

THE EUROPEAN INSTITUTE



EU Citizenship and the Market



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This publication is the outcome of a year-long project, run by the UCL European Institute in cooperation with the European Commission Representation in London on "EU Citizenship and the Market: Rights and Identities in London's European Communities". The project sought to learn, convey and discuss information about the ways European citizens exercise their market-related rights when they move to, or do business with, another Member State. In particular, it aimed to understand if and how this experience affects their sense of identity and solidarity. The project involved two focus groups (in February and March 2011) composed of randomly selected EU nationals resident in London, and a final conference (in June 2011) where the project's findings were presented and leading academics debated the nature and future prospects of Union citizenship before members of the public, including some of the focus group participants. This booklet comprises versions of all but two of the presentations from the conference.

AN INTRODUCTORY NOTE: EU CITIZENSHIP AND THE MARKET

Jonathan Scheele*

The issue of EU citizenship is contentious at many levels. It is too often conflated with the issue of identity, and presented as if there were some sort of dichotomy between being a European and being a citizen of one or other EU Member State, particularly in the United Kingdom. There isn't.

In practice of course, many of us live, more or less happily, with defining our identity at several levels – sub-regional, regional, national and European. It is of course quite another consideration as to whether one or other level of identity is seen as having primacy; many Yorkshiremen, Scots or Catalans would give that to their 'regional' identity (defined as 'national' by the latter two). Some however continue to object strongly to the whole concept of EU citizenship as forcing upon them some form of alien identity into their well-ordered 'national' lives.

EU citizenship is in fact a rather different concept from classical national citizenship. In the latter case, citizens' rights go hand in hand with obligations or responsibilities. EU citizenship derives from national citizenship and attributes rights to citizens with few, if any, corresponding direct obligations. The only obligations assumed are indirect – as part of the obligations of each Member State, such as contributing to the EU budget through national taxation/payment of VAT or customs duties – and have no relation with the subsequent introduction of the concept of EU citizenship.

EU citizenship is of course especially relevant to those who make use of the Treaty provisions on the four freedoms to work across borders, typically when they exercise their right of freedom of movement of labour. At this point, these EU citizens experience the benefits of that status – and often begin to understand that the rights derived from it are not always well understood and/or fully applied.

More generally, all EU citizens make increasing use of rights, through the operation of the Single Market, that derive from their country's belonging to the EU, rather than from EU citizenship as such. One example however of newly-established EU citizenships rights is that of consular assistance from other EU embassies in third countries, such as in the recent Libyan evacuations.

What is not clear is whether there is any perception, by their users, that these rights are in fact linked to their status of EU citizen. Nor is it clear whether this has any implications for perceptions of identity, single or multiple.

The project undertaken by the UCL European Institute, in cooperation with the European Commission Representation in the UK, is a welcome attempt to try to dig deeper into these issues, at least at the level of EU citizens from other Member States living and working in London.

The discussions at the conference on 17 June were a valuable eye-opener to this debate and the EC Representation in the UK is happy to have been able to support this project. They are a start, though I hope not the end of the affair. There is a need to do the digging not only in London but also elsewhere – and also to compare the perceptions of this status with those of nationals more firmly rooted in their home environment – here in the UK and elsewhere.

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INTRODUCTION: THE IDENTITIES AND RIGHTS OF EUROPEAN CITIZENS

Richard Bellamy*

A couple of years ago I gave a public lecture on European Citizenship at the LSE. On my way to deliver the lecture, I quizzed two friends on their knowledge of their rights as European Citizens. Neither was an expert, their areas of professional academic interest lying in quite different fields. They were attending out of general curiosity and friendship. Yet, even though both had exercised or benefitted from these rights – in one case, as a result of being married to the citizen of another Member State, rather extensively – their knowledge of them was basic at best. Moreover, while both felt European, rather than American, say, and in some respects more than they felt British, but interestingly not more than they felt English or Londoners, neither expressed any great identification with the EU, despite regarding it as on balance a benefit to both the UK and Europe as a whole.

Sometimes exchanges such as these, unrepresentative and unscientific though they may be, can seem more telling than the statistics regularly produced on such matters by *Eurobarometer* and other polling agencies. For they allow those concerned to provide the reasoning behind their responses. As it happened, in this case their views were more or less in line with that of a majority of European citizens. Like them, most EU citizens are aware of their status and of how they came to obtain it (79% according to a Flash Euro barometer devoted to European Union Citizenship conducted in March 2010¹). However, as with my friends, far fewer claim to understand its meaning (43%), with only a third (32%) considering themselves well-informed about their rights. Nevertheless, two basic rights do appear to be well-understood and appreciated - freedom of movement and the right to travel, to study, work and reside in another Member State, subject to certain conditions (89%), and the right not to be discriminated against on grounds of nationality when doing so (87%). Indeed, these rights are generally regarded by citizens as the main benefits of EU membership, with the highest proportion of Europeans (45%) choosing freedom of movement as what the EU most means for them personally.² However, despite a wide knowledge and appreciation of these basic EU rights, that has not led citizens to change their affective allegiances and personal identities from the local and national to the EU. The number of citizens identifying themselves simply as European or European first, national second, is fairly small – around 4% and 6% respectively - while those seeing themselves as national alone is around 41%, though

46% see themselves as national and European.³ Meanwhile, active political citizenship at the EU level remains low. Citizens are aware of their rights vis-à-vis European institutions, but exercise them comparatively rarely relative to their national political rights. For example, average turnout in elections to the European Parliament currently run at below 50% and in many countries is as low as 25%.

At one level, the relation between EU rights and EU identity suggested by these figures is neither surprising nor need be a matter of concern. Access to Union citizenship is via national citizenship, and the Treaty on European Union post-Lisbon continues to affirm that it is 'additional to national citizenship and shall not replace it' (Title II Article 9 TEU). Services and goods are essentially provided by the Member States rather than the EU itself. The EU serves to coordinate their activity in mutually efficient ways, and one aspect of that is to provide a mechanism for reciprocal relations between the citizens of Member States. In a sense, Union citizenship offers not so much a dual citizenship with the Union as something akin to dual citizenship between the citizenship regimes of all the Member States. Moreover, this form of citizenship is actively exercised by a significant but nonetheless comparatively small group of citizens, with around 12 million or 2% of the EU population currently residing in another Member State to their own. Consequently, one can expect the main allegiance for most people to remain their Member State. Even among those residing in another Member State, their inclination may be to become active there rather than at the EU level *per se*. That lack of affective identification as an EU citizen need not diminish their support for the rights associated with it or lead them to doubt its legitimacy. But it will be as an adjunct to their national affective identity, on the one hand, and involvement in the Member State of birth or adopted residence, on the other. As a result, they will conceive Union citizenship less as the means for making them equal members of an overarching EU *demos*, and more as a mechanism for ensuring equality between the various European *demos*.⁴

³ These figures come from: European Opinion Research Group, *Eurobarometer Spring 2004 - Public Opinion in the European Union*, (July 2004). Not all Eurobarometer polls have asked these questions and allowed comparisons between how people valued the EU more generally. This one does and so has become a standard source for identification research. However the trend has remained remarkable stable. Needless to say, there are differences across the EU. For example, *Eurobarometer 58* (Autumn 2007) found two-thirds of Belgians (65%) and Poles (63%) are 'attached' to the EU, compared with a quarter of respondents in Cyprus (25%), 27% in Finland and the UK and a third of respondents in the Netherlands (32%) and Estonia (34%). The EU average for this question reported 87% being 'attached' to their locality (village, town or region) and 91% to their country.

⁴ K. Nicolaïdis, "The New Constitution as European *Demos*-Cracy?," *Critical Review of Social and Political Philosophy* 7(2003): 76-93.

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¹ The Gallup Organisation, *Flash Eurobarometer No 294. European Union Citizenship – Analytical Report*, (October 2010).

² TNS Opinion & Social, *Standard Eurobarometer 73 - Public Opinion in the European Union*, (August 2010).



What, if anything, turns on this distinction, and why have some commentators (academics, politicians and other policy makers, as well as ordinary citizens) feared that Union citizenship undermines national citizenship, whereas others have welcomed this very development and seen in EU level citizenship rights the basis for a different form of political identification to that of nationality? For the first group, the worry lies in the teleological reasoning of the European Court of Justice (ECJ) and its claim that 'Union citizenship is 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'.⁵ This assertion has been deployed to justify the gradual undermining of what had been seen as strictly internal matters relating to access to public services and social transfers by citizens of other states, and the national determination of labour relations, tax issues and even access to citizenship itself. For example, they see a case such as *Watts*,⁶ whereby EU citizens unable to get a specific medical treatment in their home state can seek it in another Member State and have it paid for by their national health scheme, as undermining the waiting lists and other restrictions that national services employ to prioritise the spending of limited resources among different kinds of health care.⁷

In this and similar cases in fields such as education and social benefits,⁸ the ECJ has consistently refused to consider national fiscal concerns. Yet, doing so destroys an essential link between rights and obligations, and the respect citizens owe to their fellow citizens to consider the knock-on effects of their exercise of any given right for others. Likewise, a case such as *Viking*, allowing a Finnish shipping company based in Helsinki to reflag its ferry as an Estonian vessel,⁹ undermined locally negotiated terms and conditions and rendered industrial action by the relevant Finnish union against this move illegal. As in other cases, such as *Laval*¹⁰ or *Rüffert*,¹¹ the Court is charged with deploying EU level individual rights that have an inherent

⁵ Case C-184/99 *Grzelczyk v Centre Public d'Aide Sociale d'Otignies-Louvain-la-Neuve* [2001] ECR I-6193, para 31.

⁶ Case C-372/04 *Watts v Bedford Primary Care Trust* [2006] ECR 1185

⁷ See C. Newdick, "Citizenship, Free Movement and Healthcare: Cementing Individual Rights by Corroding Social Solidarity," *Common Market Law Review* 43(2006): 1645-68.

⁸ E.g. Case C-76/05 *Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I-6849.

⁹ Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* [2008] IRLR 143

¹⁰ Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160

¹¹ C-446/06 *Dirk Rüffert v Land Niedersachsen* [2008] IRLR 467

market bias to challenge national level collective rights.¹² Here too, the argument is that the Court treats the rights of firms and individuals as subjective entitlements, and ignores their broader implications for the rights of others. While there may be certain basic human rights, such as the right not to be tortured, that are legitimately viewed in this way and upheld by bodies such as the European Court of Human Rights, that is not the case with most of the rights that fall under Union citizenship. Within the Member States, the collective dimension of rights gets decided in different ways through national democratic processes. These define the reciprocal rights and responsibilities of citizens towards each other.¹³ The relationship between rights and identity enter here. For this process is said to be possible because citizens identify with each other as members of a *demos* – engaged in a public dialogue about their long-term common interests. Despite the best efforts of the Commission and the European Parliament, no comparable pan-European dialogue exists. At most, there is a dialogue on Europe within and occasionally between the various *demos* of the Member States.¹⁴

By contrast, the second group view the Court's approach much more favourably.¹⁵ They regard it as removing the arbitrary discriminations that arise from borders and offering an additional layer of protection for citizens against their government's arbitrary decisions regarding membership and its obligations and entitlements.¹⁶ Citizenship is no longer triggered by free movement for economic purposes, but can be accessed by all who seek equal treatment. In treating all citizens within the EU as equals, a new form of solidarity built on rights and the rule of law will gradually emerge among them. Not only will that help overcome the tribal divisions based on ethnicity, religion and culture that have so marred Europe's past, but also move the EU and its citizenship beyond its initial market focus. In many respects, this is an admirable ideal. How realistic it is as a characterisation of the effects of ECJ decisions is more controversial, as is the alleged arbitrariness of at least some of the collective and democratically arrived at determinations of the Member States that it has challenged.

¹² E.g. F. Scharpf, "Legitimacy in the Multilevel European Polity," *European Political Science Review* 1/2 (2009): 173-204.

¹³ For this argument, see R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).

¹⁴ R. Bellamy, "Evaluating Union Citizenship: Belonging, Rights and Participation in the EU," *Citizenship Studies* 12, no. 6 (2008): 587-611

¹⁵ See the papers by Dora Kostakopoulou and Dimitry Kochenov in this collection.

¹⁶ For example, Case C-135/08, *Rottmann* [2010] ECR I-1449 is interpreted in this way.

The relevance of these two perspectives and the clash between them is all too clear within the context of the current Euro crisis. From the first point of view, it remains significant that notwithstanding the Euro and the European Central Bank, the crisis has been a matter to be resolved primarily by national politicians and their national Parliaments. The European Parliament has barely figured and even the Commission has been side-lined to a remarkable degree. The main rationale for a collective solution that involves Germany and the other solvent states guaranteeing the sovereign debt of those states likely to default lies in enlightened national self-interest as the solution to an assurance game. However, if the appeal begins to shift so that it is less to enlightened national self-interest but rather to the collective self-interest of the Union as a whole – that is, if the sacrifices called for from either the debtor or the creditor states rises beyond a certain threshold and look to be uncompensated in the medium or even the long term – then cooperation will weaken. In the view of many national politicians and their electorates, it would appear that we are perilously close to this situation – hence the tentativeness of the proposals being made to resolve the situation. By contrast, from the perspective of the second position, the prospect of fiscal union follows logically from treating all Member State nationals as citizens of the EU; it will in turn also greatly stimulate further moves in that direction. Whether, in the absence of a stronger collective European identity and a pan-European *demos*, this solidarity will go very deep and allow the development of broader social transfers of the kind that national welfare systems have produced, or will in fact produce such an identity built on a direct commitment to social justice, remains a very open question. It is as much sociological and political as normative or legal.

These debates, then, are not merely academic but of vital concern to citizens more generally. It was in this spirit that the European Institute at UCL, with funding from the European Commission Representation in the UK, decided to engage in a dialogue between academics and EU citizens from other Member States resident in London. This was neither a straightforward ‘outreach’ or ‘impact’ exercise to audiences beyond academia, nor a scientific exercise designed to survey public opinion. Rather, the aim was to share experiences and information, with each side – the academics and the non-academics – commenting on and learning from the views of the other. To this end, we organised three events. The first two consisted of a focus group style meeting between 12 or so EU citizens and a couple of academics in which they discussed the issues of rights and identity outlined above. In particular, we explored how far the participants’ exercise of their free movement rights had led to an awareness of their other rights as EU citizens, and the impact the use of these had had on their identity. The meetings took the form of a facilitator exploring the participants’ knowledge of rights and feelings of identity, followed by presentations on these topics by the academics and a general discussion.

