

## European Citizenship Across Borders

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### A. Introduction

It is no exaggeration to say that the concept of citizenship epitomises the modern political ideal of freedom and equality. The privileged status of citizenship grants rights and freedoms which are actually enforced and protected. And the citizen alone enjoys political autonomy in the sense of being his own master. It is this very political dimension – the hallmark of citizenship *stricto sensu* – that structures and stratifies many aspects of social life since it empowers citizens to shape their polity through the democratic process. Citizenship may thus be considered as a principle of political and social self-organisation, rather than as a merely legal concept. By the same token, citizenship has an affective dimension as it establishes a special relationship between the polity and the people, a bond of affiliation which fosters the feeling of collective identity.<sup>1</sup> Considering the whole range of rights, duties and allegiances that citizenship establishes, the concept eventually acts as a means of inclusion and exclusion respectively. As Hannah Arendt rightly stressed, being excluded from a community of citizens deprives people from one of the most fundamental human rights.<sup>2</sup>

Given that citizenship is of such paramount importance in the national polity, the introduction of a citizenship of the European Union (EU) within the European Union Treaty at Maastricht in 1992 legitimately raised many hopes. And this even more so as European democracy *lato sensu* was increasingly deemed as largely deficient, as confirmed by Roland Bieber's insightful work on issues of democratic legitimacy in the Union.<sup>3</sup> In those circumstances, it is no surprise that the Union cit-

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1 See e.g. Joseph H. Carens, *Culture, Citizenship and Community: A Contextual Exploration of Justice as Evenhandedness*, 2000, 166-173; Joe Painter, *Multi-level Citizenship, Identity and Regions in Contemporary Europe*, in: Anderson (ed.), *Transnational Democracy: Political Spaces and Border Crossings*, 2002, 93, 95; André Utzinger, *Mythen oder Institutionen? Zur Bildung kollektiver Identitäten im postnationalen Europa*, in: Cheneval (ed.), *Legitimationsgrundlagen der Europäischen Union*, 2005, 235, 245; Joseph H. Weiler, *European Citizenship – Identity and Differently*, in: La Torre (ed.), *European Citizenship: An Institutional Challenge*, 1998, 1.

2 Hannah Arendt, *The Origins of Totalitarianism*, 1951; see also Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens*, 2004, 49-69.

3 See e.g. Roland Bieber, *Demokratische Legitimation in Europa: Das Spannungsverhältnis zwischen den Funktionen von Europäischem Parlament und staatlichen Parlamenten*, *Zeitschrift für europarechtliche Studien* 1999, 141.

izenship rights' catalogue of Articles 17-21 ECT (after the renumbering of the Treaty establishing the European Community [ECT] at Amsterdam) was not thought at first to live up to these expectations. Grouping those rights under the title of Union citizenship was perceived by some as little more than a misnomer since EU citizenship rights' positive guarantees were at most a reiteration of existing rights of free movement under the restrictive conditions of the common market regime. In fact, Union citizenship was deemed to be an empty promise for a long time. Notwithstanding this poor start, things began to change in the early 2000s, mainly through the intervention of the European Court of Justice (ECJ). Thanks to the latter's case-law, both the scope *ratione personae* and the scope *ratione materiae* of EU citizenship rights have been broadened. This fleshing-out of Union citizenship raises new difficulties, however. As long as Union citizenship did nothing to deserve its name, the only citizenship that held sway in Europe was national citizenship. Today, the situation has changed.<sup>4</sup>

Recent developments have shown how Union citizenship has acquired a life of its own, and this emancipation will necessarily have an impact on the future of national citizenship in Europe. In fact, as this chapter will argue, one might even say that national citizenship can only be conceived as integrated in a multi-layered and cross-border form of political membership in Europe. The set of rights held by European citizens is actually composed of rights conferred by the EU and rights conferred by Member States. Moreover, the implementation of those rights is ensured by both EU and national authorities. The true value as well as the deficits of the current EU citizenship regime can only be assessed therefore by taking into account the dynamic interplay between those different levels. Accordingly, the chapter suggests that it is crucial to speak of **European citizenship** as the overarching concept constituted by EU citizenship and national citizenships. In order to come to grips with this complex concept, the chapter starts with a discussion of the current legal regime of Union citizenship and unpacks some of its shortcomings (section B). It then addresses two main questions. First, what exactly is the latter's impact on national citizenship and what relevance might the concepts of nationality and political membership retain at the national level (section C)? Second, how is the emerging concept of European citizenship shaped and how should it be developed in the future (section D)?

## B. European Union citizenship today

### I. The legal regime of Union citizenship

The legal basis of Union citizenship in European primary law lies in Articles 17 to 22 ECT. The Charter of Fundamental Rights of the European Union (hereafter Char-

<sup>4</sup> Samantha Besson/André Utzinger, Future Challenges of European Citizenship: Facing a Wide-Open Pandora's Box, *European Law Journal* 2007 (forthcoming).

ter) reiterates those rights in its Chapter on citizenship and more precisely in Articles 39 to 46. It brings in a few new rights from the bulk of the EC Treaty, splitting other rights in two and extends the personal scope of most rights except political rights in order to encompass Third Country Nationals (TCNs) residing in the EU. Most recently, the Treaty establishing a Constitution for Europe (TCE), whose future is highly uncertain, guarantees EU citizenship rights through the constitutionalised Charter in Articles II-99 to 102 TCE and, in a shorter form, in Article I-10 TCE, without, however, adding anything new to the prior regime. Scope precludes providing a complete account of the legal regime of EU citizenship in this chapter, and strategic choices have been made accordingly in the exposition of its major characteristics.<sup>5</sup>

Intrinsically related to the democratic ideal, the concept of EU citizenship was introduced by Articles 8 ff. of the Maastricht Treaty as part of a larger strategy to placate the democratic deficit of the Union. It was then slightly revised by Articles 17 to 21 of the Amsterdam Treaty with an additional qualification. According to Article 17(1) ECT, 'every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.' This has two implications. First, citizenship of the Union has a **derivative** nature since holding the nationality of a Member State is prerequisite for acquiring it. Second, EU citizenship is not meant to replace national citizenship. This is also what one refers to as the **complementary** nature of EU citizenship.

