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Report on the further development of citizenship in the European Union

PROF. DR. GRÁINNE DE BÚRCA, FIRENZE

1. Introduction

On first approaching the subject on which I was asked to write, it is tempting to say, in response to the question how EU citizenship has developed since its introduction as a legal concept by the Treaty on European Union in 1993, that there has been little development. Directives on the right to stand and to vote in local and in European Parliament elections have been adopted and largely transposed, although unevenly implemented,¹ and a handful of cases has been handed down by the European Court of Justice in which reference is made to the provisions of the EC Treaty on citizenship.² Otherwise, Articles 17–22 of the EC Treaty have not, it would seem, transformed the lives of any nationals of the member states of the EU, nor added in a particularly significant way to the corpus of European law.

But this would be a minimalist and somewhat cynical response, as well as adopting a rather formalist perspective. A different approach could attempt to give a more empirical answer to the question whether the legal creation of a concept of European citizenship appears to have had any beneficial effects for those living within the EU and who are affected by its laws. Interesting historical-empirical research³ and a number of political and theoretical explorations of the notion of European citizenship have been conducted,⁴ which examine the evolving practice of EU-wide citizen-

1 See the Commission's second report on citizenship of the Union COM (97) 230, its report (COM(97) 731 final) on the application of Directive 93/109/EC on participation in European Parliament elections, and the 16th Annual Report on Monitoring the Application of Community law COM (1999) 310.

2 See A. Albers-Lorens „A broader construction of the EC Treaty provisions on citizenship?“ (1998) 57 Cambridge LJ 46, J. Shaw and S. Fries „Citizenship of the Union: First Steps in the Court of Justice“ (1998) 4 *European Public Law* 533, H. Toner „Judicial Interpretation of European Union Citizenship: Transformation or Consolidation?“ (2000) 7 *Maastricht Journal of European and Comparative Law* 158 and N. Reich „Union Citizenship: Metaphor or Source of Rights“ (2001) 7 *ELJ* 4, for a survey of some of the key cases. They include C-64/96, *Uecker* [1997] ECR I-3171, T-66/95, *Kuchlenz-Winter v Commission* [1997] ECR II-637, C-193/94 *Skanavi* [1996] ECR I-929, C-274/96, *Bickel and Franz* [1998] ECR I-7637, C-85/96 *Martinez Sala* [1998] ECR I-2691, C-348/96 *Calfa* [1999] ECR I-11, C-387/97 *Wijzenbeek* [1999] ECR I-6207, C-192/99, *Kaur*, 2001.

3 See A. Wiener, European Citizenship Practice (Colorado: Westview, 1998)

4 See many of the works of J. Shaw, including „Citizenship of the Union: Towards Post-national Membership?“ in Collected Courses of the Academy of European Law, vol VI, Book 1, (The Hague, Kluwer, 1998) 237, „European Union Citizenship: The IGC and Beyond“ (1997) 3 *European Public Law* 41, „The Many Pasts and Futures of Citizenship in the European Union“ (1997) 22 *European Law Review* 554, „Interpreting European Union Citizenship: A Contribution to European Identity?“ (1998) 61 *Modern Law Review* 293, „Constitutional settlements and the citizen after Amsterdam“ in K. Neunreither and A. Wiener (eds.), Beyond Amsterdam: Institutional Dynamics and

ship over the years and attempt to situate that within a theoretical framework which looks not simply at formal legal or material rights but at other indicators of social and political participation and belonging. However, to assess whether the social circumstances and sense of European identity of nationals of the Member States have been enhanced by the creation of EU citizenship is an endeavour which is methodologically beyond the scope of this paper.

The core of the report, which aims to pursue a third and rather modest way between a more sociological response and a very formal one limited to the articles of the citizenship chapter of the EC Treaty, will be an assessment of some of the legal developments relevant to the domain of EU citizenship which have taken place over the years since the Maastricht Treaty, and a comment on the significance of those developments. Although the actual provisions of Articles 17–22 of the EC Treaty and their implementation certainly are an important part of this legal picture, a number of other areas of law and policy will be touched upon which can be considered as a part of the corpus of European citizenship law. This may be the case in one of two ways: in the first place using formal criteria, i.e. where a specific policy area is consciously identified or categorised by EU institutional actors as an aspect of citizenship policy; and in the second place, on more substantive criteria, because the area of action is of particular relevance to what can broadly be considered one of the incidents of citizenship: rights, identity, participation in and, ultimately, membership of the political community.

2. European Union citizenship rights and policies

In a sense, of course, every area of political action should be of concern or relevance to the citizen who is a member of that political community. However, there are clearly dimensions of policy which affect more directly than others the relationship between the individual and the community, state or polity in which he or she lives. This is true, for example, of provisions such as voting which directly facilitate participation by the person in the political life or government of the polity, or those which directly confer rights and entitlements on the person by virtue of or in relation to

Prospects for Democracy in the EU (Oxford: OUP, 1999). See also D. Kostakopoulou, Citizenship, identity and immigration in the European Union: between past and future (Manchester UP, 2001) and the project outlined by M. Everson and U. Preuss in „Concepts Foundations and Limits of European citizenship“, ZERP Discussion Paper 2/95 (Bremen, 1995).

their membership of that community. In contrast, the benefits (or burdens) which flow indirectly to the person as a result of the consequences of external trade policy or macroeconomic policy, for example, and which are perhaps equally important to the individual, are not normally analyzed within the framework of citizenship law and policy. Such fields of action and activity, however important they may be, are not seen so directly to shape the relationship between the individual and the polity.