By and large, the results of these meetings – briefly summarised in two appendices in this publication – was not so different to the conversations I had with my friends reported above. The participants had appreciated the opportunities for employment and study opened up by freedom of movement and the absence of discrimination on the basis of nationality. However, while they felt European in a broad cultural sense, they did not identify especially with the EU. Indeed, the small group inclined to do so saw themselves more as cosmopolitans. Most felt their affective identity remained their nationality of birth. They were more concerned to be able to exercise political rights in their new country of residence than at the EU level, and in some cases – where they had met a partner and planned to settle in the UK – to become British citizens, whilst remaining ‘Italian’, ‘French’ and so on. Indeed, they were unanimous in regarding the chief attraction of London as its multiculturalism – that it was a global city that allowed its rich mix of visitors and residents to retain their different ethnic, cultural, national identities.

Therefore, the attraction of the EU lay not in its being the source of an alternative identity that might fuse the peoples of Europe into a *demos* in which separate national identities became merged, subsumed or replaced, but in its providing a framework within which those different identities and *demos* might interact on an equal basis – the role of EU citizenship being to provide the medium for this interaction. Whether that makes Union citizenship the ‘fundamental’ status of EU citizens, as the ECJ proposes, depends largely on what the requirements of equality and justice are held to be. If, following John Rawls, one differentiates the norms of justice appropriate to a ‘people’ from those that operate between ‘peoples’, then the fundamental status might be said to lie with the Member States. If, as certain critics of Rawls have argued, there is no justification for this differentiation between global and domestic justice, then equality at the EU level is liable to operate directly between citizens rather than between states.¹⁷

The project concluded with an academic workshop, to which the participants from the earlier meetings were invited, and which explored the two views outlined above. The papers and commentaries are included in this volume. As will be clear, there is to some degree a disciplinary split in the perspectives offered. The contribution by Rainer Bauböck, a political scientist, explores the multilayered citizenship regimes of the EU. He argues that the significance of the local, national and supranational all have to be given their due weight, so that there can be no view of one being superior or dissolving the others, with the EU offering a post-national system of rights. In giving equal weight to the exercise of citizenship rights, there are problems in different Member States having quite different rules on citizenship – with some, for example,

allowing dual citizens to vote twice and others not, or some enfranchising groups that others would exclude, all of which effects the equal value of votes at the EU level.

However, he also holds that access to citizenship within a Member State, along with many of the entitlements that are said to flow from it, should reflect a stakeholder principle. An on-going commitment and interest in the long-term interests of the political community is a vital aspect of being able to play a part in deciding its future. It also constrains how far the ECJ ought to interfere with ‘internal’ matters that might undermine the sense of a stake citizens feel in it. Not to do so, would risk undermining the sense of social solidarity and the obligation they feel to contribute to public goods.

Rather similar views are expressed in the comments of sociologists Christian Joppke, who pays particular attention to current ‘identity inputs’ from the nation states, and Madeleine Kennedy-Macfoy, analysing EU citizenship from a gender perspective, as well as Uta Staiger, who discusses the cultural assumptions that have informed both political theory positions and political decision-making over time. For them, identity and its role in forming a *demos* remain crucial, as does politics.

By contrast, the two lawyers, Dora Kostakopoulou and Dimitry Kochenov, defend the line of the ECJ. They see the formal entitlements offered by EU law as constraining both national law and sovereignty in justifiable and beneficial ways that empower individuals. Not only do they argue that more recent ECJ case law, which strengthens EU citizenship as a source of rights regardless of whether citizens cross into another Member State, has improved and indeed protects their legal position. They also hold that the question of identity and solidarity, where not already existent or bound to evolve with citizenship status, is not necessarily indispensable for a satisfactory resolution of the Union’s *finalité politique*. Indeed, both authors foresee an erosion of the legal importance of the Member States’ nationalities as well as, concomitantly, the gradual emergence of an identification beyond it.

Which view will resonate most with the European publics is at the time of writing an open question. Fundamentally touching upon concerns of accountability and legitimacy, of popular sovereignty and the nature of political authority, it is nevertheless also a crucial question that requires our attention.

¹⁷ On this issue, see the instructive debate between John Rawls and Philippe Van Parijs, J. Rawls and P. Van Parijs, “Three Letters on the Law of Peoples and the European Union,” *Autour de Rawls, special issue of Revue de philosophie économique* 8(2003): 7-20.

THREE CITIZENSHIP REGIMES IN THE EUROPEAN UNION

Rainer Bauböck*

Most academics who write about citizenship of the European Union tend to compare it with what they know best: nation-state citizenship. It comes as no surprise when they conclude that the current construction of EU citizenship is internally incoherent, externally not sufficiently inclusive and lacking in democratic legitimacy. I agree to a certain degree with these critiques, but I think that they apply a wrong standard of comparison and are therefore likely to promote false solutions. As the EU Treaties have spelled out clearly since the 1997 Treaty of Amsterdam, EU citizenship is complementary or additional to Member State nationality without replacing it. Academic scholars have for quite some time described the EU polity as a multi-layered system of governance and governments. It consists not just of the supranational institutions of the European Commission, the Council, the European Parliament and the Court of Justice of the European Union, but also of the national parliaments and governments of the Member States. There is a corresponding system of multilevel citizenship in the Union that needs to be studied and evaluated as a constellation where individuals have plural memberships and where citizenship regimes are connected with each other across levels.

Such a multilevel perspective avoids regarding EU citizenship either as a postnational alternative to Member State citizenship or as a mere appendix filled with a few additional rights that does not deserve the label citizenship in the stronger sense of a status of equal membership in a self-governing political community. In order to understand how a multilevel system of citizenship can work, we do not have to invent future worlds or travel far back in history. Every larger democratic state already contains within itself a multilevel citizenship regime. Only few federal states formally acknowledge in their constitutions a citizenship of their provinces, but even highly centralized states, such as France, have elections for regional assemblies that enjoy a range of devolved decision-making powers. While unitary and federal constitutions differ strongly with regard to the political status and powers of substate territories, all independent democratic states, apart from micro states and city states, are subdivided into municipalities with democratically elected offices of local councillors or mayors. Local level citizenship is not only a common feature of contemporary democracies but also a democratic requirement. If central state authorities were in charge of deciding all matters of local government, then the

inhabitants of municipalities would be unjustly dominated by representatives of national majorities.

Conceiving of democratic states as polities with nested layers of local, regional and state level citizenship is not only a useful analogy for better understanding the EU citizenship constellation. Substate citizenships form an integral part of that constellation so that there are not two, but at least three distinct levels of individual membership in the Union that are universally present throughout the EU polity and include all its resident citizens: local, national and supranational citizenship.

If citizenship is at its core a membership status, then the first task in describing this triple level structure is to analyse the rules that determine who is a member at each level of the polity. For the national level, such rules are laid down in nationality laws. These laws differ enormously with regard to their specific legal provisions and conditions for acquisition and loss of nationality, not only globally, but also within the EU. However, once we compare them with the rules for determining citizenship in supranational and local polities, it becomes obvious that all nationality laws have a common basic structure and purpose.

The fundamental principle of nationality law in modern states is automatic acquisition of citizenship status at birth, either by descent from citizen parents or by birth in the territory of the state. Acquisition of citizenship by naturalisation and loss of citizenship through renunciation or withdrawal are merely corrective rules that serve to resolve marginal discrepancies between a citizenship population determined by birthright and a reference population that states want to exclude or include. The need for such corrective devices arises mainly because of migration that generates non-resident populations with, and resident populations without birthright citizenship. Correcting birthright allocation is, however, also exceptionally necessary when international borders change through state breakup and secession or unification and territorial incorporation. Three different rules have been used for the initial determination of citizenship of populations in newly independent states or incorporated territories: a zero option that includes all residents at the point of independence, a restoration option that refers back to citizenship in an independent predecessor state, or the transformation of a previous federal entity citizenship into that of an independent successor state.

It is crucial to understand that only shifting international borders lead to automatic inclusion or exclusion of entire territorial populations. Democratic states with stable borders never include automatically first generation immigrants



without asking for their consent. One might object that there is the exceptional case of co-ethnic immigrants in Germany and Israel who are automatically naturalised upon entry. However, these groups have been identified as members of the nation prior to immigration and accepting the invitation to 'return' implies consent to acquire full citizenship status.

Correcting birthright allocation through naturalisation requires, therefore, an individual application and so does voluntary renunciation by non-resident citizens. Involuntary withdrawal of citizenship by the state is sometimes used as a sanction but may also affect persons who are seen to lack a genuine link to the state concerned – for example, if they have inherited their citizenship at birth abroad and never take up residence in their ancestors' country of origin. In any case, in democratic states acquisition and loss that is not based on birthright is regulated by procedures that involve individual consent or qualifications for membership.

What is the purpose of birthright citizenship and how could it be justified? All modern states are constructed as intergenerational political communities and birthright membership is the crucial mechanism that supports their continuity. Citizenship is attributed at birth and normally retained for a full life and it is passed on to subsequent generations. An emphasis on intergenerational continuity is often seen as a core feature of ethnic nationhood. But this is a short-sighted view, since all states, including those which are plurinational in composition or embrace a civic conception of nationhood, determine their citizenship through birthright. Moreover, there are distinct democratic reasons for birthright allocation. Governments of independent states wield comprehensive political powers over their subjects and take decisions that affect future generations in important ways. While this may also be true for some powerful non-state actors, such as big corporations, only political governments can be held accountable by and be made responsive to citizens. If all citizens regarded themselves as mere temporary residents among other temporary residents, then they would have little reason to support long-term decisions for the sake of future generations. Instead of hoping to win an argument or election next time round, exit would become the preferred response by defeated minorities who regard majority decisions as contrary to their fundamental interests or convictions. For these and other reasons, birthright citizenship is essential for maintaining the democratic idea of a self-governing people.

Yet in contemporary states citizenship at the local level is no longer determined through birthright.¹ Liberal democracies grant internal freedom of movement not only to their own citizens but to all legal residents in their territory and local governments provide public services to all those residing within their jurisdiction. It is true that most democratic states still reserve the franchise in local elections to their national citizens. But these do not have to apply for local naturalisation; they are automatically included as local citizens with full participatory rights after some time of residence. Moreover, fourteen European states, twelve of which are Member States of the European Union, have fully disconnected local from national citizenship by enfranchising also third country nationals.

At the local level we find thus a second type of citizenship regime based on *ius domicilii*, i.e. automatic residential membership. Birthright citizenship at state level has a sticky quality due to its strong external dimension. It is not lost through emigration and can be passed on to at least the second generation born abroad. This is also a main reason why plural nationality is becoming more frequent. A growing number of children of migrant origin acquire several citizenships at birth and more and more states tolerate also dual nationality in case of naturalisation or voluntary acquisition of a foreign nationality. By contrast, local citizenship is fluid and generally singular at any point in time. Taking up residence in another municipality leads to automatic acquisition of a new citizenship and automatic loss of a previous one.

This arrangement can again be supported by democratic reason. Local governments are responsible for providing public services to local residents and ought to be accountable to these. Discrimination on grounds of nationality is arbitrary from the perspective of local self-government. But why do arguments in favour of birthright citizenship not also apply to the local level? The answer is simply that local residential citizenship is not an independent regime, but is nested within intergenerational national citizenship, so that every local citizen is also a member of an intergenerational political community – either as an internal citizen of the encompassing state or as an external citizen of a foreign country.

¹ This is a relatively recent development. In late 19th century Austria and Germany, birthright citizenship in municipalities (*Heimatrecht*) was used to restrict internal migration by denying poverty relief and access to local public services to citizens residing outside their municipality of birth. Today's *hukou* system in the Peoples' Republic of China serves the same purpose and is reinforced by elements of *ius sanguinis* so that rural *hukou* status is even inherited by second generations of migrant origins born in the cities.

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By considering local and national citizenship as a combined multilevel structure, we can see how the two principles of residence and birthright supplement each other. The long-term perspective of democratic community that is supported through birthright at the national level provides a stable background for more fluid memberships at local level. Local citizenships are not for life and easily acquired and lost. Mobile individuals will therefore be multiple local citizens sequentially over the course of their lives, but not simultaneously, since local citizenship has only a very weak external dimension. In democratic states, there is an additional reason for keeping local citizenships singular at any point in time; because provinces and municipalities are integrated into a common structure of government and democratic representation, no citizen should have multiple votes across several substate polities.

Intergenerational and residential citizenship are the two basic regimes that we find in contemporary democratic polities. EU citizenship represents a third and hybrid type. When asking the question how the EU determines who its citizens are, the answer is: the nationals of its Member States. Individual membership in the EU polity is therefore neither determined by an EU birthright, nor by residence in the EU, but is derivative of Member State nationality. Yet the control that Member States retain over acquisition and loss of EU citizenship is exposed to a powerful force that operates at a transnational level: the right to free movement inside the territory of the Union. This residential aspect of EU citizenship is not only articulated in the narrowly conceived rights of territorial admission, settlement and access to employment but includes a general right of non-discrimination on grounds of nationality and applies also to political rights: EU citizens residing in Member States other than their state of nationality can participate in local and European Parliament elections there.

The derivative nature of EU citizenship is not a historically unique construct. The same citizenship architecture was characteristic for early stages of federal statehood in Germany, Austria and the United States of America. Switzerland seems to be the only surviving case where federal citizenship is formally derived from cantonal citizenship. In Switzerland, as in the EU, the distinct polities of the union enjoy wide powers of self-determination with regard to naturalisation. The important difference is that birthright acquisition and loss of citizenship are regulated by federal law (as they have been in the US since the 14th amendment of 1867) rather than at the level of provincial citizenship. Member State self-determination in matters of citizenship is therefore stronger in the EU than in any of the historical or contemporary federal states. Even the much looser Nordic Passport Union envisaged a minimal harmonisation of citizenship laws so that they would become compatible with free movement rights. No such coordination has been possible in the EU although Member States can subvert each other's immigration control by producing EU citizens with free access to the rest of the Union.

The tension between the strictly derivative nature of EU citizenship and its residence-based free movement rights shows also in the differential treatment of EU citizens who reside in their country of nationality and those residing in another Member State. Let us call the former 'first country nationals' (FCNs) and the latter 'second country nationals' (SCNs). The protection of EU citizenship applies in specific ways to those persons who have made use of their free movement rights or who are in other ways involved in 'cross-border situations'. These persons enjoy, for example, extended rights to family migration that most Member States deny to their own FCNs who want to invite third country national (TCN) family members to join them. Such instances of reverse discrimination have been a notorious side-effect of a construction of EU citizenship that applies more directly to mobile populations than to sedentary ones. In a series of recent judgments, most prominent among which are the 2010 *Rottmann* and 2011 *Zambrano* cases, the Court of Justice of the European Union has expanded the meaning of cross-border situations to cover also many that were previously considered to be purely internal ones. In order to do so, the court must often apply a twisted logic that derives fundamental rights from a merely potential link with the exercise of free movement.