Article 17(2) ECT identifies EU citizenship with a legal relationship between the Union and Member State nationals to specific rights and duties are attached; citizens of the Union enjoy all those rights which are guaranteed by the EC Treaty and secondary legislation, and are subject to the respective duties. Thus, the benefits of Union citizenship are not limited to the rights conferred by Articles 18-21 ECT, which are not exhaustive.<sup>6</sup> EU citizenship is evolutionary and can expand to new rights together with the expansion of the scope of the EC Treaty. In fact, Article 22 ECT makes plain that the concept of citizenship of the Union was explicitly designed to be developed further.<sup>7</sup>

It is also true, however, that Articles 18-21 ECT mainly restate the most topical rights from the Treaty, with the exception of new political rights protected by Articles 19 and 20 ECT. Therefore, the regime of Union citizenship is quite piecemeal; it does not match lists of national citizenship rights and remains particularly thin in terms of political rights. Citizenship rights expressly protected are the right of free movement and residence within the territory of any Member State (Article 18 ECT),

<sup>5</sup> For further reading see e.g. Stefan Kadelbach, Union Citizenship, Jean Monnet Working Paper 2003; Dora Kostakopoulou, Ideas, Norms and European Citizenship: Explaining Institutional Change, *Modern Law Review* 2005, 233; James D. Mather, The Court of Justice and the Union Citizen, *European Law Journal* 2005, 722; Norbert Reich, The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union, *European Law Journal* 2005, 675.

<sup>6</sup> Roland Bieber/Astrid Epiney/Marcel Haag, *Die Europäische Union: Europarecht und Politik*, 7th edn, 2006, 58f.; Kadelbach (fn. 5), 9, 16.

<sup>7</sup> Bieber/Epiney/Haag (fn. 6), 58; Koen Lenaerts/Piet Van Nuffel, *Constitutional Law of the European Union*, 2nd edn, 2005, 546.

the right to vote and stand as a candidate in municipal elections and in elections to the European Parliament in the Member State in which the citizen lawfully resides (Article 19 ECT), the right to diplomatic and consular protection by any Member State's authorities in third countries (Article 20 ECT), and the right to petition to the European Parliament and to apply to the European Ombudsman (Article 21 ECT).

## II. *An intermediary critical assessment*

A first evaluation of Articles 17-22 ECT, and the legal regime of EU citizenship in general, leads to an ambiguous result. Rather than being the direct source of rights hoped for in the earlier case-law<sup>8</sup>, the adoption of Articles 17-22 ECT has often been deemed as a purely rhetoric exercise in window-dressing. The cause of concern lies not only in those rights' content, as we have just seen, but also in their material and personal scope.

If one starts by asking which rights pertain exclusively to the status of citizenship of the Union and hence whether they have a **material scope** of their own, the answer is disappointing. For a long time, Union citizenship merely consisted of pre-existing fundamental market freedoms.<sup>9</sup> Its rights only applied within the material and hence mostly economic scope of the Treaty. Moreover, these rights are inherently limited by pre-existing restrictions in the Treaty.<sup>10</sup> Hence the early concern about the market-oriented nature of EU citizenship.<sup>11</sup> Of course, there are truly political rights such as the democratic rights granted by Article 19 ECT and the right to diplomatic and consular protection of Article 20 ECT. But these two rights have no direct effect and are hence barely enough to emancipate EU market citizenship into a truly political citizenship.

To make things worse, EU citizenship rights' **personal scope** is either too limited or too broad. To start with, the scope of beneficiaries is inherently limited to European migrants; EU citizens' rights can be exercised and are of specific value only to those citizens who migrate within the EU or have some kind of transnational connection – and these are, in fact, very few.<sup>12</sup> As a consequence, the reverse discrimination of EU citizens 'at home' (i.e. discrimination of nationals in purely national situations

8 See decision C-168/91, *Konstantinidis v Stadt Altensteig Standesamt*, [1993] ECR I-1191. See also Advocate General Jacobs in decision C-224/02, *Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö*, [2004] ECR I-5763.

9 See the joined decisions C-64 & 65/96, *Land Nordrhein-Westfalen v Uecker*, and *Jacquet v Land Nordrhein-Westfalen*, [1997] ECR I-3171 in which the ECJ emphasised that EU citizenship rights did not extend the scope *ratione materiae* of the EC Treaty and were not vested with direct effect. See Article 18(1) and 17(2) ECT.

10 See e.g. *Michelle Everson*, *The Legacy of the Market Citizen*, in: Shaw/Gillian (eds), *New Legal Dynamics of European Union*, 1995, 73.