The relationship between law and citizenship is inevitably complex, in that it constitutes one element of the relationship between law and society more generally. The legal provisions which purport, in EC law, to frame and encapsulate the relationship between the European individual and the polity are set out in the EC Treaty in Articles 17–22. Before the coming into force of the Treaty on European Union, which introduced these provisions into the EC Treaty, the aspects of European law which were considered to be of relevance to an unstated or ‚incipient‘ form of European citizenship were primarily those on the free movement of workers and persons, and the equal pay norms. These were the legal norms which conferred directly enforceable benefits on individuals in the European Community and they were legal rights which potentially improved the lives and choices of individual persons as opposed to corporate interests. Even if they were, at core, market-based rights, they had a social dimension which spoke directly to the human person rather than to trade or business interests only. Over the years, too, other ‚softer‘ areas of European policy were developed which did not so obviously confer individual legal rights but which potentially engaged the interests of the citizen, such as the vocational training and education policies, and the projects established and supported by the European social fund. All of these could be said to have built up a corpus of European law which framed an area of ‚citizenship practice‘ – whereby individuals living within the EC/EU engaged directly with and shaped their relationship with the polity through their labour market activities or their studies.

In 1992, however, when the Maastricht Treaty was signed, the new provisions on citizenship which were added to the EC Treaty in part merely restated rights and entitlements already existing under other specific Treaty provisions on workers and persons such as the right to move and reside freely in the Union, or rights already recognised in the practice of the European Parliament such as the right to bring a petition before it. New and potentially important political rights were those of limited suffrage: the right for EU citizens to stand and vote in local and European Parliament elections in any EU country of residence. These are the central and formally listed citizenship rights, but there are other existing and

emerging areas of European law and policy which are clearly of relevance to the EU citizen and which will also be considered here.

One very obvious and promising source (and, arguably, also a consequence) of EU citizenship practice is the EU Charter of Fundamental Rights, which is fully discussed in the paper of Professor Rodotta. Here we see not only a declaration of legal rights which includes the catalogue of citizenship rights from the EC Treaty and which „speaks“ directly to the citizen – and in many cases to residents or individuals in the EU who are not citizens of any Member State – but also a document whose drafting was influenced by a much more participative process involving inputs from various citizen groups and Non-Governmental Organizations than any previous European policy initiative. The process of drafting the Charter was not only a potentially important opportunity for European citizens to exercise some voice in a significant legal-constitutional process,⁵ but it has in fact prompted debate over the need to introduce citizen-participative procedures of this kind in other contexts (cite Commission call for bids from NGOs for projects as part of the post-Nice project), most importantly the pre-Intergovernmental Conference constitutional debate on the future of the Union. However, since this topic – whatever its importance in terms of the future development of European citizenship – is discussed in more detail by Professor Rodotta, it will not be dealt with in further detail in this paper. Suffice it to say that perhaps the most important aspect of the further development of citizenship in the EU is the way in which the limits of the official, institutional debate has been recognised and the viability of an elite-driven process increasingly called into question. The terms of the Declaration on the Future of the Union attached to the Nice Treaty (which fortunately, following the Irish referendum result does not depend for its normative validity on the ratification of the Treaty itself!) at least contains a recognition of this kind, in its call for a deeper and wider debate on the future of the Union involving all elements of society.

The various policy areas which together form much of the *legal* framework for the practice of European Union citizenship, are set out below. Apart from the obvious case of the Charter, which was instigated apparently by the desire to make the EU's ‚accomplishments‘ in the field of human rights more visible to the citizens, the areas which can be seen to be of particular relevance for the subject of the development of citizenship in the EU include the following:

5 See G. de Búrca „The Drafting of the EU Charter of Fundamental Rights“ (2001) 26 ELRev 126.

First and most obviously, are citizenship rights as they have been formally designated in EC law, in other words those rights and entitlements set out in *Articles 17–22* of the EC Treaty, the most important of which are conferred exclusively on those who are nationals of a Member State.⁶ These provisions cover the right to vote and to stand in European Parliament and in municipal elections, diplomatic representation outside the EU, the right to petition the European Parliament, to apply to the Ombudsman and most recently, the right to a reply from any of the EU institutions in any one of the official languages.⁷ This chapter of the EC Treaty also covers the rights of free movement and residence, which although now formally included within the category of citizenship rights of Article 17, have long been traditional Community law rights and were extended to non-economically active persons by secondary law in 1990. Some of the legally recognized exceptions to these traditional rights, as set out in Directive 64/221 on national measures justified on grounds of public policy, security or health, have recently been revisited by the Commission with a view to reconsidering them in the light of European ‘citizenship’.

Secondly, and closely related to the first category are the rights of *non-discrimination* recognised in EC law, including the generic prohibition on nationality discrimination in Article 12 of the EC Treaty, the important new non-discrimination enabling provisions in Article 13, together with the secondary measures so far adopted,⁸ and the gender equality provisions developed under Article 141, extended in recent years through the ‘mainstreaming’ project.⁹

6 See case C-192/99 *Kaur*, judgment of 20 February 2001, confirming the earlier ruling in Case C-369/90, *Micheletti* [1992] ECR I-4239 that it is for Member States to determine nationality, on which the status of EU citizenship is then parasitic. The rights to complain to the ombudsman and to petition the European Parliament are not, however, restricted to those holding EU citizenship.