While a market citizenship logic of free movement generates substantial privileges for SCNs, their most important democratic citizenship right remains less secure than for FCNs. EU citizens residing in other Member States enjoy voting rights in local and EP elections there but, with the exception of Irish citizens in the UK and British citizens in Ireland, they remain excluded from political representation in the national government of their host country. From the residential citizenship perspective, this is an oddity. One can hardly argue that the local franchise is necessary in order to prevent that SCNs suffer political disadvantage, but that being deprived of the much more important national franchise is an acceptable restriction of their free movement rights.

Finally, EU citizenship generates another highly problematic distinction between mobile European SCNs and TCN migrants. The residential dimension of EU citizenship has imposed a special privilege of local voting rights for SCNs on often reluctant Member States, such as Austria, France and Germany, all of which adhere to the constitutional idea of a unitary people consisting of identical members across all levels of the polity. This has led to a distinction between two classes of local citizens that is arbitrary from the perspective of local self-government. More generally, there are now two strongly contrasting approaches to the integration of migrants in the EU. For TCNs, Member States and the EU itself promote active integration policies that combine sanctions and tests with affirmative measures, while for intra EU migrants a market citizenship logic dictates a laissez-faire approach, which assumes that unconstrained mobility and non-discrimination is all that is needed for social integration.

Some of these problems could be addressed by weakening the derivative nature of EU citizenship and moving forward on the road towards a fully residential citizenship not only at the local, but also at the supranational level. Let me sketch briefly four possible steps on this road. A first reform would introduce automatic acquisition of EU citizenship, but not Member State nationality, by long-term resident TCNs. This proposal, which has been occasionally endorsed by migrant lobby organisations, MEPs and the Committee of the Regions as well as by academic scholars, would create two classes of EU citizens: those for whom this status is derived from their nationality and those for whom it is instead derived from residence. While the reform would lead to more inclusion by providing long-term resident TCNs with local voting rights throughout the EU and all the other privileges of EU citizens, it could hardly overcome present concerns in Member States about immigrant integration. Resolving these by removing them from the domestic agenda of Member States can only breed further anti-EU resentment among the electorates there. Finally, the proposal would also remove the most powerful argument for opening access to national citizenship to all long-term resident immigrants. If these enjoy automatic access to EU citizenship, they will not only lack incentives for naturalisation, but will also be perceived as having no substantive claim to full membership and political participation at the national level.

A second, and more radical proposal would address this latter problem for SCNs (and if it follows after the first step also for TCNs) by abolishing any remaining distinctions between FCNs and SCNs and granting the latter a residence-based franchise in national elections. This move would retain the exclusionary potential of nationality laws in regulating access to EU citizenship, but would effectively eliminate any traces of the derivative nature of EU citizenship with regard to its content of rights, leaving Member State nationality behind as a hard but empty shell.

A third step would then respond to this outcome by abolishing birthright citizenship in Member States and establishing it instead as the basic principle for determining EU citizenship. All those born in the territory of the EU (with possible conditions for prior parental residence as in all current versions of national-level *ius soli*) and all those born to EU citizen parents outside the territory would automatically become citizens of the Union and of all its Member States. As a consequence, state level citizenship would have to be determined by residence. This move would effectively transform the EU into a federal state and downgrade the Member States to provincial status.

Finally, we can imagine a utopian fourth step that would abolish birthright citizenship even at the level of the European supranational state and replace it with a uniform rule that in every polity all those and only those who are long-term residents will be counted as citizens. Political theorists have argued that birthright citizenship is a major source of violence between states (Jacqueline Stevens) or that it serves to maintain a globally unjust distribution of resources and opportunities (Joseph Carens, Ayelet Shachar). From this view, the three preceding proposals should

be regarded as merely intermediary steps on the road to universal residence-based citizenship.

As my earlier discussion of the conditions for residential citizenship at the local level has made clear, I am not convinced by this project. Its third step, at which the current union would be replaced by a federal state, cannot be ruled out *a priori*. There may be future economic, political or military crises that are more dramatic than the current financial troubles and convince Member States of the need for much deeper political integration. Yet such a possible response to a life-threatening challenge must not be confused with a hidden *telos* that supposedly pulls the EU towards becoming a federal state even in the absence of democratic support by its citizens.

The fourth scenario is, in my view, even more clearly a dystopian rather than a utopian one. It is hard to imagine how democratic political communities could be formed and maintained without assurances of intergenerational continuity provided by birthright membership. We can, however, not rule out this possibility on purely normative grounds. In a hypothetical world where most people are migrants living outside their countries of origin for most of their lives, maintaining birthright membership would amount to establishing a tyranny of sedentary minorities over mobile majorities. Current residence would then become the only justifiable basis for linking territorial jurisdictions to populations of citizens. I assume that in this scenario only minimal states could claim legitimate authority. Considerations of social justice that support public systems of education, health and welfare based on redistributive taxation would find little popular support and democratic participation would be reduced to a small politically interested elite. I also assume that a need for belonging to associations with birthright membership will not vanish completely, but would then probably be articulated through the formation of non-territorial associations based on religion, class or ethnicity. What I cannot imagine is how democracy as we know it could survive such a radical disconnection between residence-based territorial jurisdictions and birthright-based non-territorial associations.

In our world, less than 4% of the global population are international migrants who reside for more than twelve months outside their country of birth; among the 500 million residents of the EU in 2010 just 4% are TCNs and 2.5% SCNs. In such a world, instead of dismantling territorial and intergenerational political communities with largely sedentary populations for the sake of promoting geographic mobility, migrants must be enabled to integrate as equal citizens into these polities at all levels.

I conclude therefore that for the time being we should explore alternative ways of resolving the deficiencies of EU citizenship. The starting point should be to accept it as a potentially coherent and normatively attractive constellation of three interconnected membership regimes: a birthright-based one at Member State level, a residential one at local level, and a derivative regime with residence-based rights at the supranational level.



This perspective suggests a couple of modest reforms.

The first among these would be to extend the local franchise to all residents in all Member States. Instead of deriving local from national and European citizenship, the former would be finally based on its own distinct principle of inclusion, a principle that is already embraced by twelve Member States and that is implicitly present in local democracy in the other states as well. The main obstacle for this reform is the constitutional construction of a unitary *demos* across all levels within a state. The anachronistic character of this constitutional conception shows also in the fact that campaigns for a local franchise for third country nationals have been surprisingly resilient even in those countries where reforms have been blocked by constitutional courts or councils.

The second reform would make sure that European citizens residing in other Member States do not lose their representation at national level. This can be more easily achieved by introducing absentee ballots in those few Member States that still have not done so (for example in Ireland and Greece) or by scrapping provisions in some other countries (such as the UK or Germany) that withdraw voting rights after a certain period of residence abroad. Serious concerns in countries with large diasporas that a general right of external voting might impact too strongly on electoral results could be taken into account by limiting an absentee franchise to SCNs and excluding emigrants residing in third countries, or by reducing the weight of the external vote through counting it separately for specially reserved seats. There are reasons why external voting has recently become a global democratic standard and these reasons can be decisively reinforced through the imperative that free movement inside the EU must not lead to a loss of democratic representation at any level. A final argument for the external franchise solution rather than the extension of national voting rights to SCNs in their country of residence is that the former reform asserts the derivative nature of EU citizenship that the latter denies.

The third and most important reform would coordinate access to EU and national citizenship through some common basic standards for *ius soli* and *ius sanguinis*, for naturalisation, renunciation and withdrawal. Letting the ECJ expand the scope of EU citizenship rights while denying the EU any competence to harmonise Member State policies with regard to citizenship status will undermine the legitimacy of the Court, is likely to create conflicts between states that suspect each other of undermining their immigration control powers, and leaves radically incomplete the EU agendas of harmonising integration policies towards TCNs and promoting the political participation of SCNs in their host countries.

None of these reforms would challenge the derivative nature of EU citizenship or the importance of birthright membership in the states that have after all created the European Union. They would instead make explicit the as yet underdeveloped multilevel structure of citizenship in the European polity.

NEW EUROPEAN CITIZENSHIP: A MOVE BEYOND THE MARKET BIAS

Dimitry Kochenov*

This contribution scrutinises the main implications of the introduction by the Court of Justice of an alternative jurisdiction test in EU citizenship cases. The test is based on the concept of the intensity of Member State interference with EU citizenship rights of individuals and does not take the existence (or not) of any cross-border situation into account. This signifies a definitive move away from the Internal Market thinking, establishing EU citizenship *as such* as an activator of EU law. It also has significant implications for the division of powers between the Union and the Member States. It remains to be seen how frequently the new test will be used next to the established cross-border situation test. A departure from the market rationale, although potentially radical, is to be welcomed, since it reflects the essence of the concept of citizenship better and offers important opportunities to improve the legal position of the individual in the context of the European integration project.

1 The New Approach

The recent years have been very eventful for EU citizenship and the division of powers within the Union. In a recent line of case law, the Court of Justice of the EU (ECJ) has applied EU law without any reference to the existence of a cross-border situation. Culminating with *Rottmann*¹ (where it was ruled that EU law is not to be disregarded when decisions on Member State nationality are taken, instructing a German court which principle to apply in order to determine whether German nationality and EU citizenship be withdrawn from a naturalised person who committed fraud) and *Ruiz Zambrano*² (where a Colombian father of two Belgian children could use EU law to regularise his stay in the country), the ECJ thus made a definitive step to detach this concept from the vestiges of the Internal Market thinking. Eleanor Spaventa famously regretted that 'orthodox thinking led us to believe that, in order to fall within the scope of the Treaty, the migration paradigm had to be satisfied for Union citizens to acquire rights in Community law'³ – the ECJ concurred and embarked on purifying its case-law of the unwelcome orthodoxy, radically departing from its previous jurisprudence.

We now know that EU law, at least potentially, restrains the national law of the Member States in all situations which are 'capable of causing [EU citizens] to lose the status conferred by Article 17 EC [now 9 TEU] and the rights attaching

thereto',⁴ since any such situation would fall, 'by reason of its nature and its consequences, within the ambit of European Union law'.⁵ We equally know that any measures 'which have the effect of depriving citizens of the Union of the *genuine enjoyment of the substance of the rights* conferred by virtue of their status as citizens of the Union' are equally within the ambit of EU law.⁶ For the first time in the ECJ's jurisprudence it has been established that EU citizenship *alone* can trigger the application of EU law, with all its accompanying and inestimable consequences. This is the new approach to jurisdiction adopted by the ECJ in citizenship cases.

In a dubious decision of *McCarthy*,⁷ where the Court declined jurisdiction to grant residence in the UK to a Jamaican husband of a dual UK-Irish citizen who never exercised cross-border activities, the Court clearly demonstrated its willingness to apply the old and the new approaches side-by-side.⁸ Although definitely not eliminated, the cross-border situation test now has a sound alternative and has ceased to be the only method of framing jurisdiction at the Court's disposal. This contribution analyses the key consequences of the recent jurisdictional revolution: the principles behind drawing the line between the legal orders of the Member States and of the Union in Europe have been changed entirely.

Taken together, the recent cases mark a decisive move towards a very significant extension of the scope of application of EU law, opening up new vistas for drawing the line dividing the two legal orders in the Union. Under this approach, the distinction between wholly internal situations and cross-border situations simply disappears as inter-State borders in the Union cease to be a defining factor behind framing jurisdiction. What triggers the application of EU law according to the new approach is not the connection between the Internal Market and the factual situation at issue, but rather the potential severity of the Member States' impact on the legal situation of EU citizens.

This seems to be quite a natural conclusion to be drawn from the maturing of the European integration project which has largely outgrown its economic rationale.⁹ The total predictability of the new ECJ's approach notwithstanding, the new vision espoused by the Court is remarkable in a number of respects. These are profoundly interrelated and can roughly be split into six main mutually overlapping groups, including

4 Case C-135/08, *Rottmann* [2010] ECR I-1449, para. 42.

5 Ibid. (emphasis added).

6 Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000, para. 42 (emphasis added).

7 Case C-434/09, *McCarthy* [2011] ECR I-0000; Annotated by Van Elsuwege, P., *EuConst* 2011 (forthcoming).

8 Ibid., para. 56.

9 E.g. N. Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?," *Common Market Law Review* 39(2002): 731; A. Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe," *Legal Issues of Economic Integration* 35(2008); A. Iliopoulou, *Libre circulation et non-discrimination, elements du statut de citoyen de l'Union européenne* (Brussels: Bruylant, 2008), 267.

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1 Case C-135/08, *Rottmann* [2010] ECR I-1449. Annotated by D. Kochenov, *Common Market Law Review* 47 (2010): 1831.

2 Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000. Annotated by P. Van Elsuwege, *Legal Issues of Economic Integration* 38/3 (2011): 263.

3 E. Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects," *Common Market Law Review* 45 (2008): 17.

the improved coherence in the division of competences between the legal orders in Europe (2.); better protection of the rights of individuals in their capacity of EU citizens (3.); more serious attitude to the essence of the principle of equality on the part of the Court (4.); the shaping of a new vision of EU territory (5.); limiting unwarranted State action (6.) and the reinforcement of the general trends in the relationship between EU citizenship and Member State nationalities, marking a growing influence of the former on the essence and the practical legal operation of the latter (6.). We are looking at a very important beginning: a more coherent Union less dominated by market-oriented thinking is being born.

2 Coherence in the division of competences

The new approach introduces at least some coherence into the previously vague outline of EU law by marking yet another in a series of attempts by the Court to provide a clear and predictable explanation of the situations in which EU law is to apply and why, departing from the purely rhetorical constructs of the past.¹⁰ Although a number of questions will arise with regard to the possible limits of the new reading of the reach of the material scope of EU law, including, especially, the exact interpretation of what constitutes 'the effect of depriving [an EU citizen] of the genuine enjoyment of the substance of the rights conferred by virtue of this status,'¹¹ a vast number of virtually straightforward situations, such as the ones at issue in *Rottmann* and *Ruiz Zambrano*, are now unquestionably covered by the law of the Union. It is thus absolutely clear that once one's status of EU citizenship is under threat, EU law can intervene, no matter what. The same applies to the situation of EU citizens pushed by national law to leave the Union: EU law will be applicable with no regard to cross-border situations or actual and potential movements across the internal borders within the Union.

By ensuring a complete departure from the cross-border thinking in the situations where it is applied, the new approach offers coherence to the delimitation of the scopes of Member State and Union law, since it is not any more based on the factors which are *per se* irrelevant in the EU citizenship context, such as crossing the internal borders within the Union. Crucially, the Court does not utilise the new approach as a mere extension of the cross-border thinking. Although it is willing to employ the two side-by-side, as it has done in *McCarthy*, the underlying rationale of the new test is principally different from hypothesizing about future movement which an old approach would require.

In practice, this means that in any situation where either the status of EU citizenship (like in *Rottmann*), or the key rights associated therewith (like in *Ruiz Zambrano*) are undermined by the Member States, looking for a cross border situation is not necessary in order for the Court to intervene. The Court can still invoke cross-border movement, of course, using it as an alternative way to establish the applicable law – no problem with this. In the long run, however, it can be predicted that cross-border situation constructs will be used less and less in the cases involving EU citizens.