12 The total number of non-nationals living in the 2 Member States in 2004 was around 25 millions, which is equivalent to just below 5.5 percent of the total population (see *Eurostat*: Non-national populations in the EU Member States, Statistics in Focus: Population and Social Conditions no. 8, 2006). According to the Second Annual Report on Migration and Integration, the number of Third Country Nationals residing in the EU was 15.2 million on 1 January 2003 (see SEC(2006) 892, 3). As a result, roughly 9.8 million Union citizens – or only about 2.2 percent – actually live in a Member State of which they are not nationals.

by comparison to how nationals of other Member States would be treated in the same country) is not forbidden.<sup>13</sup> But the opposite is also true; other EU citizenship rights of a non-economic nature are quasi-universal in their personal scope, thus progressively diluting the inherently exclusive nature of the citizenship status. For instance, the rights comprised in Article 21 ECT are not exclusively conferred on citizens but, by reference to Articles 194 and 195 ECT, to all natural and legal persons having lawful residence within the EU. This lack of exclusion is reinforced in the Charter where all rights, except the political rights granted in Article 39, 40 and 46, are extended to Third Country Nationals legally residing in the EU or to all subjects of EU law.<sup>14</sup> As a result, the only source of exclusive citizenship rights lies in the democratic rights granted by Article 19 ECT and the right to diplomatic and consular protection of Article 20 ECT.

Besides the limited material and personal scope of EU citizenship rights, one may also regret the latter's **passive** orientation. EU citizenship is based on rights rather than duties, although the republican idea of citizenship as political self-organisation implies giving an active role to the citizen. And this may in turn require vesting them with duties, such as, to quote two examples, military service or taxes.<sup>15</sup>

## III. *Recent jurisprudential developments*

Thanks to the European Court of Justice (ECJ)'s active case-law in recent years, Union citizenship has started to develop and hold some of the promises made in 1992. This evolution shows how Union citizenship may evolve towards a more inclusive form of political membership both in terms of its personal and material scope.<sup>16</sup> More precisely, the ECJ has constantly developed the social dimension of EU citizenship, thus gradually turning it into a source of rights of its own.<sup>17</sup>

This evolution has taken place primarily through the combined reading of EU citizenship and anti-discrimination provisions, and, more precisely, of Article 18 ECT's freedom of movement and residence and Article 12 ECT's prohibition of discrimination on grounds of nationality. Through this connection, the case-law finally expanded EU citizenship by making it the fundamental status from which

13 *Lenaerts/Van Nuffel* (fn. 7), 137.

14 *Roy W. Davis*, *Citizenship of the Union . . . Rights for All*, *European Law Review* 2002, 121.

15 See e.g. *Norbert Reich*, *Union Citizenship – Metaphor or Source of Rights?*, *European Law Journal* 2001, 4, 20f.; *Reich* (fn. 5), 698; *Marie-José Garot*, *European Citizenship and European Integration*, *Thinking Outside the Box* Editorial Series 2003; *Augustin J. Menéndez*, *Taxing Europe: Two Cases for a European Power to Tax*, *Arena Working Paper* 2003.

16 See *Kostakopoulou* (fn. 5) on the different phases in the ECJ's case-law pertaining to EU citizenship.

17 *Piet Eeckhout*, *The EU Charter of Fundamental Rights and the Federal Question*, *Common Market Law Review* 2002, 945; *Siofra O'Leary*, *The Relation between Community Citizenship and Fundamental Rights*, *Common Market Law Review* 1995, 519. See also Advocate General Jacobs in *Konstantinidis* (fn. 8): »In my opinion, a Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that [ . . . ] he will be treated in accordance with a common code of fundamental values [ . . . ]. In other words, he is entitled to say »*civis europeus sum*« and to invoke that status in order to oppose any violation of his fundamental rights.«

citizens may directly derive individual rights, while also providing at the same time a more universal scope for the protection against discrimination in EC law. Until recently, indeed, for Article 12 ECT to apply, one needed to show that the issue at stake fell into the scope of application of the Treaty. This implied falling into the scope *ratione materiae* of EC law and required some involvement in an economic activity.<sup>18</sup> Recent case-law has changed this. Other cases have also shown how the scope *ratione personae* of EU citizenship is gradually being extended by the ECJ.<sup>19</sup>

The first group of cases have extended the scope *ratione materiae* of EU citizenship in extending its rights to **non-economic agents** such as students, unemployed people, family members of workers, etc. The first decision in this jurisprudential evolution was the ECJ's judgement in the *Martinez Sala* case in 1998.<sup>20</sup> In this case, the ECJ allowed Ms Martinez Sala (a Spanish national, former worker but currently unemployed, who was lawfully residing in Germany) access to social benefits in her host Member State even though she was not an economic migrant. In the *Grzelczyk* case in 2001 the ECJ confirmed that the material scope of EU citizenship rights is defined by the very fact of migration and the exercise of the right to move and reside freely in another Member State, independently of an economic activity.<sup>21</sup> What the ECJ acknowledged then was the direct effect of Article 18 ECT. Since 2002, the ECJ has pursued its work of extension of the scope *ratione materiae* of EU citizenship, for instance in the *Ninni-Orasche*, *Collins*, *Trojani*, and *Bidar* cases.<sup>22</sup> It is this very jurisprudential evolution that gave rise to the Directive 2004/38/EC which recognises EU citizens' free movement and residence rights in general and codifies the case-law *acquis*.<sup>23</sup>

A second group of decisions in the ECJ's case-law points to the progressive extension of the scope *ratione personae* of EU citizenship rights. This extension started with the *Carpenter* and *Baumbast* cases in 2002.<sup>24</sup> In those two cases, the ECJ granted EU citizens' **third-country-national family members** quasi-citizenship rights. Since 2002, the ECJ has pursued its work of extension of the scope *ratione*

18 Kadelbach (fn. 5), 31, 36.

19 Reich (fn. 5), 679ff.

20 Decision C-85/96, *Martinez Sala v Freistaat Bayern*, [1998] ECR I-2691.

21 Decision C-184/99, *Grzelczyk v Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve*, [2001] ECR I-6193.

22 See decisions C-413/01, *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, [2003] ECR I-13187; C-138/02, *Collins v Secretary of State for Work and Pensions*, [2004] ECR I-02703; C-456/02, *Trojani v Centre publique d'aide sociale de Bruxelles*, [2004] ECR I-7573; C-209/03, *The Queen (on the application of Dany Bidar) v London Borough of Ealing and Secretary of State for Education and Skills*, [2005] ECR I-2119. The reasoning in *Bidar* has since been confirmed in the decision C-147/03, *Commission of the European Communities v Republic of Austria*, [2005] ECR I-5969.

