporary grounds" under Article 3(2)(e) of the Directive. When E.K. appealed this rejection, the court of first instance, the District Court of The Hague seated in Amsterdam, referred preliminary questions about the interpretation of the Directive and of Art. 20 TFEU.

In its decision of 7 September 2022,[66] the Court of Justice expressly reformulated the referring court's question about Article 20 TFEU. The Court considered that the question was about the meaning of residence 'solely on temporary grounds' in the Directive. The Court did, of course, provide a useful summary of its previous case law providing for a right of residence based on Article 20 TFEU. But this was mainly to support its ruling on the provision of the LTR Directive, i.e. that the exclusion of residence 'on temporary grounds' doesn't necessarily mean that any inherently non-indefinite right of residence (as is one derived from a young Union citizen's dependence on their caretaking parent) was meant to be excluded from the scope of the Directive. Rather, 'temporary residence' is to be understood simply as any type of residence that is specifically intended to be of short duration. Nonetheless, the Court did provide a very welcome clarification of its previous Article 20 TFEU case law, to mention that the relationship of dependence does not necessarily automatically end when the child reaches the age of majority (as in fact the Dutch son of E.K. has done), but can continue 'beyond that age if the conditions are met'.

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[66] *ECJ E.K. v Staatssecretaris van Justitie En Veiligheid*, vol. C-624/20, 2022. From here on out, I am heavily borrowing text from an op-ed I wrote commenting on the decision, Jeremy B. Bierbach, "Touching EU Citizenship Only Indirectly: The Nature of the Right of Residence under Article 20 TFEU in the Court of Justice's E.K. Judgment (C-624/20)," *EU Law Live* (blog), n.d., https://eulawlive.com/op-ed-touching-eu-citizenship-only-indirectly-the-nature-of-the-right-of-residence-under-article-20-tfeu-in-the-court-of-justices-e-k-judgment-c-624-20-by-jeremy-b/.

My own first positive decision subsequent to *E.K.*, in an administrative objection procedure against the rejection of the application of a Surinamese man named "B", may have been a result of this suddenly changing tide. B had five Dutch children with two Surinamese-Dutch ex-partners, and his life, as well as the lives of his children, clearly bore the scars of his over 18-year-long struggle to obtain legal residence in the Netherlands, on top of any other tribulations they suffered. He and his second partner had made a defective attempt to move to another member state in order to get him a right of residence based on freedom of movement, but the stress of the move, which required uprooting the family, ended up being fatal to their relationship, and the second partner now bore nothing but ill will toward him. B lived at the home of a cousin of his, and did his best to be involved in the lives of both sets of children, who lived in separate cities, at least an hour's travel time apart. I could not escape the feeling that the initial rejection of his application, based on his supposed failure to be able to demonstrate what "specific care responsibilities" he had in a reliably documented way, was an additional kick to someone who was already down, who was trying his best to hold down a job with temporary work authorizations he could get during the application procedure, and at the same time drive his kids to soccer practice and doctor's appointments whenever he could. His application had additionally been rejected, or at least the basis of his oldest child for a potential approval had been denied him, because that child had recently turned 18.

E.K. was therefore perhaps not, in and of itself, decisive for the positive decision that B did ultimately get, granting him a *Chavez* document—I believe that it was a hearing that B was able to get with at least three of his children, including the oldest, in which they could communicate in their own words how important their father's presence in their lives was. But there are other signs that the spirit of *E.K.* might have prodded the Dutch government no longer to seek out the innermost boundaries of its obligations based on EU law when it comes to Dutch children. Not only would the Dutch government no longer deny holders of *Chavez* documents the ability to apply for long-term resident permits: in quick succession, the Dutch government announced that parents of Dutch children would no longer be subject to the exam and visa requirement for applying for regular Dutch residence permits for stay with their partners, and also, most momentously, announced that holders of *Chavez* documents would also no longer be

denied the ability to obtain Dutch nationality by naturalization. Indeed, that was a rather commonsense reform: it was no longer tenable to maintain that restriction, if the holder of a long-term resident permit (which could not be denied to a *Chavez* parent) cannot be denied the ability to get naturalized.

Out of pure practicality, therefore, the promise of *Micheletti* , that EU law could affect "the conditions for the *acquisition* […] of nationality" of a member state, has now been indirectly realized. it means, most importantly, that Dutch children of a third-country national parent can no longer be denied the possibility of their third-country national parent remaining permanently in the Netherlands (indeed, gaining Dutch nationality themselves) and being around for the rest of their lives, and not just as a temporary caretaker.

Conclusion: developing the promise of EU citizenship as a norm of equality

As I have written elsewhere,[67] *Ruiz Zambrano* was the Court's *Brown* v. *Board of Education*[68] moment. This was a comparison to the moment in 1954 in the case-law of the Supreme Court of the United States when the status of being a United States citizen, and the rights of equal protection deriving from the 14th Amendment of the US Constitution, was first successfully invoked by citizens who had not crossed an interstate border in order to set aside the discriminatory laws of the state in which they resided. Similarly, the African American citizens involved were also young, school-going children, for whom the Supreme Court ruled that being deprived by state law of quality, non-segregated education had a negative impact on their healthy development as US citizens and their full integration in society.

In my practice, I continue to see parallels between the imposition of immigration restrictions on third-country national parents of young Dutch citizens and apartheid regimes such as segregation in the United States. The parents who must rely on Article 20 TFEU, and whose claims are most frequently denied, are overwhelmingly racialised persons with the nationalities of former European colonies, meaning that their children, too, are racialised in

[67] Bierbach, *Frontiers of Equality in the Development of EU and US Citizenship*, 444.
[68] *Oliver Brown, et al. v. Board of Education of Topeka, et Al.*, *347 U.S. 483*, 1954.

Dutch society. For these children, the absence of support from the third-country national parent undoubtedly will have a negative impact on their education; indeed, where the Dutch parent is already absent, the child will not even effectively be able to live in the Netherlands to get an education there. This really does amount to an "apartheid" treatment based on a racial distinction within a member state's own set of nationals.

I still see significant room for the Court to develop its Article 20 TFEU case law on Union citizen children (such as in another pending preliminary reference from a Dutch court, *Mère thaïlandaise*, C-459/20), by reference not to the Union citizen child as a passive object compelled by external forces (who is potentially "obliged to leave the territory of the Union" if the TCN parent is denied legal residence). And indeed, not only by reference to children. The concept of EU citizenship can be further developed from the perspective not of movement, but of the *autonomy* of the EU citizen and of the *integration* of the EU citizen in family and social networks, especially in that citizen's own member state of nationality. Rather than the ideal EU citizen being a colorless, internationalized figure moving across borders in expatriate circles, it can be acknowledged that an EU citizen has a foundation precisely in her or his rootedness and identity with his or her own member state and own communities. *And precisely* because EU law once tried to deny freedom of movement to denizens of territories that member states had "institutional ties" with, it is now incumbent on EU law, via a new conception of EU citizenship, to provide reparations for that past exclusion.