The intensity of interference approach formulated in *Rottmann* and *Ruiz Zambrano* is much more coherent and logical, solving virtually all the main flaws from which the cross-border situation thinking suffers. The new approach does

not presume that EU citizenship has to be 'activated' in some way before being relied upon;¹² it makes the construction of purely hypothetical cross-border situations, like in *Schempp*,¹³ which are rarely truly convincing,¹⁴ unnecessary; and it liberates EU citizenship of the main birth-defect, related to assumptions connected to the market, which disregards the wording of the Treaties where such a connection is not to be found. In other words, the new approach is rooted in the facts – the meaningful nature of the status of EU citizenship and the necessity to protect the rights associated therewith – and the old, cross-border one, is rooted in desires – the willingness of the Court to bring as many situations as possible within the scope of EU law by claiming potential cross-border effects. Both the Member States and the Union are mature enough at this stage, as the latest case law demonstrates, to face the facts. *Rottmann* and *Co.* is thus a long expected *adieu* to *Cowan*¹⁵ and its offspring.

3 Protection of EU citizens.

The second important aspect of the new approach directly follows from the first and reinforces the protection of the rights of EU citizens and their relatives¹⁶ in situations where the very essence of their Member State nationality and EU citizenship statuses, as well as the rights associated therewith, seem to be profoundly undermined, and where the Member States are unwilling to step in to correct the deficiencies. Under its current jurisprudence, the ECJ is empowered to check the legality of the Member States' actions against the letter and the spirit of EU law, becoming 'the final arbiter in disputes' on citizenship questions,¹⁷ enabling the Court to defend EU citizens and ensure that their rights *in this capacity* are respected by all the Member States, including their own Member State of nationality.

Two important issues arise in the context of the ECJ's newly-acquired ability to take the side of the citizens against their Member States of nationality even in those situations which could be classed as wholly internal under the previous approach. The first is concerned with the minimal thresholds of the protection of rights and deals with the question of how much protection should the 'substance of rights' of EU citizenship ensure, no matter what. The second issue deals with the emerging parallelism of rights – a clear overlap between the rights granted to EU citizens in their EU citizen capacity and those granted in their capacity as nationals of the Member States.

Classical citizenship rights, like Janus, currently exist in Europe in a dual form.¹⁸ The majority of such rights is guaranteed by both the Member States and the Union in a situation where the bodies of their citizenry necessarily overlap virtually entirely. In other words, EU-level rights can be essentially identical to the Member State-level rights, even though the scope of the two groups of rights is very different indeed, as the EU-level rights cover the whole of the territory of the Union, including

12 D. Kochenov, "Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between the Status and Rights," *Columbia Journal of European Law* 15 (2009): 169, 235.

13 Case C-403/03 *Schempp* [2005] ECR I-6421, para 22.

14 Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects," 14.

15 Case 186/87 *Cowan* [1989] ECR I-195.

16 P. Van Elsuwege and D. Kochenov, "On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights," *European Journal of Migration and Law* 13(2011).

17 G. Davies, "The Entirely Conventional Supremacy of Union Citizenship and Rights," in *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law? EUI Working Papers*, RSCAS (2011).

18 D. Kochenov, "Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship," *EUI Working Papers*, RSCAS 2010/23(2010).

10 D. Kochenov, "Citizenship without Respect: The EU's Troubled Equality Ideal," *JMWP (NYU Law School)* 08/10(2010).

11 Case C-434/09, *McCarthy* [2011] ECR I-0000, para. 56

all the Member States, while the national rights are confined to a particular Member State. While there are several notable exceptions to the overlap rule, such as political participation at the national level or the right to occupy sufficiently important positions in the civil service, the overlap is otherwise almost complete: the rights, *inter alia*, to enter and to leave, to work, not to be discriminated against, are all provided by both legal orders. This parallelism of rights shapes a reality where virtually any national citizenship right can be regarded as an EU citizenship right. In the absence of wholly internal situations as a meaningful factor in delimiting the scopes of the two legal orders following the turn away from a cross-border approach to jurisdiction by the ECJ, this potentially amounts to granting the Union a right to intervene in almost all the cases where the Member States disregard, using whatever pretext, the rights of their own nationals guaranteed in the national legal system. So in *Ruiz Zambrano* the Court had to protect the children's EU citizenship right to reside in the Union where Belgium failed to ensure that their rights to stay in Belgium stemming from their Belgian nationality are respected.

Establishing the thresholds of ECJ intervention is vital in this respect: a clear test of what would amount to rendering the exercise of the essence of EU citizenship rights impossible, thus warranting the EU's intervention, will need to be formulated. A large number of cases will need to be solved in order for the ECJ to establish a coherent way of distinguishing between the cases worthy of intervention and those to be left with the Member States and the ECHR legal systems. It is clear already now, however, that the ECJ is unlikely to benefit from showing too much self-restraint. All the key rights of EU citizenship should receive sufficient protection.

In a situation where virtually all national citizenship rights are paralleled at the supranational level and where the ECJ is entitled to ensure that EU citizenship rights are respected by the Member States' authorities in all circumstances, the Member States will most likely lose the freedom of substantial deviation from the EU's standards established for EU citizens (initially) in cross-border situations – at least not without a sufficient justification. National laws providing for a poorer level of protection compared with what EU law offers will be under constant pressure also from EU law, not only from the standpoints of common sense and the idea of equality between citizens – which is the case already. Pushed to the extremes this would mean that reverse discrimination can be eliminated also in those Member States like Germany, Belgium and the Netherlands, where national law does not view it as a problem. The EU will thus become the provider of the minimal standards of rights protection in a number of areas. While disabling Member State action which would fall short of respecting such standards, the doors will be open for the Member States to establish more permissive rules. Needless to say, these developments benefit EU citizens to a great degree.

4 Promotion of equality

The new approach reinforces EU citizenship, not only in terms of enlarging the number of situations where EU citizens can rely on EU law, and making it sufficiently clear in advance where EU law can legitimately be expected to step in, but also through making it a somewhat fairer status, closer to the ideal meaning

of citizenship espoused by legal philosophers.¹⁹ Citizenship is, *per se*, 'a status of equal membership within a bounded polity'²⁰ and by reinforcing its quality of equality through adopting the new approach, the ECJ helps to better legitimize the EU.²¹ While previously the application of EU law to EU citizens, including the application of the principle of equality and non-discrimination, depended largely on the history of the use of the fundamental freedoms provided by the EU, inviting distinctions to be made between 'activated' and 'non-activated' EU citizenship, and thus profoundly undermining the very essence of this legal status, the recent case law opens up the possibility of changing this situation completely.

The previously missing connection between the legal status of EU citizenship and the principle of equality in EU law undermined the essence of EU citizenship to a great degree, shaping 'citizenship without respect.'²² The narrow-mindedness of the EU's approach to equality is best expressed by Gráinne de Búrca, who demonstrated that the EU principle of equality 'is only selectively relevant in certain specific areas of [EU] law [...and...] does not have a single coherent role in [Union] law.'²³ Clearly, in a citizens' Union, such a situation is untenable. A 'true European citizenship'²⁴ is only possible when an appeal to the legal status of itself creates rights for the bearer and obligations for the public authority *vis-à-vis* the bearer of the status. *Rottmann* and *Ruiz Zambrano* both ensure the possibility of such a real citizenship status emerging. The new approach helps legitimize the Union through reconnecting citizenship and equality at the EU level.

5 New vision of territory

The new approach to EU citizenship taken by the Court has resulted in the emergence of a new, functional notion of EU territory, where no distinction at all is made between the territories of the particular Member States any more:²⁵ EU citizenship rights thus do not stop at the doorstep of those who never 'moved' (not even in the mind of the judges, like the little Catherine²⁶). For the first time, EU citizens seem to be granted the plenitude of the rights associated with this 'fundamental status of all the nationals of the Member States'²⁷ also *at home*, and not only abroad²⁸ or upon returning from

19 E.g. K.L. Karst, "Equal Protection of the Laws," *Society* 24(1986); K.L. Karst, "Why Equality Matters," *George Mason Law Review* 17 (1983): 245.

20 R. Bauböck and V. Guiraudon, "Introduction: Realignments of Citizenship: Reassessing Rights in the Age of Plural Memberships and Multi-Level Governance," *Citizenship Studies* 13(2009): 439.

21 E.g. J. Mueller, "Democracy and Ralph's Pretty Good Grocery: Elections, Equality, and the Minimal Human Being," *American Journal of Political Science* 36(1992): 983; W. Sadurski, "Majority Rule, Legitimacy and Political Equality," *EUI Law Working Paper* 2005/21(2005).

22 Kochenov, "Citizenship without Respect: The EU's Troubled Equality Ideal."

23 G. de Búrca, "The Role of Equality in European Community Law," in *The Principle of Equal Treatment in Ec Law*, ed. A. Dashwood and S. O'Leary (London: Sweet and Maxwell, 1997), 13-14.

24 Opinion of AG Sharpston in Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000, para. 3.

25 L. Azoulay, "A Comment on the Ruiz Zambrano Judgment: A Genuine European Integration,"(2010)., available on the website of the EUDO citizenship observatory of the EUI in Florence: www.eudo-citizenship.eu.

26 Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

27 E.g. Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31.

28 Abroad can become a reference to the lacking correspondence between one's Member State nationality and the Member State of residence and does not necessarily involve movement across internal EU borders: Case C-148/02 *Garcia Avello* [2003] ECR I-11613; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925. But see Case C-434/09, *McCarthy* [2011] ECR I-0000, para. 41.

abroad,²⁹ thus also covering the right to *reside* in the ‘territory of the Union,’³⁰ including one’s Member State of nationality.³¹ This potentially brings any EU citizen anywhere in the Union within the scope of Article 18 TFEU, and of the general EU non-discrimination principle.³² The change in the construction of the notion of territory is a very positive one, since a unitary notion of EU territory clearly puts the importance of internal EU borders, glorified under the previous approach, into the right perspective.

The main losers in the context of the new approach to territory are the third-country nationals who are (long-term) residents in the Union. Although their lives are lived in the Union with no internal borders, they are not granted access to the opportunities offered by the Internal Market. This situation is entirely illogical, since the status of the third country nationals and their rights in the EU seem to be entirely out of date, as the profound change in the economic and legal reality of the Union during the last decades has not been reflected in their legal situation. In a way, uniquely for the third-country nationals, the Member States pretend as if their Union does not exist. There is no rational explanation for this situation – even speaking in purely economic terms the benefits of free movement are quite obvious: if a Ukrainian or a Moroccan cannot find a job in Slovenia, but in Poland jobs are readily available, both Member States and the third country nationals themselves suffer alongside common sense from the failure to ensure that the same idea of territory applies in the Union to EU citizens and third country nationals. In a current situation of the rise in nationalism around the EU where naturalisation regulations become more and more restrictive, the third country nationals’ situation is particularly difficult, as the possibilities offered to them to become EU citizens become increasingly restrained.³³

The new vision of territory in the context of EU citizenship law is certainly similar to the reading of this notion as it relates to the law of free movement of goods,³⁴ thus following a general line of convergence of EU citizenship and fundamental freedoms law. The new approach reinvents the Union, turning it, to borrow from Oxana Golyner, into a ‘single living and working space.’³⁵ All in all – for the first time in the history European integration – the Union, which has among its goals to ‘offer its citizens and area of freedom, security, and justice without internal frontiers’³⁶ is starting to deliver on its promise.

6 Limiting Unwarranted Member State Action

The new approach has clear implications for the Member States’ ability to regulate a number of fields as they please

at the expense of EU citizens’ rights and entitlements with no sufficient justification. This is not a minor matter. Before 2011 the Member States could do absolutely anything to those EU citizens who are not in a cross-border situation and no justification of such policies was needed, which is at the heart of sovereignist thinking. Although it is presumed that the Member States – which are, just as the Union as a whole, ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’³⁷ – would not want to mistreat their own nationals, the practice is different from idealistic accounts tinted with ideology. A large number of cases of reverse discrimination provide a vivid illustration of this fact. It is thus great news that now the Member States will need to justify their potentially dubious actions *vis-à-vis* EU citizens not only in front of the European Court of Human Rights, where the margin of appreciation given to States is at times very broad indeed, but also in front of the ECJ. To present this as squarely going against the Member States’ sovereignty and the idea of democracy would be to make a half-hearted argument.

Firstly, it is obvious that the new jurisdiction test employed by the ECJ does not enable the EU to legislate in the fields of Member State competences, leaving them all the freedom to regulate these areas as long as the general lines of EU law are respected. Secondly, democracy is not only about the reflection of the will of the governed, as Mattias Kumm has demonstrated, but also about creating regulation which is not nonsensical or harmful and which is justifiable by solid reasons.³⁸ In this sense being subject to constant Socratic contestation, which will most likely be the outcome of the new ECJ’s jurisdiction test, the level of legitimacy and the quality of government in the Member States will only increase, rather than be undermined. Sovereignty is not an end in itself and appeals to it are deficient when used with an aim of justifying bad regulation,³⁹ which is usually the case with the laws knowingly introducing worse treatment of nationals who would fail to meet the old standard of a ‘cross-border’ situation.

The current developments are thus in line with a global move, described by Moshe Cohen-Eliya and Iddo Porat, towards the ‘culture of justification’, which is supplanting the ‘culture of authority’ in mature constitutional systems.⁴⁰ In reply to a question ‘why am I treated like this’, a sovereignist answer ‘because I so decided’ is not sufficient any more: substantive reasons need to be given. In the cases of the reverse discrimination such substantive reasons *have never existed*. This situation could not persist in a Union of citizens. The new approach to jurisdiction by the Court has a potential to change this situation by asking the Member States to

move beyond purely procedural considerations in reply to the question why EU citizens are deprived of the possibility of the ‘genuine enjoyment of the substance of their rights’⁴¹ associated with this status. While the exact scope of such rights remains to be seen, it is suggested that the ECJ should not shy away from using EU citizenship to the full of its potential by asking the Member States simple questions about their reasons. The fields affected will definitely range from immigration and family reunification to a wide number of other areas of law, potentially resulting in fundamental consequences for the exercise of the essential competences of the Member States. Agreeing with Hailbronner and Thym, ‘The Court endows itself with a novel instrument, which may potentially be directed against a variety of national measures’.⁴²

It will thus go precisely to the heart of what *Bundesverfassungsgericht* was warning about when it announced the idea of ‘Identitätskontrolle,’⁴³ potentially interpreting the Basic Law *ultra vires* and sparking scholarly criticism: the ‘malaise allemande’⁴⁴ seems to be back, albeit in a deeply mutated form.⁴⁵ The German *Lisbon* decision is a telling illustration of how the Member States’ authorities tend, by adopting a strictly national approach to rights and freedoms, to fail their nationals by refusing to see the EU citizen in them. As a consequence, by trying to develop rhetorical devices to limit the reach of EU law, national courts are often deaf to the fact that this can actually diminish the amount of rights and protections which Europeans – *i.e.* their own nationals – enjoy.⁴⁶ Jack Balkin’s idea of the ‘Constitutional evil’⁴⁷ naturally comes to mind in this context: protecting the Constitution, which is, naturally, one of the key tasks fulfilled by the judiciary of the Member States, can also harm individual citizens who derive rights precisely from the limitations put on the national norms by the EU legal order.