7 For a mildly ironic example of the right to a reply in most of the official languages, see the Annex to this report.

8 Three significant measures have been adopted under Article 13 EC: Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, and Council Decision 2000/750/EC establishing a Community action programme to combat discrimination (2001 to 2006). This Action Programme was launched in Helsinki on 12 March 2001. Prior to the existence of Article 13 EC, Joint Action 96/443/JHA under the former Justice and Home Affairs pillar was adopted by the Council on the basis of the then existing Article K.3 TEU, concerning action to combat racism and xenophobia.

9 For a broad and up-to-date analysis of developments in EC law and gender J. Shaw ‘Gender and the Court of Justice’ in G.de Búrca and J.H.H.Weiler *The European Court of Justice* (Oxford: OUP, 2001) and on the recent policy trend of mainstreaming, see

Thirdly a policy field of growing importance in the area of EU citizenship which was previously known as „Justice and Home Affairs“ under the original third pillar of the Maastricht Treaty on European Union, which has now been renamed the „*area of freedom security and justice*“, covers issues such as immigration, asylum, visa policy, policing and judicial co-operation, and is governed both by the provisions of the reformed third pillar and the new Title IV of the EC Treaty.

Fourthly, of increasing significance for the citizen are issues of *access to information* and „transparency“, which are now formally dealt with in Article 255 of the EC Treaty, and also in secondary law. A series of judgments of the Court of Justice and Court of First Instance introduced and developed the notion of a right of access to information,¹⁰ and this notion had initially been introduced on a legislative level in the field of environmental information.¹¹ The codification of the general principle in the EC Treaty and its elaboration in institutional codes of conduct, in legislation¹² and most recently in a general Regulation to implement Article 255 EC have raised the profile and significance of what is undoubtedly a key de-

M. Pollack and E. Hafner-Burton, „Mainstreaming Gender in the European Union“ (2000) 7 *Journal of European Public Policy* 432.

- 10 See cases C-58/94 *Netherlands v Council* [1996] ECR I-2169, T-194/94 *Carvel v Council* [1995] ECR II-2765, T-105/95, *WWF v Commission* [1997] ECR II-0313, T-124/96. *Interporc v Commission* [1998] ECR II-0231 and T-92/98. *Interporc v Commission* [1999] ECR II-3521, T-188/97. *Rothmans International v Commission* [1999] ECR II-2463, T-610/97 R. *Carlsen et al v Council* [1998] ECR II-0485, T-174/95. *Svenska Journalistförbundet* [1998] ECR II-2289, T-14/98. *Hautala v Council* [1999] ECR II-2489, T-178/99. *Elder v Commission* [1999] ECR II-3509, T-309/97. *Bavarian Lager Company v Commission* [1999] ECR II-3217, T-106/99. *Meyer v Commission* [1999] ECR II-3273, T-123/99. *JT's Corporation v Commission* [2000] ECR II-3269, T-188/98. *Kuijer v Council* [2000] ECR II-1959, T-20/99. *Denkavit Nederland v Commission* [2000] ECR II-3011
- 11 See Directive 90/313 on freedom of access to information on the environment, and the Commission's recent report on the experience gained in the application of this directive, COM(2000) 400, and the proposed new directive on public access to environmental information, COM(2000)402 OJ 2000 C 337/156. See also the report of the IMPEL European environmental network in May 2000 „Complaint Procedures and Access to Justice for citizens and NGOs in the field of the environment within the European Union“.
- 12 See most recently Council Decision 2000/527 amending Decision 93/731/EC on public access to Council documents and Council Decision 2000/23/EC on the improvement of information on the Council's legislative activities and the public register of Council documents OJ 2000 L 212 /9. This was the infamous ‚Solana‘ decision which was proposed by Javier Solana, secretary-general of the Council, and opposed only by three Member States.

mocratic issue,¹³ albeit with plenty of debate and controversy on the extent and limits of the principle. The right to protection in relation to the transfer and use of personal data can also be seen as a partial corollary to the right to receive information, and is an issue of clear importance for citizens.¹⁴

Fifthly, a number of other important dimensions of *citizen practice* which are not readily captured in the language of rights, including the EU's consumer protection, vocational training and educational programmes, and other policies designed to secure social participation such as those financed by the social and structural funds. In the Commission's Annual Report on the Activities of the Union 2000, for example, emphasis is deliberately placed in the introductory paragraphs of the report on the 'citizenship' dimension of many policies and policy proposals which do not derive from the formal citizenship chapter of the Treaty. Thus, in addition to the Charter of Rights and the revised mechanism for monitoring serious breaches of fundamental rights by Member States in Article 7 TEU, the report also makes reference to public health, food safety, environmental protection and economic and social cohesion within this context.