23 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/77.

24 Decisions C-413/99, *Baumbast v Secretary of State for the Home Department*, [2002] ECR I-7091 and C-60/00, *Carpenter v Secretary of State for the Home Department*, [2002] ECR I-6279. Drawing on *Carpenter*, see also decision C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State*, [2002] ECR I-6592. For the relation between EC law and national migration law, see also Advocate General's Opinion in the decision C-109/01, *Secretary of State for the Home Department v Akrich*, [2003] ECR I-9607.

*personae* of EU citizenship to non-European family members as exemplified in the *Chen* case.<sup>25</sup>

#### IV. Open questions

As a result of this extremely active case-law, EU citizenship is gradually emancipating and turning into a more inclusive form of social membership, which is in line with universal human rights guarantees.<sup>26</sup> Nonetheless, different questions are still open and remain a source of concern. One may group these issues in two main categories depending on whether they relate to the material content of EU citizens' rights or to their personal scope.<sup>27</sup>

With respect to EU citizenship rights' **material scope**, one may regret, first of all, that, despite their newly acquired direct effect, these rights still have to be invoked together with Article 12 ECT's non-discrimination principle; this prevents EU citizenship from becoming the direct source of all rights hoped for in the *Konstantinidis* case.<sup>28</sup> Second, EU citizenship rights may be restricted by reference to the justifications accepted in the Treaty (18(1) ECT by analogy). This has always been an object of concern since it subjects EU citizenship rights to limitations one may accept in relation to fundamental economic freedoms but not to other social and political rights. The difficulty has increased as the ECJ's case-law has recently become more generous in granting justification for national limitations to EU citizenship rights than it would have, had these rights been invoked as one of the four fundamental freedoms.<sup>29</sup> Moreover, these justifications are quite vague and leave it to national authorities and courts to determine where to draw the line; this is quite paradoxical given the traditionally strict limitations placed by EC law on national restrictions to EC rights and principles.<sup>30</sup> A final concern is that of social levelling-down in Member States, which may occur in reaction to the increasing number of rights to social benefits attached to EU citizenship and this despite the legitimate restrictions to those rights recognised by the ECJ in its recent case-law.<sup>31</sup>

As to EU citizenship rights' **personal scope**, one may mention the following three concerns. First, the transnational element, although it has been partially watered-

25 Decision C-200/02, *Zhu, Chen v Secretary of State for the Home Department*, [2004] ECR I-9925.

26 See Eeckhout (fn. 17); O'Leary (fn. 17); Jo Shaw, The Many Pasts and Futures of Citizenship in the European Union, *European Law Review* 1997, 554; Joseph H. Weiler, To Be a European Citizen: Eros and Civilization, in: The Constitution of Europe: 'Do the new clothes have an emperor?', and other essays on European integration, 1999, 324; Samantha Besson, The European Union and Human Rights: Towards a new kind of post-national human rights institution, *Human Rights Law Review* 2006, 323; Besson/Utzinger (fn. 4).

27 See on the detail of those future challenges, Besson/Utzinger (fn. 4).

28 See decision C-168/91, *Konstantinidis* (fn. 8).

29 See decision C-209/03, *Bidar* (fn. 22).

30 See e.g. Juliane Kokott, EU citizenship – citoyens sans frontières?, *European Law Lecture* 2005, Durham European Law Institute; Francis G. Jacobs, Citizenship of the Union – a legal analysis, *European Law Journal* 2007 (forthcoming).

31 Reich (fn. 5), 698. Although Directive 2004/38/EC (fn. 23) improves the situation in the latter perspective, it does not tackle the problem at its root: see Besson/Utzinger (fn. 4).

down in *D'Hoop*<sup>32</sup>, *Carpenter* and *Schempp*<sup>33</sup>, is still a necessary condition of application of EU citizenship rights. Hence the problem of reverse discrimination persists, thus belying the ideal of EU citizenship as the fundamental status and basis of all rights in the EU. Second, derivative EU citizenship is, in conformity with international law<sup>34</sup>, determined by reference to the many rules of conferral and withdrawal of nationality and hence to the rules of citizenship-acquisition of particular Member States.<sup>35</sup> There are, in other words, nowadays 27 modes of acquiring the nationality of a Member State and hence EU citizenship. This is a source of great inequality across Europe and jeopardises the inclusive and universal nature of EU citizenship.<sup>36</sup> The third area of concern is the exclusion of long-term residents in the EU from the benefits of EU citizenship. Third Country Nationals remain generally deprived of political rights with the exception of those rights recognised directly at national level in a few European countries. This is objectionable from the point of view of the democratic principle of inclusion in the decision-making process of all those affected by a decision.<sup>37</sup> Since European Others may as European citizens take part in municipal and European elections in other Member States, it is difficult to see why non-European Others legally residing in the EU could not benefit from the same rights. If the tension between exclusive citizenship and inclusive human rights is disturbing at national level, it is even more difficult to maintain at post-national level when nationals of other Member States are given rights in a Member State which were previously reserved to nationals of that Member State.<sup>38</sup> Of course, progress has been made in Europe as well as on the national level where foreigners are granted more and more rights. For instance, Article 41 to 46 of the Charter of fundamental rights, but also Directive 2000/43/EC and, more importantly, Directive 2003/109/EC show a clear evolution in favour of the harmonisation of long-term residents' rights in the EU.<sup>39</sup> Nevertheless, these rights are still very limited and do not entail political rights.<sup>40</sup>

32 Decision C-224/98, *D'Hoop v Office national de l'emploi*, [2002] ECR I-6191. See also decision C-224/02, *Pusa* (fn. 8), and Advocate General's Opinion in C-224/02, *Pusa* (fn. 8), par. 18-22.