Since under the new approach the ECJ acquires many more opportunities to interfere with the Member States’ exercise of powers, the Member States will need to be very careful in the framing of their nationality legislation and the rules which can potentially interfere with the possibility of exercising of EU citizenship rights by EU nationals, including their own nationals. This is likely to result in further rationalisation of rule-making in the fields concerned, adding to the legitimacy of the rule-making and decreasing its arbitrariness.

7 Reinforcing the main trends

Lastly, the new phase of integration comes down, *inter alia*, to the continuation of the trend of the erosion of the legal importance of the Member States’ nationalities⁴⁸ and the further tensions between the Member States and the Union in the fight for the citizens, extending to the essence of the EU’s constitutional tactic of humiliating the Member States as articulated by Gareth Davies.⁴⁹ Once the list of rights already granted to nationals via their EU citizenship status is enriched by the right to reside in the Member State of nationality⁵⁰ and, most importantly, once the *material scope* of EU law explodes as a consequence of recent moves, these nationalities – which have already been ‘abolished,’ in Gareth’s words, within the material scope of EU law⁵¹ by what used to be Article 12 EC (now Art. 18 TFEU) – end up even further curtailed.

Notwithstanding how fast the transformation will actually occur, the recent case law definitely enables a fairly accurate prediction of where the development of EU citizenship will be going in the near future. It is clear, however, that regardless of the success of the new approach, the core problems will remain. As Andrew Williams demonstrated, the problems plaguing the key principles of law in the Union, including equality and non-discrimination connected with EU citizenship, could have much deeper roots than one would expect,⁵² going as far as the flaws (or, rather, gaps) in the very philosophy of the European integration exercise, leading to an impoverished idea of justice⁵³ and a highly proceduralised vision of the principles of law which threatens to strip the latter of even its most essential substance. It is difficult to disagree with Joseph Weiler’s view in this context. Indeed, ‘oggi, noi accumuliamo la retorica dei valori anche se, nelle parte operative dei trattati, vi diamo poca importanza o lasciamo prevalere ambiguità’.⁵⁴

The new phase of EU law development hailed in this article is thus just a small step towards a more coherent and citizen-friendly Union, which is at the same time infinitely removed from the much needed solution of the more profound problems lying outside the scope of this paper: *i.e.* the missing substantive idea of justice, which undermined EU integration to a great degree. Nevertheless, even if unable to solve all the Union’s underlying problems, many of which are deeply woven into the fabric of the European integration project from the very beginning, the new approach marks a definitive step towards the commencement of a substantively new phase of integration, bound to affect the Union and its Member States alike, as well as the citizenry which the two have in common and whose interests any law, be that the law of the Union or the law of the Member States, is bound to protect.

29 *E.g.* Case C-224/98 *D’Hoop* [2002] ECR I-6191.

30 Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000, para. 44.

31 Connecting EU citizenship and the right of residence in the Union does not seem to exclude, however, expulsions of EU citizens from one Member State to another, which still remain a legal possibility in a limited array of cases. See Art. 28, Directive 2004/38.

32 See *e.g.* Case 117/76 *Ruckdeschel* [1977] ECR 1753, para. 7; Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, para. 61.

33 *E.g.* R. van Oers *et al.*, “Mapping the Redefinition of Belonging in Europe,” in *A Re-Definition of Belonging?*, ed. R. van Oers, *et al.* (The Hague: Koninklijke Brill, 2010), 307.

34 P. Van Elswege and S. Adam, “Situations purement internes, discriminations à rebours et collectivités autonomes après l’arrêt sur l’Assurances Soins Flamande,” *CDE* (2008): 655, 61.

35 O. Golyner, “European Union as a Single Working-Living Space: EU Law and New Forms of Intra-Community Migration,” in *Theorising the Global Legal Order*, ed. A. Halpin and V. Roeben (Oxford: Hart, 2009), 145.

36 Art. 3(2) TEU.

37 Art. 2 TEU.

38 M. Kumm, “The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review,” *Law and Ethics of Human Rights* 4, no. 2 (2010).

39 J.H. Carens, “Citizenship and Civil Society: What Rights for Residents?,” in *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe*, ed. R. Hansen and P. Weil (New York/Oxford: Randall Books, 2002), 100, 15.

40 M. Cohen-Eliya and I. Porat, “Proportionality and the Culture of Justification,” *American Journal of Comparative Law* 59(2011): 463.

41 Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000, para. 42.

42 K. Hailbronner and D. Thym, “Annotation of Case C-34/09 *Ruiz Zambrano*,” *Common Market Law Review* 48(2011): 1253, 57.

43 BVerfGE 63, 2267 (2009) para. 240; G. Davies, “Constitutional Disagreement in Europe and the Search for Legal Pluralism,” *Eric Stein Working Paper (Prague)* No. 1/2010 (2010).

44 A. Peters, “European Democracy after 2003 Convention,” *Common Market Law Review* 41(2004): 70.

45 In the *Lisbon* judgment the Bundesverfassungsgericht (German Constitutional Court) changed its approach to *demos*, probably under pressure from the literature criticizing its previous approach. D. Thym, “In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court,” *Common Market Law Review* 46(2009): 1795, 818.

46 Cf. Kochenov, “Citizenship without Respect: The EU’s Troubled Equality Ideal,” 65–67.

47 J.M. Balkin, “Does the Constitution Deserve Our Fidelity: Agreements with Hell and Other Objects of Our Faith,” *Fordham Law Review* 65(1997): 1703, 04.

48 Kochenov, “Rounding up the Circle: The Mutation of Member States’ Nationalities under Pressure from EU Citizenship.”

49 G. Davies, “The Humiliation of the State as a Constitutional Tactic,” in *The Constitutional Integrity of the European Union*, ed. F. Arntsenbrink and P. van den Berg (The Hague: T.M.C. Asser Press, 2010).

50 Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000, para. 44. See also AG Sharpston’s Opinion in this case, para. 101.

51 G. Davies, “Any Place I Hang My Hat?” Or: Residence Is the New Nationality,” *European Law Journal* 11, no. 1 (2005): 43, 55.

52 A. Williams, “Taking Values Seriously: Towards a Philosophy of EU Law,” *Oxford Journal of Legal Studies* 20(2009): 549.

53 A. Williams, *The Ethos of Europe* (Cambridge: Cambridge University Press, 2010).

54 J.H.H. Weiler, “Europa: “Nous coalisons des États nous n’unissons pas des hommes,”” in *La sostenibilità della democrazia nel XXI secolo*, ed. M. Cartabia and A. Simoncini (Bologna: Il Mulino, 2009), 51, 54.

ON EUROPEAN IDENTITY

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Identities, be they personal or collective, are complex entities. Not only are they entwined with specific narratives, but they are also embedded within time. In fact, they belong to time; that is, there is always a time for building them, strengthening them, developing them, consolidating them, transfiguring them and a time for letting them go. To paraphrase T.S. Eliot, we could probably call this 'the time of season and of the constellations'. For season and constellations essentially allow us to enjoy our identities and to live in them, make us shake them off and abandon them, lead us to forget them in our embrace of new ones or to just push them in the background, thereby carrying on our business as if a certain identity did not even exist.

This 'time and constellation' bound reality applies to the European identity, too. In the 1990s, when the normative turn in European studies started having an impact and questions of democracy, legitimacy and identity in the EU were raised, scholars and policy-makers believed that the issue of the formation of a solid European identity revealed the limits (and, indeed, the edges) of European citizenship. The reader may recall that EU citizenship was a weak institution at that time and many saw it as a purely decorative element in the European Union edifice or as means of enhancing the Community's social legitimacy. Accordingly, adding flesh onto the bones of the Treaty on European Union's citizenship provisions (1992, in force on 1 November 1993) was seen as a key to promoting a sense of European identity. The latter was seen at that time to be urgently needed not only because the internal market cannot generate strong forms of identification and social solidarity among the participants, but also because its alleged absence made EU citizenship a pale reflection of its national counterparts which nourished and, in turn, were nourished by resilient national identities.

And yet almost twenty years following the birth of European Union citizenship, we have come to see European integration largely through the lens of European citizenship. The Court has made a number of significant contributions to its development and transformation, and the adoption of the so called Citizenship Directive (Dir. 2004/38),¹ notwithstanding the ensuing implementation gaps in several Member States, has transformed 'market Europe' into a 'citizens' Europe'. European Union citizenship is now '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'.² And as Advocate General Maduro has stated, 'when the Court describes Union citizenship as "the fundamental status" of nationals it is not making a political

statement; it refers to Union citizenship as a legal concept that goes hand in hand with specific rights for Union citizens'.³ And further, 'Citizenship of the Union must encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bonds of the national community, but also within the wider context of the society of peoples of the Union'.⁴

Accordingly, the EU Citizenship Report 2010 (the sixth report on EU Citizenship) targets the obstacles faced by citizens in their daily lives and focuses on the enforcement of EU legislation in the Member States.⁵ The Commission's pragmatic approach has yielded twenty five concrete actions designed to dismantle obstacles to EU citizens' rights and to address their needs in their various subject positions, that is, as private individuals, consumers, residents, students and professionals and political actors. In 2013, the European year of citizens, the Commission will reflect on the progress achieved thus far and will put forward a comprehensive action plan designed to complete the removal of persistent obstacles to the enjoyment of citizens' rights.⁶

Given the maturation of European citizenship and its increasing centrality to the European Union's present and future, it seems to me that we can no longer believe that the question of a European identity reveals the limits of EU citizenship. Instead, during the last two decades the evolution of the remarkably experimental institution of EU citizenship has revealed the limits of what may be tentatively called 'the European identity talk'. For it can hardly be argued that the European Court of Justice embarked upon the strengthening of EU citizenship in the 1990s and in the new millennium because judges became aware of statistics showing increasing levels of European identification among Europe's inhabitants. Nor did European citizens fill the streets and demanded more citizen rights because they became more 'European'.⁷ True, studies may find that the better educated and skilled European citizens are more likely to benefit from the European integration process and thus more likely to lend their support to it and that contextual

3 See the AG's Opinion in C-524/06 *H. Huber v Bundesrepublik Deutschland*, delivered on 3 April 2008.

4 See point 23 of Maduro's opinion in *Nerkowska*, 28 February 2008; see also the Opinion of Advocate General Trstenjak in Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-0000, points 82 to 84.

5 European Commission, *EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights*, COM (2010) 603 Final, Brussels 27.10.2010. The Report is accompanied by a *Report on progress towards effective EU Citizenship 2007-10* (COM(2010) 603 final) and a *Report on the Evaluation of the 2009 European Parliament Elections* (COM(2010) 605).

6 *Ibid.*, at 23.

7 Interestingly, 79% of EU citizens claim familiarity with the term 'citizens of the EU' and awareness of the rights attached to EU citizenship remains overall at the same level since 2002 and 2007; The Gallup Organisation, "Flash Eurobarometer No 294. European Union Citizenship – Analytical Report," (October 2010).



factors and the varieties of capitalism may explain why unskilled workers in capital-rich states are sceptical of integration while their counterparts in labour-rich states may be supportive of the same process,⁸ but who could predict whether this might be the case in $t+1$? Peoples' subjective identifications fluctuate so unpredictably, that being a winner or a loser in time t provides almost no guarantee that one will display a positive or negative attitude towards European integration, respectively, in time $t+1$. Valuations change and identifications evolve, too, owing to a range of endogenous as well as exogenous factors. And it is often the case that discourses build collective identities but events unbuild them. Patterns of identification shift in light of economic, social and political exigencies and are often falsified by new circumstances.

This is, perhaps, one of the lessons we have learnt from the sovereign debt crisis in the Eurozone area. Despite being winners, German citizens react negatively to further bail out packages and to the French proposals about a closer economic union, with a centralised authority coordinating taxation and expenditure, even though they are aware of the severe economic as well as political costs associated with either the collapse of the Euro or the fragmentation of the Eurozone.⁹ Similarly, if the EU embarks upon a closer economic and fiscal union, it will not be because European Union citizens have embraced the notion of a federal Europe. Instead, it will be because this may be seen as the option that is more likely to solve in an effective way the economic crisis and avert a Euro collapse which would endanger the whole of European integration. True, we are witnessing a sovereign debt crisis that has nothing to do with notions of identity. However, the crisis has stimulated the proliferation of narratives of 'us and them', shifts in the 'Europeanness' index of European populations and a rise in Euro-scepticism.

And while it may be imprudent to state that a European identity is no longer needed for the success of the European project, the evolution of EU citizenship as well as the crisis in the Eurozone force its reconsideration and a rethinking of the time and constellations that either make it a central political issue or let it fade into silence. Accordingly, I would suggest that, in addition to providing models for European identity construction and typologies about its conceptualisation, it is important that we also address other questions, such as 'who is raising the issue of a European identity?', 'when and for what purpose?', and 'how much weight is, or should be, given to it?'

These are important questions that have been thus far sidestepped in scholars and practitioners' quest for

8 Gabel, M. 'Public Support for European Integration: an Empirical Test of Five Theories', *Journal of Politics* 60(2), 1998, 333-354; Hooghe, L. and G. Marks, 'Calculation, Community and Cues: Public Opinion on European Integration', *European Union Politics* 6(4), 2005, 419-443.

9 See S. Fleming, "The Devastating Price of Pulling out of the Euro," *The Times*, 7 September 2011.

conceptualisations of European identity and understanding. They are important questions because they reveal contrasting perspectives about its content as well as its necessity for European integration depending on who is looking at it, when and why. National executives and political elites, for instance, may use the weak presence, or absence, of a European identity to criticise the EU, to make and remake national publics and as a means of creating subject positions domestically by contrasting them with European options. Ordinary members of their publics may draw on the European identity theme in order to complain about the poignant gap between rhetoric and rules on paper, on the one hand, and concrete realities, on the other. In this endless play of identity games, positions and perspectives are bound to shift as well as to become more rigid. There is no secure foothold, but this is not necessarily a problem. It has not been a problem for national identities, after all; if we look closely at events in the southern Member States during the last two years we see that the presence of a strong sense of collective identity does by no means make people less critical of the status quo and more willing to support it in times of crisis.