Finally, the role of „civil society“ more generally is gaining a higher profile in EU institutional discussions and in public debate on the EU. The importance of involving non-governmental organisations and other groups within civil society in the policy-making process is increasingly being recognised. These groups are, classically, citizen interest groups, representing and reflecting points of view which have often been neglected in the official European law and policy-making processes. The Commission in the past few years has begun a dialogue with NGOs and in the recent preparations for its White Paper on European governance, the role of civil society has –albeit not without debate and controversy on the subject within the Commission itself, which apparently resulted in the suppression of the in-

13 See Regulation 1049/2001 of the European Parliament and Council regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43, adopted eventually in May 2001. The original proposal was published in COM(2000)30 OJ 2000 C 177/70. For the convoluted passage of this proposal through the legislative process, including the controversy over the earlier so-called 'Solana' decision of the Council (ibid footnote 12), see the observatory website set up by the Statewatch organization, <http://www.statewatch.org/secret/observatory.htm> which includes the text of the 'compromise' proposal agreed between the Council and the Parliament in March 2001.

14 For the Commission's recent guide to data protection information in the EU, see its Communication of May 2001 http://europa.eu.int/comm/internal_market/en/media/dataprot/news/guide_en.pdf.

terim white paper report which was originally expected early in 2001 – been highlighted more prominently.¹⁵

A number of other self-conscious European ‚citizen initiatives‘ have been launched, including the Commission’s 1998 so-called ‚Dialogue with the citizen‘ programme, which succeeded the ‚Citizens First‘ programme. The aim of these programmes was at least in part to provide practical information on free movement and related rights. The ‚Dialogue‘ can apparently be accessed in their own language through free telephone lines in each Member State and through the Internet.¹⁶ It is very difficult, however, to assess whether these initiatives actually reach a significant number of persons, and what kind of impact, if any, they may have in developing the relationship between the citizen and the European entity.

Not all of the policy areas set out above will be examined more closely in this report, since some of them, such as the non-discrimination rights in particular the field of sex equality, have already generated a vast amount of commentary and a very developed body of law and jurisprudence which merit an entire book rather than one part of a short report on citizenship.¹⁷ Further, others such as the role of civil society, although of vital importance and the subject of considerable discussion and attention, remain diffuse in their development and rather more difficult to assess as yet in terms of their significance. The approach adopted in the paper instead will be to look a little further at a selected number of these areas, and to identify the emerging features which are of most relevance for understanding the significance and development of the notion of European citizenship. The areas on which the report will concentrate are (a) the original ‚free movement and residence‘ rights as they are developing in their newer ‚citizenship‘ guise (2) the more recent political rights enshrined by the Maastricht Treaty (3) the dimension of ‚freedom, security and justice‘ as

15 See K. Armstrong ‚The rediscovery of civil society in the production of governance‘, paper delivered at the LANAGE workshop, Madison, Wisconsin, May 2001. See also, apart from the Commission’s various communications on the ‚social‘ dialogue, its report on ‚The Commission and Non-Governmental Organisations: Building a Stronger Partnership‘ OJ 2000 C 268, and the work programme for the forthcoming White Paper on Governance ‚Enhancing Democracy in the European Union‘ SEC (2000) 1547.

16 For citizens the web address given is <http://europa.eu.int/citizens> and for business it is <http://europa.eu.int/business>. For further information see http://europa.eu.int/comm/internal_market/en/update/citizen/index.htm

17 For some interesting commentaries on the link between sex equality, or more broadly, gender and citizenship, see Louise Ackers, *Shifting Spaces: Women Citizenship and Migration within the European Union* (Bristol, Policy Press, 1998) and M. Everson ‚Women and Citizenship of the European Union‘ in T. Hervey and D. O’Keeffe, *Sex Equality Law in the EU* (Wiley, 1996).

so-called in the Amsterdam Treaty and (4) some mention of other areas of ,citizen practice‘ fostered by EU policies. Finally, a little tale of a citizen’s troubles in tracking EU citizenship developments will be told in the Annex to this report!

3. *Conceptualising EU citizenship: comparing Marshall’s classic tripartite analysis*

The above classification, however, adopts the official EU discourse and presentation of these areas as citizenship rights and policies, but without necessarily analysing them in a conceptually helpful way. If we return to the classic tripartite categorization of citizenship rights developed by T.H. Marshall, he identified three historic stages of their evolution: from civic rights in the eighteenth century to political rights in the nineteenth century with social rights developing primarily in the twentieth century.¹⁸ Applying this analysis to the EU, of course, reveals the distinctive evolution of the European polity and the difficulty of understanding the development of a substantive notion of citizenship in this non-state context. Marshall’s civil rights were essentially the ,freedoms‘ of individuals from state interference, such as the right of habeas corpus to protect physical liberty and due process rights to prevent arbitrary or oppressive forms of state behaviour. The analogy in the EU context is evidently not a straightforward one. The European Economic Community as it was created was quite unlike a state in these key respects, in the sense that – apart from the competition law enforcement powers of the Commission, its executive body – the Community lacked the policing system and coercive apparatus which are characteristic of a state. Instead, the rights of „negative liberty“ which in historic terms were first recognised by the European Economic Community were specific kinds of economic rights, primarily the freedom to trade across borders. Thus the first generation of specific EC rights were particular kinds of libertarian economic rights.