33 Decisions C-60/00, *Carpenter* (fn. 24) and C-403/03, *Schempp v Finanzamt München V*, [2005] ECR I-6421.

34 See e.g. International Court of Justice, *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgement, ICJ Reports 1970, 3; and *Nottebohm*, Second Phase, Judgement, ICJ Reports 1955, 4.

35 See recently the decisions C-200/02, *Chen* (fn. 25), and C-369/90, *Micheletti v Delegacion del Gobierno en Cantabria*, [1992] ECR I-4239. See, however, decision C-378/97, *Criminal Proceedings v Wijsenbeek*, [1999] ECR I-6207. See also *Reich* (fn. 15).

36 See e.g. *Reich* (fn. 5).

37 See Samantha Besson, *Deliberative Democracy in the European Union. Towards the Deterritorialization of Democracy*, in: Besson/Marti (eds), *Deliberative Democracy and Its Discontents*, 2006, 181 ff.

38 See e.g. *Besson* (fn. 26).

39 Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22; Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, [2004] OJ L 16/44.

40 *Reich* (fn. 5), 694 ff.

## C. National citizenship tomorrow

### I. Three stumbling blocks

Before early solutions to these open questions can be ventured, it is necessary to investigate further the relationship and the tension between EU citizenship and national citizenship. As exposed in the introduction, it is somewhat pointless to devise a comprehensive scheme of EU citizenship without taking into account the interplay of the various levels of the European polity. Current shortcomings in the EU citizenship regime can only be remedied by considering simultaneously ways in which it could complement national citizenship regimes. In fact, EU citizenship is not merely complementing citizenship of the Member States but has already constructed inroads to the principle of national citizenship. Although EU citizenship is built upon national citizenship to create a multi-levelled form of European citizenship, the granting of its rights and their enforcement also take place outside of the boundaries of national politics and, more importantly, independently of some of the criteria traditionally set in national politics. And this, in turn, is bound to have an impact on both national nationality and national citizenship. This impact need not, however, be feared as the growing interdependence between the national and the European level is gradually giving rise to a new European citizenship.

If one analyses the relationship between the two legal statuses of national citizenship and EU citizenship, one can observe three main points of friction, which, in the following, will be formulated as three fundamental questions. They concern three main building blocks of the traditional concept of citizenship.

**First, what is the criterion for being or becoming a citizen?** In the case of national citizenship, the answer to this question is usually nationality, be it based on either *ius sanguinis* or *ius soli*. Union citizenship, on the other hand, decouples citizenship from nationality in three steps. Firstly, although Union citizenship relies on national citizenship, it does not create a European nationality of its own and therefore severs the fundamental link between the two. Secondly, Union citizenship gives citizenship rights to nationals of a Member State by virtue of their residing in another Member State. Thus, Union citizenship creates a new category of European non-nationals that weakens the traditional exclusivity of national citizens' rights in each Member State.<sup>41</sup> Finally, Third Country Nationals legally residing in a Member State are able to benefit from quasi-citizenship rights in that Member State. Even though Union citizenship is based on national nationality and hence on national citizenship, its legal regime reveals a shift from nationality to lawful residence as a criterion for being granted certain citizenship rights in the EU.

**Second, which authorities grant citizenship rights?** Citizenship used to be granted by the state alone. Yet in a multi-level system, such as the European polity, there is more than one authority granting citizenship rights. Rather than having people being granted a comprehensive set of citizenship rights by one authority that

41 See *Lenaerts/Van Nuffel* (fn. 7), 550.

then ought to be respected by others, European citizenship rights are fragmented materially across different functional layers of political organisation over the same territory.<sup>42</sup> As a consequence, national governments no longer hold absolute sovereignty over the rights and duties of their citizens. On the one hand, EC law limits the ways in which a Member State may deprive its own citizens from their national citizenship rights, since this would then condition their benefit of EU citizenship rights.<sup>43</sup> On the other, each Member State can determine, through its nationality-acquisition laws, who can be the beneficiaries of EU citizenship rights in other Member States.

**Finally, how is the set of citizenship rights enforced?** In Europe, people are citizens of both a Member State and the Union. Since the main duty-holders corresponding to Union citizenship rights are the Member States, the whole set of recognised rights for Union citizens remains attached to the national level in the first instance, and is thus opposable mainly to other Member States.<sup>44</sup> However, citizens of the Union see some of their rights, which pertain to that status, as protected by European authorities as well. This tendency is taken further as citizenship of the Union is becoming a source of rights of its own and this in purely national contexts as well, since, in some (as yet rare) cases of loose transnational connection, EU citizenship rights may be opposed to one's own Member State on top of one's own national citizenship rights vis-à-vis one's state. So, European citizenship rights *lato sensu* are not only multi-levelled in their origins, but also in their enforcement.