But what is then the future of a European identity? Should the flexible and dynamic development of EU citizenship absorb the issue of a European identity, particularly since the former creates a sense of shared belonging to a common European polity? Or is it the case that European Union citizenship itself needs to be accompanied by a narrative of a shared European identity in order to reach the solidaristic manifestations that elude it at the moment owing to determined attempts to preserve the boundaries of national welfare systems? The former question seeks to make the notion of a European identity almost obsolete while the latter depicts it as an addition.

Contrary to the underpinnings of both questions as well as the depiction of a common European identity as an end or the destination of the process of creating an ever closer Union, I would argue that the question of a European identity has already been settled. The answer lies where we started from – otherwise put, what we believe and call the end is, in reality, the very beginning. For nothing else could be the cornerstone of a European Union identity than peace and freedom. At the very beginning realising peace and freedom were the ideals that drove the project of European integration and these remain the preconditions that make discussions about European identity possible.

In this respect, we can have the luxury of spending considerable parts of our lives without consciously thinking about them and of engaging in a number of interesting debates about the assessment of the present stage of European identity, the impact of the Lisbon Treaty and making the EU more visible in the everyday lives of its citizens. Peace and freedom have been the precondition of our present comfortable existence and of our ability to be able to make choices and life plans, including the

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1 Directive 2004/38/EC, OJ 2004 L 158/77.

2 Case C-184/99 *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 31.



capacity to be able to feel at home wherever we go in the European Union as students, professionals, service providers, workers or workseekers and tourists. The same applies to our choice not to take part in cross-border activity and to stay at home undisturbed by occurrences at the border and hostile tensions among countries. Peace and freedom are the underpinnings of our European identity made possible by the development and maturation of the European Union, including its unique model of citizenship. So despite all our debates, all the flaws we may find in European Union as well as national policies, and the misguided positions circulating in the media, we know that we can identify with the European Union because we will not be bombed, driven away from our homes, be tortured, battered, dispossessed and crushed by state power or foreign invasion. Otherwise put, the European Union has given so many ordinary people 'a break'. We have also come across menus of choices that enable and facilitate us and let us develop, explore and enjoy the multifarious creations of the diverse peoples of Europe. Safe in this identification, we can continue our business either without paying too much attention to European identity matters or witnessing so many other meanings, and narratives, of it coming and fading. For what is important is that what has to be achieved and made has already been discovered and it is this discovery we need to safeguard for the future. European identity is thus necessarily backward bound.

This, to an extent, also explains why the European identity can never be a mirror image of national identities; being at war within itself and with other countries is not the modality of European identity. In addition, the existence of an overarching identity is not needed in order to furnish the unity and the purpose of the European edifice. For this has already been achieved by doing things together, solving problems together, by designing appropriate institutions, reflecting critically on them, revising and redrawing the European Union architecture. True, the participants in this project must not be indifferent, that is, they must have a positive orientation towards European integration and a sense of commitment that stimulates their engagement, but such orientation and engagement have many shades and are manifested in different ways. Certainly, European citizens are not required to suppress all other identifications and to display unqualified acceptance of, and allegiance to, what has been decided. The language of sacrifice and patriotism is not apposite to the European Union; in fact, the latter has led us to revise our belief that a political order that cannot command personal sacrifice is either short-lived or illegitimate.¹⁰ In the plural European community people are free to choose whether or not to identify with a particular community or with more than one communities simultaneously and to revise or modify this choice whenever they wish.

Welcoming the modest reality of being European citizens and participants in the most unique and ambitious political experiment in human history should thus be our starting point. Appreciating this and all those things that we have taken for granted for more than half a century, namely, peace and freedom, is good enough. This, of course, is not to say that citizens, groups and policy-makers are not free to define their own sense of belonging to the European Union in unique ways, construct new agendas and initiatives and to identify possibilities for political action. Nor should we forget that in times of prosperity people are bound to neglect the issue of European identity and in times of adversity they will decry it. For this is a reality. But it is also important not to lose sight of the fact that European identity has always been work in progress. It is its business to acquire importance and new meanings, additional to those it had in the beginning. It will forever need building, endless invention and an institutional framework that builds on, and further advances, peace, freedom, the rule of law, social justice, respect for human rights and democracy. After all, this was how European identity was defined for the first time in the 'Declaration on European identity' adopted by the Member States at the Copenhagen Summit in 1973. The nine Member States at that time expressed their determination to build a Community of law and democracy which 'measures up to the needs of the individual and preserves the rich variety of national cultures'.¹¹ Many things have changed enormously since 1973, but, I would argue, the building blocks for a political as well constructive notion of European identity remain the same.

As T.S. Eliot so wisely observed in his second quartet, East Coker,¹²

'In order to arrive there,
To arrive where you are, to get from where you are not,
You must go by a way wherein there is no ecstasy.
In order to arrive at what you do not know
You must go by a way which is the way of ignorance.
In order to possess what you do not possess
You must go by the way of dispossession.
In order to arrive at what you are not
You must go through the way in which you are not.
And what you do not know is the only thing you know
And what you own is what you do not own
And where you are is where you are not'.

Herein lies the answer to the question of the European identity. But evidently, this is an answer of a different kind.

¹⁰ D. Kostakopoulou, *The Future Governance of Citizenship* (Cambridge: Cambridge University Press, 2008).

¹¹ European Commission, "Annex 2 to Chapter II, 7th General Report," (1973).

¹² T.S. Eliot, "Four Quartets: East Coker (1940)," in *The Complete Poems and Plays* (London: Faber and Faber, 2004), 181.

EU CITIZENSHIP AND IDENTITIES: SOCIOLOGICAL AND LEGAL-INSTITUTIONAL VIEWS

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The question posed to me is: 'How has the exercise of free movement rights (especially free movement of labor) impacted on identities in Europe?' There are at least two ways to answer this question: a sociological and a legal-institutional.

From a *sociological* point of view it has to be stated: free movers are a tiny majority among a largely sedentary European populace – as it were, you can squeeze them all into the Bar Fiasco of the Badia Fiesolana.¹ Their impact on something as grand as a 'European identity' is likely to be small, perhaps nil. The extant best sociological study of free movers, incidentally by a graduate from the European University Institute,² comes to skeptical conclusions. Free movers are likely to be blocked elites at home, and they remain blocked elites abroad. The flat by the Amsterdam Gracht and the coveted place in the non-paying public elite school is likely to go to the – now as before – national elites, against whom our 'Eurostars' lose out. So Favell ends his impressive study with a wondrous look at a Danish province town cemetery: 'How do you get in *there*, together with the Sorensens and the Jansens?'

From a *legal-institutional* view, you come to more upbeat conclusions. It is such a view that I presented in my coda to a small book on citizenship and immigration,³ where I take EU citizenship as an instance of a 'citizenship light' that I see spreading in liberal societies. This is a citizenship that is easy to get, that gives you little rights, and that is capped by thin and thinning identities. This was a revisiting of EU citizenship after having left Fiesole some eight years earlier, and outside Florence one just gives little attention to such things.

But my surprise, entirely generated by ignorance, of course, was great: the old Weilerian picture of a 'Saatchi and Saatchi' citizenship was no longer accurate. As a result, as usual, of bold European Court of Justice (ECJ) case law, EU citizenship had become a *real* citizenship, if only on the 'rights' (especially the social rights) front. Now kicks in what postnationalists had always seen in EU citizenship:⁴ that this is a citizenship that dissociates nationhood from citizenship, and thus opens up entirely new identity vistas. EU citizenship is one where 'residence' becomes the 'new nationality'⁵ or fulcrum of identity. If residence is the source of rights, for which there is an interesting docket of case law by the ECJ (for instance, on who is to

benefit from subsidised museum or park entrance fees in Florence), this has interesting consequences: we then have a citizenship that 'absorbs the foreigner' and that 'rejects the expatriates', as the Euro-lawyer Gareth Davies has put it in an imaginative think piece. EU citizenship as residence- and not nationality-based opens up the prospect of '(a) community...defined by its current members more than its history, constantly reinventing itself and changing, belonging to those who participate, not those selected at birth'.⁶ This is a 'model that looks rather American', as Gareth concludes.⁷ This was also a perfect conclusion for a book on the 'lightening' of citizenship in the West.

I still think this is a brainy construction, in need to be sobered by sociology. At the micro-level, one has to consider the Favellian fact of second-class only and numerically insignificant Eurostars. At the macro-level, one has to be aware that the 'financial solidarity'⁸ exacted by EU citizenship on national taxpayers will dampen their enthusiasm for costly social schemes, leading to a less desirable – but eminently more realistic – kind of 'Americanisation'.

Moreover, on the identity front, 'Europe' is more absent than ever, and more enlargement (not to mention a break-down over the sovereign debt crisis) will yield ever less of a 'European identity'. There is absolutely no escape from this logic.

Instead, the 'identity' inputs today come from the old nation-states. Here I see two projects competing with one another. One is that of a 'muscular liberalism', as British Prime Minister David Cameron put it recently.⁹ The other is that of a culturalised Christianity, which has recently been acknowledged by the European Court of Human Rights (ECtHR) in its *Lautsi v. Italy* decision.¹⁰ The 'muscular liberalism' is an ethical, thickened variant of the 'American model' diagnosed by Davies, so I will say no more of it. My interest is in the ECtHR's *Lautsi* decision, which allows the Italian state to exhibit the crucifix in its public schools.

Lautsi is entirely unrelated to European Community law and EU citizenship, but it still represents what is disliked and resented about 'Europe', metaphorically speaking. Here comes an atheist Fin, telling the Italians to discard their national culture, because it conflicts with

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¹ The student bar at the European University Institute, Florence.

² A. Favell, *Eurostars and Eurocities* (Oxford: Blackwell, 2008).

³ C. Joppke, *Citizenship and Immigration* (Cambridge: Polity, 2010).

⁴ Y. Soysal, *Limits of Citizenship* (Chicago: University of Chicago Press, 1992).

⁵ G. Davies, "'Any Place I Hang My Hat?' Or: Residence Is the New Nationality," *European Law Journal* 11, no. 1 (2005).

⁶ *Ibid.*, 56.

⁷ *Ibid.*, 55.

⁸ Case C-184/99 *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 44.

⁹ D. Cameron, "Speech to the Munich Security Conference, 5 February 2011," (downloaded from www.number10.gov.uk).

¹⁰ European Court of Human Rights, *Lautsi and Others v. Italy*, 18 March 2011.



her secularist (tacitly Lutheran) leanings. This is, indeed, 'cultural vandalism', 'historical Alzheimer's', as one justice on the Strasbourg court called it. It all comes down to how to justify the preference for majority culture. The premise, of course, is to argue that the Crucifix in this (not in any) context is not religious but cultural, and thus no violation of liberal neutrality, which is a principle to regulate religion, not culture.

But then, on this floor of culturalised Christianity, there are two possibilities to justify the Crucifix that are different in kind. The first is to argue that only Christianity has generated the secular state and its liberal values, so that a preference for it is warranted by its superiority over other religions. This is what, no tongue in cheek, Italian administrative courts and the Italian government have argued in this case. This is nationalism under a different name.

The second possibility is to argue by way of pluralism (as against Christian universalism). This is the line taken by the Grand Chamber of the Strasbourg court: the Cross is justified in reference to the fact that Italy opens up the school environment in parallel to other religions, especially Islam: headscarves are allowed on the part of students, optional Islam instruction is available, no exams are scheduled on Islamic holidays. Etc.

I do not know whether these factual claims are correct. But if mellowed by and argued in terms of pluralism, culturalised Christianity appears as an entirely reasonable and feasible identity option, and one that should not be discarded by the let-loose legalism through which 'Europe' in various guises has rightly become infamous.¹¹

11 For a sane defense of 'Christian Europe', see Joseph Weiler, *Ein christliches Europa* (Salzburg: Pustet, 2004).

EUROPEAN CITIZENSHIP THROUGH A GENDER LENS?

madeleine kennedy-macfoy*

Since the mid-1980s, feminist scholars have been highlighting the ways in which classical and traditional conceptualisations constrained women's access to the rights and privileges deriving from citizenship;¹ as well as other disadvantaged groups.² A burgeoning feminist scholarship has re-appropriated the concept of citizenship, with many feminists viewing it as 'an invaluable strategic theoretical concept for the analysis of women's subordination and a potentially powerful political weapon in the struggle against it'.³ Feminist critiques have shown how women's exclusion has been central to the historical conceptualisations of liberal and republican approaches to citizenship; they have exposed the false universalism of the category 'woman' and centralised the issue of difference; and they have sought to address the tension between a gender analysis that is grounded in difference, and the inherent universalism of citizenship.⁴

Under the auspices of the EU funded research project – FEMCIT, Gendered Citizenship in Multicultural Europe – new empirical research has investigated the relationship between the struggles of the women's and feminist movements, and women's citizenship in a number of European countries⁵. The premise for the chapters presented in an anthology presenting the findings from this research, is that women's and feminist movements have been 'remaking citizenship' in varying ways across time and space in Europe over the last forty to fifty years.⁶ Much of the effort of the women's and feminist movements' struggles have occurred within organisations established for the purpose of changing women's experiences and position in society.

Therefore, women's activism within organisations can be seen as a key aspect of women's citizenship for two reasons: firstly,

women's organisations stand out as important sites within which women enact⁷ their political citizenship. Politics is conceived of broadly, in Held's terms, as being about power; 'that is about the capacity of social agents, agencies and institutions to maintain or transform their environment, social or physical...'.⁸ This broad conceptualisation of politics is necessary if women's activism, which does not always take place through formal channels, but is no less political in its intent and effects, is to be recognised. Although we can identify a public sphere in which political citizenship is enacted, as Lister points out, 'it cannot be divorced from what happens in the private which shapes its contours and which can be the proper object of citizenship struggles'.⁹

Secondly, women's activism within organisations is related to citizenship because it is focused on issues that constitute 'the proper object of citizenship struggles'.¹⁰ Of course, activists may not explicitly use citizenship as their strategic/political framework, or even think or talk about their work in terms of citizenship.¹¹ However, feminist theorists' critical re-appropriation of this strategic concept means that women's experiences can be included in the literature, research and policy-making within which citizenship is given top priority. Citizenship's substantive content is also made deeper and more nuanced through feminist theorisation, which is in turn strengthened by empirical research. One of the FEMCIT project's main contributions has been to suggest that as well as thinking of citizenship in terms of rights, duties, participation and belonging, a gendered perspective highlights the many dimensions of citizenship. These include the traditionally recognised social, political and economic dimensions; and the emerging or newer bodily/sexual and intimate dimensions, as well as the issues of religion and ethnicity in relation to citizenship.¹² FEMCIT research was conducted across a wide range of European countries, including EU Member States as well as non-Member States. However, since the empirical approach of the project was 'mainly nation-state oriented',¹³ the issue of how gender is addressed within European citizenship received little attention. In what follows, I suggest that given the fact that European citizenship remains (formally at least) inextricably bound to national citizenship, findings from the FEMCIT project, relating to how citizenship is being remade through women's activism at the national level, remain pertinent to any attempt to understand current constructions and meanings of European citizenship through a gender lens.