Conversely, it is only in very recent years that the EU has begun to develop its area of so-called ,freedom justice and security‘, with the emergence of police cooperation and a degree of coordination in the field of criminal law and justice. And hence it is only now that we are likely to begin to see the real development of what would correspond to Marshall’s

18 T.H. Marshall, *Citizenship and Social Class and Other Essays* (Cambridge: CUP, 1950) And see the analysis developed by M. Everson in „The Legacy of the Market Citizen“ in J. Shaw and G. More (eds) *New Legal Dynamics of European Union* (Oxford: OUP, 1995).

first category of 'civil' citizenship rights. Indeed, the recent inclusion of the classic rights such as life, liberty, physical integrity and freedom from torture in the EU Charter of Fundamental Rights can only make sense primarily in the light of the emergence of these capacities or policies at EU level.

What then of Marshall's second category of political rights, which he identified as emerging after the first recognition of basic civil rights? This category, in the EU context, can most clearly be seen as corresponding to what were consciously created as EU 'citizenship rights' when the Maastricht Treaty first introduced the formal legal conception of citizenship into Community law, and indeed also in the right to directly elect European Parliament members which was created in the 1970s. Although here again, the partial nature of the EU polity is clearly reflected in the creation of limited electoral rights only, in the sense that participation in national or regional elections is not included, but only in European Parliament and municipal elections. The other emerging rights which can be analyzed as political rights of citizenship in the Marshallian sense are those such as access to information and transparency, which have been developing in particular over the last decade.

In between these early economic liberties and later political rights, however, and before the very recent articulation of the more traditional civil rights of liberty and security of the person, came the emergence of a weak collection of social rights which correspond roughly to Marshall's third category. The rights of movement and residence can be conceived as a dimension of social rights (as well as a consequence of the original negative economic rights) but his category of social/industrial rights are in fact reflected best in the social policy provisions of the EC Treaty. These were developed mainly through the enhancement of the EC's social chapter by the Treaty on European Union at Maastricht and its subsequent integration by the Amsterdam Treaty, and they have again been emphasised by their inclusion in the provisions of chapter IV of the Charter on Fundamental Rights.

The striking feature of this evolution of what might be called citizenship rights in the European Union is that they do not in any sense track the historical development traced by Marshall in the statist context.¹⁹ Not only is the order of development of the various categories reversed, with weak social rights preceding political participation rights, followed only quite

19 For some reflections on Marshall's historical analysis, and the problems of its inevitable linkage with the nation-state, see M. Everson and U. Preuss „Concepts Foundations and Limits of European citizenship“, ZERP Discussion Paper 2/95 (Bremen, 1995).

recently by the hesitant articulation of traditional civil rights, but more fundamentally, it was economic freedoms rather than political or civil liberties which formed the original and fundamental dimension of citizenship recognized in the European Community. Furthermore, although the political dimensions of EU citizenship have come increasingly into focus in recent years, as indeed the European elites have confronted the waning popular legitimacy of the EU and recognized the need to address its democratic deficiencies, there remains still an economic core which is reflected in the enshrinement of a qualified right to free movement and residence in Article 18 EC as the first entitlement of European citizenship.

4. Revisiting the rights of movement and residence in the light of the citizenship concept

Arguably, it is possible to detect a number of trends which indicate that the pre-existing economically-inspired rights of free movement are being reinterpreted – or at least their interpretation in this way is being encouraged – in the light of the concept of European citizenship. In its communication on the rights of residence for non-economically active persons created by the three 1990 directives, and its communication on the public policy, security and health exceptions to free movement, the Commission seems to be urging the ‘infusion’ of these fragmented pieces of secondary legislation with the constitutional significance of the new status of EU citizenship.

First, in its communication to the Council and the European Parliament on the measures which Member States can take to limit the movement and residence of EU citizens on grounds of public policy, public security or public health, the Commission argues that Directive 64/221, which over the decades has been the subject of various Court of Justice rulings, should be reinterpreted to reflect the significance of the novel status of EU citizenship: „The new concept of citizenship of the Union should play a role in the overall assessment of the position of a Union citizen whenever national authorities consider his/her expulsion or non-admission for reasons of public order, public security or public health. *Article 18 of the EC Treaty should be accorded its full weight by national authorities when they contemplate the application of Directive 64/221/EEC to a Union citizen*“⁴. While the Commission did not spell out what it considered to be the full implications of this change, it drew particular attention to long-term residents of other Member States and to minors. Clearly, an interpretative communication of this kind by the Commission does not have the authoritative legal status of a Court of Justice ruling, but the views expressed are

nevertheless significant as indicators of how previous legal categories might alter in the light of the constitutional change in the status of individuals represented by Articles 17–22 EC. Long-term residents, for example, should certainly be treated differently from tourists. The Commission however did not go as far as the High Level Panel on Free Movement of Persons in 1997 seemed to suggest, when it proposed that the possibility of expelling certain long-term EU nationals resident in a Member State should be reconsidered in the light of Article 8 of the European Convention on Human Rights on the right to respect for private and family life.²⁰

Whether influenced or not by the views of the Commission, the Court of Justice's approach in cases in recent years such as *Calfa*²¹ and *Shingara*²² has reflected what might be called a civil libertarian concern, even though the Court in those cases declined to draw specifically on the provisions of the Treaty on citizenship, and thus did not reflect on the relevance of the introduction of that concept into EC law. However, only eighteen months after this more circumspect approach to arguments based on citizenship in *Calfa*, the Court last year in *Yiandom* expressly referred to the provisions on citizenship in Article 18 EC when interpreting the provisions of Directive 64/221 in favour of an individual.²³

The citizenship provisions of the Treaty have also been invoked, albeit in a supplementary and passing way, by the Court to support other liberal rulings in favour of individuals invoking or exercising Community rights. In *Bickel and Franz*, for example, the Court referred to the rights conferred on citizens by Article 18 in ruling that national rules which permit an individual to have criminal proceedings conducted in a language other than that state's principal language falls within the scope of the EC Treaty, and must comply with Art 12 thereof.²⁴ The consequence of the ruling was that a Member State must ensure equal treatment for a Member State national travelling in an area where the national residents in that area who use the same language are entitled to require criminal proceedings be conducted in that language.