## II. From nationality to residence

Each of these three questions and their respective answers help drawing the possible future of national citizenship. Interestingly, answers to all three questions point in the same direction: to an increasing degree, citizenship rights can be acquired, are granted and will be protected on grounds of lawful residence rather than nationality. This development ensues from the fact that European non-nationals and, under certain circumstances, even non-European non-nationals enjoy some of the rights national citizens enjoy in each Member State.<sup>45</sup> Indeed, Member States are facing a situation where non-nationals are now vested with rights that were originally genuine national citizenship rights. The principle of nationality, which was the basis of citizenship in the so-called Westphalian system, seems to be seriously undermined. Although Union citizenship remains formally based on 'national citizenship' (see Article 17(1) phr. 2 ECT), it need no longer be deemed materially based on the 'nationality' of a Member State (see Article 17(1) phr. 1 ECT). Consequently, the holding of a particular nationality appears to have become less important. In turn,

42 See Jean L. Cohen, *Changing Paradigms of Citizenship and the Exclusiveness of the Demos*, *International Sociology* 1999, 245.

43 See decision C-378/97, *Wijzenbeek* (fn. 35). See also *Reich* (fn. 15).

44 *Kadelbach* (fn. 5), 15.

45 See the recent European Court of First Instance's decision granting the right to diplomatic protection to all non-national residents in a Member State: decision T-49/04, *Hassan v Council and Commission*, 12 July 2006, unpublished.

given that a particular nationality is usually the basis for national citizenship, it is fair to assume that the status of national citizenship will be less relevant and functional in the future.

It is likely that these changes in legal terms will, in the long run, also affect the social and psychological dimensions of citizenship. If nationals and non-nationals are, to an increasing degree, treated equally, people's allegiances and their loyalty to the national state itself are likely to alter. Their feeling of belonging is expected to be less exclusively directed towards the national state. Instead, Union citizens might direct their allegiance towards the Union not only because they owe some of their basic rights as citizens to the EU, but also because the EU might be protecting some of them. This might eventually create 'an immediate bond of affiliation'<sup>46</sup> between citizens of Member States and the Union. Furthermore, Article 19 ECT, and participation in municipal elections, could foster feelings of belonging on both the transnational and the sub-national level in other Member States than that of one's nationality, and thus further challenge national identity as the primary political identity in favour of more local albeit foreign entities. The long-run impact of these developments might bear on solidarity, stratification and social cohesion, which would all partially shift away from the guiding principles of nationality and national citizenship.

## D. Towards European citizenship

### I. The democratic inclusion dilemma

Considering the function of EU citizenship against the background of these developments in national citizenship, the former does not appear as an exclusive status pertaining to a comprehensive catalogue of rights which only Union citizens would enjoy. It has rather become the inclusive status of European citizenship *lato sensu* in that it bridges the exclusionary nature of national citizenships in Europe by opening national polities to one another's nationals and even to non-nationals. Nevertheless, if its main quality is to promote political inclusion and to create a European-wide socio-legal sphere of equality, the current regime is still largely deficient. In order to flesh out its material and personal scope of application, three alternative strategies could be envisaged. They strive to give European nationals, European non-nationals and non-European non-nationals a similarly comprehensive set of citizenship rights hence fulfilling the promise of citizenship as full membership in the European polity and legal community *lato sensu*.<sup>47</sup>

46 Ulrich K. Preuss, *Citizenship in the European Union: A Paradigm for Transnational Democracy?*, in: Archibugi/Held/Köhler (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy*, 1998, 138, 139.

47 See e.g. Thomas H. Marshall, *Citizenship and Social Class*, 1950; Jo Shaw, *The Interpretation of European Union Citizenship*, *The Modern Law Review* 1998, 293.



First, European citizenship could be redefined and granted at EU level only on grounds of **residence in any Member State**, and no longer at national level on grounds of national nationality. In this scenario, the Union would, in a 'top down' manner, extend European citizenship to all lawful long-term residents in the European territory. Impinging on the core of national sovereignty, and the democratic principle of self-constitution, this approach would clearly be rejected by Member States who fear for their national prerogatives. Apart from this practical obstacle, it would sever the link between national citizenship and Union citizenship which is crucial to a multi-levelled polity that values local differences.

Second, **some Union citizenship rights**, and especially political ones, but not the whole status of citizenship as such, could be extended to Third Country Nationals residing in the EU.<sup>48</sup> The recent tendency in case-law and legislation seems to take this direction. This is the case, for instance, of the extension of the scope of application *ratione personae* of some EU citizenship rights guaranteed in the Charter (Articles 41 to 45), with the exception so far of political rights. This also seems to follow from the recent harmonisation of Third Country Nationals' residence rights in the EU.<sup>49</sup> The difficulty with this approach is that it risks diluting the idea of political membership and the inherent exclusivity of citizenship<sup>50</sup>, on the one hand, and to create second-class citizens, on the other.

A third alternative might be to encourage Member States to promote naturalisation at national level on grounds of **residence** and thus to extend the European political franchise through national ones.<sup>51</sup> This third variant presents the advantage of bringing exclusive European citizenship closer to universal human rights guarantees without superimposing a homogeneous socio-legal structure to the national one. It clearly follows a 'bottom to top' approach, which does not betray the multi-levelled structure of the European polity. Residence-based naturalisation aims at integrating people into their immediate social environment and thus allows for local differences. In theory, this scenario seems perfectly sound. In practice, however, Member States might be reluctant to harmonise naturalisation conditions on the basis of residence. One might therefore simply wait until residence gradually imposes itself as the most inclusive and democratic criterion for national citizenship, as this is starting to be the case in certain Northern European countries.<sup>52</sup> Alternatively, a certain pressure from the EU level might accelerate and confirm this now rapidly progressing evolution.<sup>53</sup>

48 See Lynn Dobson, *Constituting Which Goods and Whose Rights?*, Federal Trust Online Constitutional Paper 2003.

49 See Directive 2004/38/EC (fn. 23), and Directive 2003/109/EC (fn. 39).

50 See Davis (fn. 14).

51 See Andreas Follesdal, *Third Country Nationals as Euro Citizens: The Case Defended*, Arena Working Paper 1998.

52 Patrick Weil, *Access to Citizenship: A Comparison of Twenty Five Nationality Laws*, in: Aleinikoff/Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices*, 2001, 17.