The establishment of European citizenship under Article 8 of the 1993 Maastricht Treaty contained no explicit mention of gender or any other axes of differentiation, which prevent certain groups of people from enjoying full citizenship. However, gender

7 According to Engin Isin, the 'enactment of citizenship implies an understanding of political participation beyond a narrowly defined political realm and beyond the canons of electoral politics' (www.enacting-citizenship.eu/index.php/sections/blog_post/53/, last accessed August 25th 2011, at 14.53).

8 Cited in Lister, *Citizenship: Feminist Perspectives*, 26, emphasis in the original.

9 Ibid., 28.

10 Ibid.

11 See NyhagenPredelli et al., "Remaking Multicultural Citizenship," in *Remaking Citizenship in Multicultural Europe: Women's Movements, Gender and Diversity*, ed. B. Halsaa, et al. (Basingstoke: Palgrave MacMillan, 2012).

12 See B. Halsaa et al., "Femcit Final Report," (2011). www.femcit.org.

13 Ibid., 71.

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1 See for example M. Dietz, "Context Is All: Feminism and Theories of Citizenship," in *Dimensions of Radical Democracy: Pluralism, Citizenship, Community*, ed. C. Mouffe (London: Verso, 1992); R. Lister, *Citizenship: Feminist Perspectives* (Basingstoke: Palgrave MacMillan, 1997); R. Lister, *Citizenship: Feminist Perspectives (2nd Edition)* (Basingstoke: Palgrave MacMillan, 2003); B. Siim, *Gender and Citizenship: Politics and Agency in France, Britain and Denmark* (Cambridge: Cambridge University Press, 2000).

2 I.M. Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship," *Ethics* 99(1989); N. Yuval-Davis and P. Werbner, "Introduction: Women and the New Discourse of Citizenship," in *Women, Citizenship and Difference*, ed. N. Yuval-Davis and P. Werbner (London: Zed Books, 1999); G. Lewis, "Do Not Go Gently...": Terrains of Citizenship and Landscapes of the Personal," in *Citizenship: Personal Lives and Social Policy*, ed. G. Lewis (Bristol: Policy Press in Association with the Open University, 2004).

3 Lister, *Citizenship: Feminist Perspectives*, 195. There is certainly no general consensus that citizenship is useful to feminism, either in its theory or practice. Where some feminists argue for a broadening of the concept to encapsulate the multiple layers and dimensions of women's lived experiences (for example Lister, 1997, 2003); others find citizenship to be useful only insofar as it centralises the political sphere, within which women should aim to be more present (see for example Dietz, 1992 and A. Phillips 'Citizenship and Feminist Theory', in *Democracy and Difference*, A. Phillips (Cambridge: Polity Press, 1993).

4 Ibid., 197.

5 See www.femcit.org: the project was funded under the Sixth Framework Programme of the European Commission, started in January 2008 and closed in January 2011.

6 See B. Halsaa et al., eds., *Remaking Citizenship in Multicultural Europe: Women's Movements, Gender and Diversity* (Basingstoke: Palgrave MacMillan, 2012).



issues (especially relating to violence, the family and politics) have permeated EU policy-making, as a result of the EU's formal gender equality policy, which includes gender mainstreaming.¹⁴ The question of just how far EU citizenship reaches has been addressed through the interpretation of the EU provisions relating to citizenship, as exemplified in the judgements of the European Court of Justice (ECJ),¹⁵ as well as in the work of scholars in this field.¹⁶ Findings from another EU-funded research project¹⁷ suggest that the EU's formal definition of citizenship is based on the concept of equality (between citizens, including between women and men) and that the EU principle of gender equality, which is central to the enhancement of women's citizenship, is based on the recognition of the gendered barriers that constrain women's access to full citizenship. However, some of the policy solutions adopted by the EU in the fields of family policies, domestic violence and gender inequality in politics, for example, do not result in the transformation of the traditional roles of men and women, but rather reproduces them.¹⁸ From this perspective, viewing EU citizenship through a gender lens does not seem so promising.

In Dora Kostakopoulou's view, however, the future is being written through European citizenship. She argues that there has been a shift in thinking amongst scholars about European citizenship over the last ten to fifteen years from a negative view of EU citizenship as a 'pie in the sky' ideal, with only symbolic and instrumental value. Following various judgements of the European Court of Justice (ECJ), what is now prevalent is a more forward-looking, constructivist view that EU citizenship 'constitutes a unique experiment for stretching social and political bonds beyond national boundaries and for creating a political community in which diverse peoples become associates in a collective experience and institutional designers'.¹⁹ She argues further, that EU provisions, especially in the way they have been interpreted by the ECJ, have irrevocably altered the substance of national citizenship by weakening 'the traditional link between the enjoyment of citizenship rights and the possession or acquisition of state nationality'.²⁰ Consequently, EU citizenship offers more promise of inclusivity than national models, because it is more respectful of 'difference'.²¹ In contrast, Bellamy argues that EU citizenship

has not established any substantive 'sense of Europeanness', and because the rights that accrue under it are dependent on Member State nationality, 'Union citizenship re-affirms the linkage between belonging, rights and participation within the Member States'.²²

FEMCIT's empirical research findings support Bellamy's view of the centrality of the nation/Member States as the primary site where the three elements of rights, participation and belonging relating to citizenship can most realistically be enjoyed by European citizens. Equally, the research makes clear the ways in which the multiple layers and dimensions of national citizenship shape lives in European contexts, very often unequally on the basis of class, gender, 'race', ethnicity, age and sexual orientation, *inter alia*. Those findings include the following:²³

- A number of women's movement demands have been (partially or totally) accommodated; however, on-going structural and social changes mean that women's movements are facing new challenges. Although gender equality is established by law, for instance, it is often used instrumentally, as a tool for other aims (such as economic growth).
- Whenever gender equality is framed as a 'European' value, it works as a symbolic marker between 'us' and 'them', where non-Western/European immigrants are often perceived as patriarchal and regressive.
- Broad support for gender equality in European public domains is challenged today not only by equal worth ideologies related to religious and cultural diversity, but also by economic deregulation and neoliberal policies.
- New norms of dual-income-families and the expectations that women should be in paid employment throughout their lives (from 'welfare to workfare') mean that women are expected to "earn" their citizenship rights on the same basis as men, whilst still providing much of the un-paid care.
- Economic independence for some groups of women takes place at the expense of other groups of women, in particular groups of non-western/ non-EU immigrants. As certain categories of women approach equality in the labour market, other groups of women are forced to take up employment in jobs that mirror the tasks they are also expected to continue to perform, unpaid, for their own families.
- There are still many barriers that hinder women in politics, both starting a political career and in working effectively once in the parliament, including the keeping of women away from positions of responsibility, and excluding women from unofficial meetings where key decisions are made.

FEMCIT research clearly shows that much remains to be done at the national level, for women and other marginalised groups to enjoy full citizenship. Therefore, until the view of citizenship through the *national* gender lens is transformed, the European level has little more to offer in terms of a gender-fair multicultural citizenship.

22 Bellamy, "Evaluating Union Citizenship: Belonging, Rights and Participation in the EU," 598.

23 Halsaa *et al.*, "Femcit Final Report," 83-84.

14 P. Meier and E. Lombardo, "Concepts of Citizenship Underlying EU Gender Equality Policies," *Citizenship Studies* 12, no. 5 (2008).

15 D. Kostakopoulou, "European Union Citizenship: Writing the Future," *European Law Journal* 13(2007).

16 For example R. Bellamy, "Evaluating Union Citizenship: Belonging, Rights and Participation in the EU," *Citizenship Studies* 12, no. 6 (2008); G. Delanty, "European Citizenship: A Critical Assessment," *Citizenship Studies* 11, no. 1 (2007).

17 The MAGEEQ project on 'Policy frames and implementation problems: the case of gender mainstreaming', 2003-2006, funded by the Fifth Framework Programme of the European Commission. www.mageeq.net. See also Meier and Lombardo, "Concepts of Citizenship Underlying EU Gender Equality Policies."

18 *Ibid.*, 489.

19 Kostakopoulou, "European Union Citizenship: Writing the Future," 623-24.

20 *Ibid.*, 642. She also argues that EU provisions have changed the boundaries of national citizenship by invalidating ethnicity as a boundary marker: *ibid.*, 642. I do not think this holds true for *all* EU citizens, since some ethnicities are negatively racialised in ways that others are not. For example, being from the Basque country might not prevent a Spanish national from fully enjoying his or her rights as a European citizen in another Member State; the same may not be true for a Spanish national with an Equatorial Guinean ethnic background.

21 *Ibid.*, 643.

EU CITIZENSHIP AND CULTURE

Uta Staiger*

Despite the legal and normative potential some held it to contain, Union citizenship as introduced in the 1992 Maastricht Treaty was at best a symbolic gesture. Derivative from citizens' prior nationality in a Member State, it brought few new rights for its bearers and only barely disguised its mercantile nature.¹ Since then, however, increasingly assertive rulings by the European Court of Justice (ECJ) – denounced by some as 'activism',² by others approved as 'tactical interventions'³ – have transformed the legal standing of Union citizenship. The Amsterdam Treaty may have emphasised that it 'shall complement and not replace national citizenship' (Art. 17.1), with the Lisbon Treaty even defining it as 'additional' (Art. 9), yet EU citizenship has now become an independent source of rights. It not only enshrines citizens' rights of free movement and residence, but also supplements it with substantial social rights – rights that now apply, significantly, even where the EU citizen is not economically active. Consequently, the distinction between EU citizens and national citizens has become increasingly blurred. Indeed, the ECJ has ambitiously declared Union citizenship 'destined to be the fundamental status of citizens in the EU'.⁴

What, then, are we to make of this? Broadly, answers have tended to fall into two camps. Some argue that the status and its associated rights are procuring a type of institutional change, which is bound to unlock the transformative potential of citizenship. Joined with the instruments of the internal market, EU citizenship is not only changing the 'legal essence' of national citizenship.⁵ This transformation is held to be at the heart of its 'normative aspirations'.⁶ Union citizenship is not only expected to ultimately supersede the status, model and practice of national citizenship. It is seen as the very means by which citizens' identification with the Union is heightened, thus contributing towards forging a new political community beyond the state, 'in which diverse peoples become associates in a collective experience'.⁷

By contrast, others point out that far from offering an attractive alternative to nationality-based membership, EU citizenship has proven rather detrimental to the majority

of EU citizens. Its legal expansion has led to the gradual undermining of core rights that were hitherto enshrined nationally, above all those related to social, industrial and welfare citizenship, without either commensurate obligations or significant compensatory rights established at supranational level.⁸ It has created a rights imbalance, in other words, which throws into relief the fundamental tension between a market-based freedom of movement with associated rights on the one hand, and the principle of solidarity that is deemed necessary to underwrite a social welfare system on the other. A preceding lack of collective allegiance not only makes economic solidarity with non-nationals difficult, it is argued; the imposition of the latter is likely, if anything, to inhibit such an allegiance from emerging.

Clearly, while the importance of rights now granted directly to EU citizens continues to attract most interest, key to the controversies surrounding Union citizenship is its affective, subjective dimension, or rather the lack thereof. For most observers, a however defined sense of 'we-ness'⁹ is necessary to underwrite the individual autonomy, rights and modes of participation associated with citizenship. That is, a degree of trust, reciprocity, and commitment among fellow citizens is considered essential to forming a social compact, where individuals are expected to contribute to their mutual well-being – whether or not one might go as far as calling this the 'moral basis of the welfare state'.¹⁰ What divides opinion, however, is in which context and under which conditions such a sense of or belief in commonality can exist or come into existence. Specifically, the question remains whether the nation-state is still the privileged *locus* of citizens' solidarity and allegiance, and if a full citizenship beyond it could ever be conceived.

Interesting, if rarely fully argued, are the cultural assumptions that underpin the arguments put forward in response. Despite the renaissance of 'identity' as an analytical term in EU studies, particularly from a social constructivist perspective, there is a certain theoretical reticence among many political scientists to engage with notions of culture and community. They are all too often considered, where not insufficiently robust, certainly 'controversial, even

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1 M. Everson, "The Legacy of the Market Citizen," in *New Legal Dynamics of European Union*, ed. Jo Shaw and G. More (Oxford: Oxford University Press, 1995).

2 C. Joppke, "The Inevitable Lightning of Citizenship," *European Journal of Sociology* 51, no. 1 (2010): 23.

3 D. Kostakopoulou, "The Evolution of European Union Citizenship," *European Political Science* 7(2008): 286.

4 Case C-184/99 *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para. 31

5 D. Kochenov, "Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship," *EUI Working Papers, RSCAS* 2010/23(2010).

6 D. Kostakopoulou, "European Union Citizenship: Writing the Future," *European Law Journal* 13(2007): 637.

7 *Ibid.*, 628.

8 Cf. R. Bellamy, "The Liberty of the Post-Moderns? Market and Civic Freedom within the EU," *LSE 'Europe in Question' Discussion Paper Series* 01/2009(2009).

9 M. Ferrera, *The Boundaries of Welfare* (Oxford: Oxford University Press, 2005), 133.

10 C. Offe, "The Democratic Welfare State in an Integrating Europe," in *Democracy Beyond the State? The European Dilemma and the Emerging Global Order*, ed. M. Green and L. Pauly (Lanham: Rowman and Littlefield, 2000), 68.

distasteful, and redundant'.¹¹ Yet not only do they implicitly inform theoretical presuppositions about the relationship between citizenship, legitimacy and democracy both within and beyond the European nation-state. They have also been harnessed by EU institutions themselves, precisely in order to 'give substance' to the legal skeleton of Union citizenship.

Fundamentally, the touchstone for many remains a citizenship based on thick attachments and cultural ties, which are rationalized as pre-political types of belonging. Drawn from a late eighteenth-century idealist understanding of the particularity of cultures and denoting the value systems, languages, traditions, beliefs and symbols shared by distinct peoples, culture is regarded as a formative and integrative attribute that articulates individual identification within a wider community. Linked since Herder to the nation as *Kultur*, it is often conceived of as congruent with a territorially delineated political organisation, creating not only a 'shared experience of the state-subject tie'¹² but also a sense of 'shared continuity'¹³ over time. This is no longer irreconcilable with recognizing the pluralist nature of most of today's societies; nor would most deny that individual cultural affiliations, far from homogenous, tend to be multiple and differentiated. It may even be accepted that membership of certain sub-national cultural or ethnic communities (for some, the 'societal cultures' of national minorities rather than immigrant groups¹⁴) can be a criterion for distributing benefits and burdens that is consistent with the principles of liberal justice. However, these are often expected to be or become compatible with an overarching national identity: a common public culture deemed necessary to manage heterogeneity within a polity.