In 1992 David O'Keeffe put forward the view that the newly introduced status of citizenship in the EC Treaty was likely in time to reduce the relevance and scope of the public service exception, which permits Member States to discriminate against non-nationals in certain forms of employ-

20 See http://europa.eu.int/comm/internal_market/en/people/hlp/hlpen.pdf.

21 See case C-348/96 *Donatella Calfa* [1999] ECR I-11

22 Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343

23 Case C-357/98, *R v Secretary of State for the Home Department ex parte Yiandom*, [2000] ECR I-9265, paragraphs 23 and 24.

24 C-274/96 *Bickel and Franz* [1998] ECR I-7637 paragraph 15

ment which presuppose a special relationship of allegiance between the individual and the state.²⁵ The gist of his view appeared to be that the development of a notion of a new civic relationship between each Member State national and the EU polity might make it gradually less likely that Member States would seek to claim that an EU national could not perform public services within their state. Whether the status of EU citizenship has really affected the practice of any particular Member State in this respect is difficult to assess, but it is certainly true that the Court of Justice has continued to restrict the scope of the exception, and not to permit attempts by Member States to discriminate against nationals from other Member States in a wide range of public posts.²⁶ It may well be the case that the notion of what requires or what constitutes a special relationship of allegiance between an individual and a particular EU Member State is changing as the EU polity densifies and develops.

Apart from the by now well-known and interesting case of *Martinez Sala*,²⁷ however, more recent cases such as *Wijsenbeek*²⁸ and *Kaba*²⁹ suggest that the Court is not necessarily treating the new citizenship provisions as a lever with which to open up or to broaden aspects of the rights of movement and residence into new areas of social and political entitlement.³⁰ In *Wijsenbeek* the Court ruled that Article 18 did not of itself require Member States to remove border controls which would allow them to distinguish between EU citizens and non-citizens, and in *Kaba*, the Court made reference to the fact that the rights to move and to reside in Article 18 are not unlimited but are subject to conditions and restrictions. In this particular case, the condition that the spouse of an EU national seeking indefinite leave to remain must be resident for four years in the UK, while the spouse of person who is ‚settled‘ in the UK according to na-

25 D O' Keeffe „Judicial Interpretation of the Public Service Exception to the Free Movement of Workers“ in D. Curtin and D. O' Keeffe (eds.) (Butterworths, 1992) Constitutional Adjudication in European Community and National Law,

26 See for example cases C-195/98, *Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v Republik Österreich*, judgment of 30 November 2000 and C-283/99, *Commission v Italy*, judgment of 31 May, 2001.

27 C-85/96 *Martinez Sala* [1998] ECR I-2691.

28 Case C-387/97 *Wijsenbeek* [1999] ECR I-6207

29 Case C-356/98 *Kaba* [2000] ECR I-2623 paragraph 30. For criticism of this case, see S. Peers „Dazed and confused: family members' residence rights and the Court of Justice“ (2001) 26 ELRev 76

30 On the other hand, see the opinion of Advocate General Alber in case C-184/99 *Grzelczyk v Centre public d'Aide Sociale Ottignies/Louvain la Neuve*, 28 September 2000 which relies on the citizenship provisions of Art 17 and the non-discrimination principle in Art 12 EC to support the claim of an EU student, who possesses a right of residence, to resources guaranteeing a minimum level of subsistence in Belgium.

tional law needed only twelve months residence was compatible with the EC Treaty.

The Commission has continued to encourage the revisiting or reinterpretation of more traditional rights of movement and residence in the light of the newer concept of citizenship. In its 1999 report to the Parliament and the Council on the implementation of the three residence directives of 1990,³¹ it suggested that a number of steps needed to be taken, including a commitment to „make Community legislation on freedom of movement of persons clearer and restructure it around the notion of Union citizenship“.³² The Commission also referred to these three directives as an „extension in secondary legislation of the categories of persons entitled to the right of residence which was subsequently formally enshrined at EC Treaty level with the insertion of Article 8a into the Maastricht Treaty which states that ‚every citizen of the Union shall have the right to ... reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect““. The report goes on to state that „apart from the right of residence, more general reference should be made to the importance of the status of European citizen reflected in Article 8(2)...under which ‚citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed hereby““. And, in a clear reference to the judgment of the Court of Justice in *Martinez Sala*,³³ the Commission declared that the right not to be subject to discrimination on grounds of nationality within the material scope of the Treaty was an essential citizenship right, thus drawing a connection between the residence rights created by the 1990 directives and the unusually generous approach to social entitlement demonstrated by the Court in that case in the context of the citizenship provisions of the Treaty.³⁴ And in the more recent case of *Elsen*,³⁵ the Court of Justice drew on Art 18 EC to support a favourable reading of the old-age pension entitlement of a frontier worker, requiring the compe-

31 These were initially Directives 90/364, 90/365 and 90/366, but the third of these – the so-called students’ residence directive was replaced by Directive 93/96 after its annulment by the Court of Justice for inadequate consultation of the European Parliament. See case C-295/90 *Parliament v Council* [1992] ECR I-4193

32 See also the Commission Communication to the European Parliament and the Council on the follow-up to the recommendations of the High-Level Panel on the Free Movement of Persons, 1.7.1998, COM(1998)403 final.