53 See the positive signals in two recent cases: C-145/04, *Spain v United Kingdom*, 12 September 2006, unpublished, and C-300/04, *Eman, Sevinger v College van burgemeester en wethouders van Den Haag*, 12 September 2006, unpublished.

## II. Cross-border citizenship in Europe

The proposal that national and hence EU citizenship should be based on residence is the natural consequence of the gradual externalisation of citizenship in Europe, first to European non-nationals in each Member State and then to non-European non-nationals.<sup>54</sup> Since the current regime is, at least partially, already heading in that direction, the concept of EU citizenship has triggered significant development.

Admittedly, citizenship of the Union is a far cry from a fully-fledged citizenship as we know it from the democratic national state. Yet, a comparison between EU citizenship and national citizenship is beside the point. Since EU citizenship is both a derivative and a complementary concept, its theoretical and practical importance lies in its complementarity with national citizenship. The set of rights held by European citizens is composed of rights conferred by the EU and of rights conferred by Member States, on the one hand, and of rights enforced by the EU and of rights enforced by Member States, on the other. These levels are interwoven in such a way that they cannot be disentangled without sacrificing the value of the respective rights. Thus, European citizenship is more than the sum of its parts. The European Union is neither a mere Union of citizenries nor a Union as single citizenry.<sup>55</sup>

European citizens no longer refer in this case to national citizens but to the combination of national citizens *qua* European citizens.<sup>56</sup> Thus, notwithstanding its limited scope, the concept of European citizenship is truly innovative. It builds a post-national form of citizenship upon national citizenship without replacing it nor national nationality, but in creating at the same time a more inclusive form of political membership in Europe which generates nationality-independent rights across Member State borders. Hence the proposed global concept of European citizenship<sup>57</sup> constituted by the imbrication of EU citizenship and national citizenships.

This cross-border<sup>58</sup> concept of European citizenship is more suited to protecting the rights of people than purely national regimes. What is sometimes described as a process of 'denationalisation'<sup>59</sup> points to the fact that some rights can no longer be granted and enforced within the realm of individual states. Therefore, national citizenship should evolve with EU citizenship towards an integrated form of post-

54 Besson (fn. 26); Samantha Besson, *The European Union qua Agent of Global Justice*, unpublished manuscript (on file with authors); Kalypso Nicolaidis/Justine Lacroix, *Order and Justice Beyond the Nation-State: Europe's Competing Paradigms*, in: Foot/Gaddis/Hurrell (eds), *Order and Justice in International Relations*, 2003, 125.

55 See Besson (fn. 37). See also Kalypso Nicolaidis, *We, The Peoples of Europe ...*, Foreign Affairs 2004, 97.

56 See Besson (fn. 37). In this sense, we follow Weiler (fn. 26), 324-357, although not for the same reasons: one need not believe in national nationalisms to believe in the importance of maintaining many *demos* in Europe as opposed to promoting a single European *demos* à la Habermas (see Justine Lacroix, *L'Europe en procès: quel patriotisme au-delà des nationalismes?*, 2004).

57 This is in fact a denomination that is often already used in common language to refer to EU citizenship, at least in French and English. It is not the case in German for reasons related to the intricate connection between the conceptions of citizenship and nationality.

58 On this notion, see Andreas Follesdal, *Citizenship: European and Global*, Arena Working Paper 2001.

59 Michael Zürn, *Regieren jenseits des Nationalstaates: Globalisierung und Denationalisierung als Chance*, 1998; Jürgen Habermas, *Die postnationale Konstellation: Politische Essays*, 1998, 91-169.

national citizenship that can provide rights at all the different levels required by new global circumstances.

### III. *Deterritorialising European citizenship*

The comprehensive concept of European citizenship should match the economic, political and cultural dynamics of globalisation.<sup>60</sup> From the debate on globalisation, two concepts have emerged that are essential to understanding future expectations of post-national citizenship. First, there is the concept of 'glocalisation', which rejects the view that globalisation is a process of universalisation causing global homogenisation. On the contrary, globalisation incorporates and even creates local particularities.<sup>61</sup> Second, the term 'deterritorialisation' describes changes in the nature of social space that transcend the paradigm of territoriality. Relations between people are increasingly trans- or supra-territorial; that is, communication and interaction happens regardless of territorial boundaries.<sup>62</sup> Instead, social spaces are structured according to functional requirements and interests. Given these processes it is plain to see how the traditional national state – and hence national citizenship – is challenged. Social spaces of communication and interaction cut across territorially bounded states. People's interests and loyalties establish networks below, across and above borders. Therefore, any congruence between the political, the economic and the cultural has (more than ever) become an illusion.<sup>63</sup> In short, the holistic concept of the national state is called into question.

To some extent, the concept of European citizenship strives to meet the challenges of both glocalisation and deterritorialisation. First of all, the sociological model of glocalisation best matches a multi-level concept of citizenship, such as the emerging European citizenship.<sup>64</sup> Considering deterritorialisation, secondly, the evolution in citizenship theory and practice is less advanced. Admittedly, substituting residence for nationality as a basis for certain citizenship rights does justice to increased cross-border mobility and the need for further inclusion, yet it still links rights to a territory. In short, both national citizenship and EU citizenship follow the paradigm of methodological territorialism. The shift from territoriality to functionality present in social interaction has not yet been matched by a shift in the foundations of citizenship. The task ahead is therefore to combine the search for greater political inclu-

60 For a definition of globalisation see e.g. David Held/Anthony McGrew, *Globalization*, in: Krieger (ed.), *The Oxford Companion to Politics of the World*, 2001, 324.