Recent events seem to bear out a renewed relevance of this conception of cultural citizenship in Europe. Not only do Member States increasingly aim to reinforce the affective dimension of national citizenship, via instruments such as civic integration tests or naturalisation ceremonies, to counteract what is diagnosed as a declining bond between polity and citizen, a 'lightening'¹⁵ or proceduralisation of citizenship *tout court*. Public responses to the sovereign debt crisis seem to suggest furthermore, as many *Eurobarometer* surveys had previously indicated, that despite these challenges the nation-state continues to be seen as the most legitimate repository not only of citizens' rights and modes of participation, but of their loyalty and identification. The only way for the EU to elicit similar allegiance of its citizens, the above model would suggest, is for it to engage in an exercise of nation-building. This however is deemed to be not only substantively inconceivable – given the absence of both 'mythomoteurs' and a shared, transnational public sphere – and empirically invalidated. It would also be normatively undesirable: 'a project of social engineering uncomfortably reminiscent of other failed modernist ideologies of the

twentieth century'.¹⁶ Citizenship beyond the state, it is inferred, is constitutively unable to muster the loyalties it needs to buttress the rights it provides.

This, however, is what EC/EU institutions have arguably been engaged in achieving. Despite a lack of definition in the treaties, and an institutional refusal to be drawn into 'academic argument over the definition, purpose and substance of culture',¹⁷ culture has historically been linked to Union citizenship both as a rhetorical notion and as a policy sector. With neither mentioned in the founding treaties, this first becomes explicit in the early 1970s when – at another critical juncture for the Community – economic integration began to be declared not an end in itself (Paris Summit 1972). Not only was the European citizen *avant la lettre* increasingly invoked; Europe itself was said to rest on common values and the 'diversity of cultures within the framework of a common European civilisation'¹⁸ – generally including Greco-Roman, Judaeo-Christian and Enlightenment references. For different reasons and despite strong reservations on the part of some governments, this paradigm began to take hold in Council, Parliament and Commission alike: it was to undergird citizens' market-related and prospective special rights with a sense of belonging. Come the Single European Act, the Commission could confidently argue that the 'sense of being part of a European culture is one of the prerequisites for the solidarity which is vital if the advent of the large market [...] is to secure the popular support it needs'.¹⁹

The double bind that so troubles us today had reared its head. If the 1975 Tindemans Report had presupposed a popular will for further integration – invoking the 'growing clamour' of 'the people of Europe' – it also already recognized that this self-perception as a people required active reinforcement.²⁰ In other words, in response to the expectations of citizens, the same needed to be made aware of their will by promoting their identity, which was *ipso facto* discursively generated. To this task, the Adonnino Report on *A People's Europe* (1985) declared, the 'areas of culture and communication' were 'essential' – and ranged from common passports to cultural cooperation programmes.²¹ It is not surprising then that the introduction of EU citizenship (Art. 8; now Art 9) in Maastricht was simultaneously 'given substance through the conferment of significant powers in sectors such as culture'.²² Yet Art 128 also constrained this new mandate by laying down strict subsidiarity requirements and requiring the Community to 'respect national and regional diversity while bringing the common heritage to the fore'. As with citizenship, this was enforced in the 1996 Amsterdam Treaty. The rhetorical conjunction of culture and citizenship has since proceeded steadily. Without any significant budget allocation given to the few disjointed cultural or citizenship programmes in place, however – outcome of continued political opposition

this has not had significant impact upon public perception, nor gone any way towards addressing the democratic deficit. As the Maastricht ratification crisis already appeared to predict, and recent trends arguably confirm, 'Europe' seems *qua definitionem* unable to provide the cultural-political congruence it supposedly requires.

And yet: the narrative is not quite as straightforward. The very terms of the debate, which would postulate the replication of nationality-like cultural citizenship at supranational level as both the *sine qua non* and immediately the refutation of EU citizenship, have also been queried, both conceptually and in policy terms. Holding that citizenship 'was never conceptually tied to national identity' Jürgen Habermas argues that it can and indeed should be dissociated from any ethno-cultural grounding.²³ The affective appeal of constitutional forms, rights and the rule of law, he suggested, can more than make up for the absence of an overarching European 'culture' to buttress identity in the singular. Indeed, far from internally coherent, such accounts argue, political communities are always created and recreated through contested cultural narratives and practices.²⁴ There is therefore no *a priori* reason why the emergence of transnational 'communities of communication'²⁵ may not come to bind members into a politicized sphere of common interests and concerns. These need not be decoupled from national or regional cultural contexts. Just as citizenship status has legally become 'multilevel and composite',²⁶ so may individual membership be dispersed over vertically differentiated levels, from local to supranational, as well horizontally, in overlapping circles of affiliation. One's stake in the future of the political community can arguably be a criterion for membership claims,²⁷ in affective as well as in legal terms.

Clearly, we are still a far cry from such scenarios. The comparatively weak emotive appeal of values already taken for granted by citizens – including such fundamental ones as peace and liberty, as Dora Kostakopoulou argues in this publication – is compounded by political and constitutional traditions that still differ strongly across Member States. The lack of a media-supported pan-European public sphere not only entrenches the dominance of domestically refracted news and debating cultures. It is also affected by the Union's own institutional structures, whose 'decisional bias'²⁸ tends to privilege certain actors over others, with the resulting unequal filtering of public debate not conducive to fostering a strong sense of commonality.²⁹ That said, these models do

allow for a more flexible and arguably more contemporary notion of cultural membership, which furthermore does not claim to pre-empt the practices and experiences of generations born into more complex political constellations by tying them irrevocably, and uniformly, to the nation-state alone. They also emphasise how ethical attachment and civic commitment to political communities, rather than predominantly pre-political, is constructed and secured over time. By extension, we need perforce to recognise culture's role in the cultivation of habits and virtues, the 'forming of civic and civil attributes'³⁰ on which a liberal political order builds. As an educational vehicle, associated with public institutions and arts policies, culture has always been made operable in the process of managing politics – national or otherwise.

Incidentally, despite the competing policy goals and integration preferences of institutional actors, there has been a gradual expansion of the scope and remit of Community cultural action since the late 1990s. It has more recently shifted from an emphasis on promoting a putative European 'cultural model' to securing access to and participation in decision-making and public affairs. At EU level, it has led to a more extended role for cultural professionals and associations, part and parcel of broader trends to involve civil society more closely in EU affairs, by way of structured dialogue with sectoral platforms. Also an outcome of extensive lobbying by the professional cultural sector and sign of an increased willingness of the Council to take cultural measures more strongly into account, the most recent cultural actions at EU level aim to 'make European citizenship a tangible reality by encouraging direct participation by European citizens in the integration process'.³¹ As such, rather than taking exclusive recourse to shared pasts, they also reference culture in the future tense, as entry points for citizens to collaborate across interest-based and national boundaries.

How capable these commitments are in creating more than transient communities of interests, how far they represent the activities of political citizens rather than individual subjects acting in a private capacity, and to what extent nationality will always revert to gaining the upper hand once conflicts of interest arise, remain open questions. What is possibly most interesting is that if anything, along with the parallel tendencies of a declining legal and emotive bond among fellow citizens in some quarters and a resurgent nationalist dictum in others, the very idea of a European culture is losing its conflictive edge. As the introduction of qualified majority voting for Art 167 in the Lisbon Treaty seems to suggest, EU cultural action is no longer as disputed as it used to be. It is above all performing a 'soft' sector role, onto which policy concerns can be safely displaced, given its low ranking on resource and priority lists. It is indeed to citizenship's rights rather than its subjective dimension that attention is paid during the current critical moment, in which the very ends and means of the Union are once again under scrutiny.

11 R. Bellamy, "Between Past and Future: The Democratic Limits of EU Citizenship," in *Making European Citizens: Civic Inclusion in a Transnational Context* ed. R. Bellamy, et al. (Basingstoke: Palgrave, 2006), 242.
12 C. Tilly, *Citizenship, Identity and Social History* (Cambridge: Cambridge University Press, 1995), 12.
13 A. Smith, "National Identity and the Idea of European Unity," *International Affairs* 68 no. 1 (1992): 58.
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15 Joppke, "The Inevitable Lightening of Citizenship."

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FOCUS GROUP 1

February 2011

Participants: Profiles and motivation

A (Italian) Curious.

B (Greek-Cypriot) Interested in citizenship issues. Wants to know more about his rights.

C (French) Has been in the UK 6 for years and feels more European. Wants to know more about her rights.

D (Italian) Extensive traveller, loves Europe and feels most welcome in London. Wants to share his experience and learn about his rights.

E (Danish) In London since September 2010, has also lived in Berlin and Amsterdam. Feels European and is interested in the relationship between EU and national citizenship rights.

Reasons for moving to and staying in the UK

- To learn English.
- Strong feeling of belonging in London.
- More opportunities, especially for women.
- Better job prospects.
- Easy to mix and integrate in London; positive assessment of its multi-national and multicultural environment.

Awareness of EU citizenship rights

- General lack of awareness of their rights as EU citizens on arrival.
- Some assumed that they would be entitled to same rights as home countries.
- Others assumed that they would be entitled to same rights as UK citizens, for example with regard to the NHS, benefits.
- Rights become apparent only when particular situations occurred, or after having spent considerable time in the UK.
- Confusion over voting rights and jury service.
- None had registered to vote for EU elections.
- Most found it strange that they could not vote in national elections.
- None were aware of the European Citizens' Initiative as introduced by the Lisbon Treaty.
- None felt the need to become a British citizen.
- Some felt more like European citizens.
- Some felt it was difficult to absorb being European citizens and continued to be more attached to the nation-state.
- Education was seen as a possible route to embedding the feeling of being a European citizen.

How is information about EU citizenship rights gained

- Most learned about specific rights via personal experiences.
- Information is sought and gained as circumstances arise.
- The general consensus was that it would be good to know rights prior to need.
- All agreed that there was a lack of general information about rights.

Final Thoughts

- Most feel their national identity strongly when they are in another country.
- All were proud to be European but most found it difficult to explicitly state their affiliation as European citizens.
- Most thought that 'being European' is too generic to explain belonging.
- Some specified their particular interest in European culture.
- Many were interested in their EU citizenship rights for professional or financial motives.

FOCUS GROUP 2

March 2011

Participants: Profiles and reasons for moving to and staying in the UK

A (Italian) Has been living in UK 13 years, chose London to learn English. Stayed because she loved living in London. Felt totally European.

B (Dutch) Came to do his PhD and found a job. Stayed for personal, professional and economic reasons.

C (Polish) Arrived in 2005 after Poland joined the EU. Came mainly to learn English but also because of interest in the UK. Decided to pursue an MA at UCL. Currently working and would be happy to live anywhere in the UK.

D (Hungary) Arrived in 2006 as an au pair in Surrey. Fell in love with London and did not want to return home. Currently studying and working part-time. Lives in London because of the professional opportunities but would happily live anywhere in the UK.

E (Italian) Has been living in London for 5 years mainly for work reasons and to escape the Italian job market where there are less opportunities. Would only live in London.

F (French) Has been living in the UK 3-4 years, originally from Lyon. Had been unemployed in France and wanted to learn English and gain some work experience. Found an interesting job, met her current partner and stayed.

Motivations for participating in the Focus Group

- Most are mainly interested in discovering their rights
- They have an interest in identities, particularly the question of European vs. national identity.
- They see the focus group as an opportunity to meet different people from across Europe.
- They have an interest in other peoples' reasons for coming to the UK.
- Most express an interest in citizenship generally.

Awareness of EU citizenship rights

- 3 of the participants were relatively aware of their rights; 3 others less so
- 2/6 were aware of air passenger rights
- 1/6 voted in the local elections
- 1/6 not interested in Euro/local elections but will fly home to vote nationally
- 1/6 thought the mayor candidate was important
- 1/6 used their embassy to vote nationally

National vote in the country of residence

- 4/6 believed they should have the right to vote in national elections in the country of residence
 - The right to vote should be linked to residency
 - As an EU resident, the outcome of national elections affects everyone
 - EU citizens should be able to vote only in their country of residence, not necessarily in 2 different countries.
- 2/6 were of the opinion that they should not have the right to vote in national elections in their country of residence
 - The country of residence is not 'home', national politics should remain the privilege of national citizens
 - Local elections are different, because they address issues in your local area.

Nationality and parentage

If one or both parents are from another European country but the children are born in the UK, what is their nationality?

- Opinions varied:
 - It should not matter where you were born, benefits should relate to where you pay taxes
 - Children end up choosing what resonates with them most
 - Children may acquire British nationality because of their place of birth but may have an alternative cultural identity

Free movement rights

Do you become an EU citizen only when you move? How important do you consider the right to move freely? Is there a benefit?

- All agreed that the freedom of movement was a core right for citizens in the EU.
- Free movement is only a benefit if you want to move but offers no benefits for those who do not move.
- All felt that rights as an EU citizen are only activated by moving.
- Health and emergency healthcare: it was noted that some EU citizens gain more rights to healthcare in the UK as compared to their own home countries, where it is linked to payment of tax (France, Holland, Hungary and Germany).
- Only 2/6 had a European Health Insurance Card (EHIC) for access to emergency healthcare in Europe.
- It was noted that most countries do give information about the EHIC card, but the onus remains on the individual.

Consular help for EU citizens in third countries

- None new that EU citizens are allowed access to other EU embassies if they are in another country and require assistance.
- Question arose as to why there is no EU consulates or embassies instead of individual country embassies.

Lobbying, Citizens Initiative and the EU

- 5/6 did not know how or that they could lobby the EU.
- 1/6 has been aware of the European Citizens' Initiative.
- Discussed a case of an Italian who went to court because of excessive charges abroad.
- The consensus was that if EU law is beneficial, it goes unnoticed but if the law is not popular, there is a tendency to blame the EU.

Is there a European Identity?

- 5/6 felt there was an EU identity.
- Most agreed that it was necessary to live in another country to feel European.
- A felt only European when outside the EU.
- E feels more European than Italian but definitely not English. There is common ground between European people due to a common heritage. The more you travel the more European you feel.
- F does not generally have any sense of being European generally – she feels French.
- B feels that as soon as he leaves the EU, he loses a sense of identity as an EU citizen. This is replaced by feeling like a global citizen.
- Most agree that culturally, their loyalties lie where they were raised.
- C is doing research with the Polish community in London on this issue.
 - Preliminary result: a sense of dual nationality (i.e. identification with both Poland and the UK) is most popular; it is more difficult to combine all three levels of identification (i.e. identification with Poland, the UK and the EU).

Final Thoughts

- Overall, although nearly all agreed that there is a European identity, the extent to which they felt allegiance to it was varied. There was a marked difference between a cultural sense of belonging and a specifically European identity.
- For the majority, the European identity is only activated when you leave your home country
- The external perception is that there is a European identity.
- For all, EU citizenship equates with safety because of the strong element of rights.

CONTRIBUTORS

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