33 C-85/96 *Martinez Sala* [1998] ECR I-2691.

34 See also the interesting opinion of Advocate General Alber in case C-184/99 *Grzelczyk*, footnote 29 above.

35 C-135/99 *Elsen v Bundesversicherungsanstalt für Angestellte*, 23 November 2000, paras 34–36

tent institution of a Member State to take into account, as if they had been completed in the national territory, any periods of time devoted to child-rearing in another Member State.

Focusing more generally on the proper implementation of the three residence directives, the Commission reported on the uneven process of their transposal by the Member States. Only 3 states had transposed the 90/364 and 90/365 directives by their deadline of 30th June 1992, despite the absence of any legal difficulties which could explain the delay, whereas the ‚students residence‘ measure, after its initial annulment and replacement by Directive 93/96 was transposed by all but 3 of the states, by its deadline of 31st December 1993.³⁶ By the time of the Commission’s report in 1999, all three directives had been transposed by all Member States, but the difference between formal transposal and full compliance becomes evident from the fact that infringement proceedings were nonetheless initiated and in several cases remained outstanding against a number of Member States.³⁷

The Commission identified, despite what it considered to be a „high level of uptake on these rights by citizens“ a lack of information on the part of citizens more generally as to their rights of free movement, and pointed to its own efforts to introduce guides and fact-sheets to assist individuals who might wish to exercise these rights.³⁸ Its report also highlights the difference between formal and substantive compliance on the part of Member States, since it appears that even when the directives had been fully and properly transposed in law by the states, that individuals encountered difficulties in asserting their legal rights in practice: e.g. although students were given the right in national legislation simply to make a declaration that their financial resources were sufficient, this entitlement

36 See case C-95/96, *Commission v Germany* [1997] ECR I-1653 where the ECJ ruled on Germany’s failure to implement directives 90/364 and 90/365 in time.

37 The Commission cites the proceedings it commenced – where in most cases the alleged infringement was subsequently terminated by the Member State – against Austria, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, and the U.K. In two cases the situation was initially referred to the Court of Justice before settlement. In the case of Greece, proceedings were referred to the Court in case C-85/98 in relation to its authorities’ practice of demanding a higher fee for the issue of residence permits to members of EU citizens’ families who are nationals of non-member countries than to EU citizens themselves, but this case was removed from the register in 1999. In case C-424/98 *Commission v Italy* [2000] ECR I-4001 the Court of Justice found that Italy was in breach of directives 90/364, 90/365 and 93/96 in relation to its requirements as to adequacy of financial resources.

38 See also the „EURES“ network provides information on job opportunities and living and working conditions in the Member States.

was not being recognized in practice, the checks on whether individuals had sufficient resources appeared to be excessive.³⁹

5. EU citizenship as an increased disadvantage for third country nationals

The enhanced protection for EU nationals – in particular for those disadvantaged by the fact that they live in a Member State other than that of their nationality – which is implied in the creation of the status of citizenship, however, further exacerbates the invidious differences of treatment between EU citizens and third country nationals. The Council's second EU Annual Report on Human Rights 2000 draws attention to the tension between the aim of adopting a 'human rights' approach to all those residing lawfully within the EU on the one hand, and the creation of a class of privileged EU citizens with enhanced rights on the other. According to the section of that report which deals with the common EU asylum and migration policy for which the European Council called at Tampere:

„A direct consequence of the human rights-based approach is that the area of freedom, security and justice has to cover all persons residing in or seeking access to the Union. The Tampere conclusions set this as an important objective in the efforts to create a truly encompassing area of free movement of persons. This principle applies both to asylum and to migration policy of the Union. According to the Tampere milestones the challenge is to ensure that freedom includes the right for all those who reside legally to move freely throughout the Union in a way which is not restricted to the Union's citizens.“

At a later stage, the report declares that one of the key aspects of the EU's Common Asylum and Migration policy is fair treatment for third country nationals: „The aim of the Common Policy should be to grant legally residing third-country nationals (in particular long-term residents) rights and obligations comparable to those of EU citizens“. This aim is clearly undermined at present by the considerably enhanced legal protection given to EU nationals as compared with non-nationals.⁴⁰ The Com-

39 See the proceedings referred to in footnote 36, above.

40 For other critiques of the treatment of third country nationals resident in the EU, see H. Staples, *Legal Status of Third Country Nationals Resident in the EU* (Kluwer, 1999), E. Guild, *European Community Law from a Migrant's Perspective* (Nijmegen, 2000), M.J. Garot, *La citoyenneté de l'Union: de la liberté de circulation a une démocratie européenne* (Florence: EUI, 1997)

tionals who are long-term EU residents, is evidently intended as one step in a better direction, but it remains to be seen what action the Council chooses to take on this basis. The aim of its proposed directive, according to the Commission, is to carry out what the European Council itself called for at the Tampere summit, i.e. „to permit fair treatment of third-country nationals and promote their full integration“.⁴¹