61 Roland Robertson, *Globalization: Time-Space and Homogeneity-Heterogeneity*, in: Featherstone/Lash/Robertson (eds), *Global Modernities*, 1995, 25; Roland Robertson, *Globalisation Theory 2000+*: Major Problematics, in: Ritzer/Smart (eds): *Handbook of Social Theory*, 2001, 458.

62 David Held/Anthony McGrew/David Goldblatt/Jonathan Perraton, *Global Transformations: Politics, Economics, and Culture*, 1999, 32; Jan A. Scholte, *Globalization: A Critical Introduction*, 2000, 46.

63 Zürn (fn. 59).

64 The current structure of the EU is actually best described as multi-level; see e.g. Gary Marks/Liesbet Hooghe/Kermit Blank, *European Integration from the 1980s: State-centric v. Multi-level Governance*, *Journal of Common Market Studies* 1996, 341; Liesbet Hooghe/Gary Marks, *Multi-level Governance and European Integration*, 2001.

siveness with the incorporation of principles of functional rather than merely territorial inclusion.

True, deterritorialisation is particularly problematic in so far as democratic rights of participation are concerned, but not in view of so-called market citizenship rights because the structural interdependence between citizens and authorities is much more demanding in the case of democratic rights. A democratic regime requires a sort of reciprocity that a market regime does not. Moreover, the reflexive character of democracy also implies continuity. Rights of political participation institutionalise a feedback loop between the people as subject and the people as sovereign. Popular sovereignty is based on the congruence of these two groups. The vexing question is thus to find a criterion that ensures long-term congruence and, at the same time, allows for deterritorialised forms of political or groups. This may be found in the functional criterion of normative affectedness. Space precludes tackling this issue any further. Enough to mention that novel forms of democratic deliberation might be required and should be institutionalised in Europe.<sup>65</sup>

### E. *Conclusion*

From its inception, Union citizenship has been heavily criticised as an empty promise and as an exercise in window-dressing of the underlying market citizenship. In recent years, mostly thanks to important jurisprudential developments, Union citizenship has become a key element of the new European polity and offers a huge potential for the legitimisation of the latter. Owing to the emancipation of Union citizenship, the material and personal scopes of application of Union citizenship rights have constantly expanded. After exploring these tendencies in detail, the present chapter raised and addressed two main questions.

First, as regards the fate of national citizenship, it concluded that it is likely to decline in importance. To the degree that EU citizenship becomes a source of rights of its own, people see some of their citizenship rights conferred and protected by the EU rather than by the national state only. Within the emerging multi-level polity, the national level and its respective rights are simply less exclusive albeit still pivotal. Furthermore, there is an increasingly noticeable tendency to grant citizenship rights on the basis of lawful residence. Although nationality remains the primary criterion for Union citizenship, it is gradually being complemented, and even substituted in part, with residence. In sum, it appears that both national nationality and national citizenship are losing exclusiveness and hence functionality. This is not to say that citizenship is in danger. On the contrary, the emerging regime of European citizenship conceived as the imbrication of EU citizenship and national citizenships can

65 See Besson (fn. 37); Samantha Besson, *Institutionalizing global democracy*, in: Meyer (ed.), *Justice, Legitimacy and Public International Law*, 2008 (forthcoming); Francis Cheneval, *The People in Deliberative Democracy*, in: Besson/Marti (eds), *Deliberative Democracy and Its Discontents*, 2006, 159.



work towards a more universal and inclusive form of citizenship. According to the recently favoured principle of lawful residence, the socio-legal sphere of the European Union not only covers the rights of all Member State nationals in any Member State, but also confers certain quasi-citizenship rights to Third Country Nationals lawfully residing in a Member State.

Notwithstanding this positive evolution, second, the current regime of European citizenship remains rather ambiguous; it oscillates between the two principles of nationality and residence, and this creates the risk of further desegregating citizenship. Roughly, this has led to a situation where three categories of people lawfully residing in the same Member State are granted different packages of citizenship rights: nationals, European non-nationals, and non-European non-nationals. These differences are particularly striking with respect to political rights of participation, which lie at the heart of citizenship. The claim was thus made that a path to full political membership must be opened to all long-term residents in every Member State just as it was to European non-nationals before them. The proposition is to facilitate naturalisation on the national level on the basis of long-term residence and integration in national society. Compared to other possible solutions, this offers the advantage of not diluting the multi-levelled structure of the EU and the nexus between Member State nationality and Union citizenship.

The principle of residence is not without problems, however. Because it amounts to more than just a legal status, citizenship must be understood as a normative principle of political self-organisation enabling freedom and autonomy under law. In theory, political autonomy is gained whenever people hold the power to be the authors of their laws. Under the conditions of advanced globalisation, however, the community of law-givers and the ones being affected by those laws can no longer be made congruent on a merely territorial basis. Social interaction is increasingly deterritorialised and structured according to functional patterns instead. Thus, the criterion of residence, which clings to methodological territorialism, is partially deficient. In order to overcome this shortcoming, solutions are awaited to gradually ground European citizenship not only on residence, but also on functional criteria of normative affectedness. If this were to succeed, then citizenship in Europe would finally respect the ideal of full political membership in people's actual social context to which it has shown a firm and constantly strengthening commitment since 1992.