On the other hand, despite a less than perfect record on this subject,⁴² some of the recent case law of the Court of Justice has indicated a degree of sensitivity to this tension, and to the unpalatability of the nature of the differences in status and treatment of non-EU nationals, in particular those who have been resident and integrated for a considerable period of time within an EU Member State. The case of *Nazli*⁴³ concerned a similar situation to that in *Calfa*,⁴⁴ discussed above, in that both cases concerned individuals who had been implicated in drug-related activities and against whom expulsion was sought from the Member State of their residence. *Nazli* however was a Turkish national without EU citizenship, whereas *Calfa* was an Italian national. Although Advocate General Mischo in his opinion in *Nazli* was clear as to the differences in status and entitlement to treatment of a non-EU national as compared with an EU citizen, the Court of Justice in fact cited *Calfa* and other previous cases in support of its ruling that when determining the scope of the public policy exception in Article 14(1) of Decision No 1/80 of the Turkish Association Council, it would draw on the interpretation given to that exception in the field of freedom of movement for workers who are EU nationals. Thus the same limiting approach to the scope of the exception was adopted by the Court, and the restrictive national measure was disapproved.⁴⁵

41 COM (2001)127

42 See the various commentaries by S. Peers „Towards equality: actual and potential rights of third-country nationals in the European Union“ (1996) 33 C.M.L. Rev 7, also (1999) 24 ELRev 627, and more generally EU Justice and Home Affairs Law (Longman: 1999)

43 C-340/97 *Nazli* [2000] ECR I-957

44 Footnote 2 above.

45 On the rights of individuals and the possible scope of the public policy exception under the Europe agreement with the Czech republic, see Case C-257/99, *Barkoci and Malik*, opinion of Advocate General of November 2000, judgment not yet given.

6. *The „political“ rights of EU citizenship:*

The right to vote and stand in European and municipal elections:

Apart from the restatement of the right to move and reside freely as a fundamental aspect of European Union citizenship in Article 18 of the Treaty, the most important element – in symbolic and political terms – of the novel status of citizenship introduced by the Maastricht Treaty was the right to vote and to stand in the European Parliament and in municipal elections.⁴⁶ As far as the right to vote and stand in European Parliament elections are concerned, the Commission adopted a Communication in 2000 assessing the application of the relevant secondary legislation, Directive 93/109,⁴⁷ to the elections which took place in June 1999.⁴⁸

Municipal elections

Directive 94/80/EC concerning municipal elections, which was modified by Directive 96/60⁴⁹ was also slowly implemented by the Member States. Proceedings were brought by the Commission against several states in 1998,⁵⁰ but all had formally transposed the measure by 1999. Reasoned opinions were issued by the Commission in 1999 against two of the German Länder for failure to properly implement the measure, in that they required EU citizens resident in Germany to apply for inclusion in the electoral list before each municipal election, in breach of Article 8(3) of the Directive. Similarly, a reasoned opinion against Greece was issued on a number of points relating to the patently improper implementation of the Directive, and particularly the rule whereby persons are only entitled to vote if they have knowledge of the Greek language and have been resident in Greece for at least two years.⁵¹

46 For an interesting comparative analysis of the implementation of the electoral rights in Article 19, see S. Day and J. Shaw „Implementing Union Citizenship: the Case of Alien Suffrage and the European Union“, written as part of the Boundaries of Suffrage Project in the Centre for the Study of Law in Europe, Department of Law, University of Leeds.

47 OJ 1993 L 329.

48 COM(2000) 843. The Commission had previously reported on the application of the Directive to the 1994 European Parliament elections: see COM(1997) 731.

49 OJ 1996 L 122/12

50 See the 16th Report on Monitoring the Application of Community law COM (1999) 310. In C-323/97 *Commission v Belgium* [1998] ECR I-4281 the ECJ ruled against Belgium for its failure to transpose Directive 94/80 on time. By the time of the 17th Annual Report on monitoring (1999) COM (2000) 92, however, the Commission could report that all Member States had now at least transposed Directive 94/80.

51 See again the 17th Annual Report: COM (2000) 92

European Parliament elections

In publishing its communication on the second European Parliament elections after the introduction of Directive 93/109, the Commission explained that the directive itself did not provide for such a second report (following the first report on the 1994 elections), but that for a number of reasons, including the fact that the 1994 elections took place so soon after the date of adoption of the directive, it was considered important to highlight the main problems which still existed, and to publicise and encourage the good practices developed in certain Member States. The aim of this exercise, according to the Commission, was that of „increasing participation by Union citizens in the political life of their Member State of residence“, and the communication was intended to demonstrate „the Commission’s commitment to ensure proper application of Community law and to bring the Union closer to its citizens“. These new political rights are, in its view „an important factor in fostering a sense of belonging to the European Union“. The Commission identifies the key principles underlying the directive as those of freedom of choice, single vote and single candidacy, equal access to electoral rights, and a duty to inform.

An overall drop in turnout was noted, which continued the trend since the Parliament was first elected directly in 1979.⁵² Although this trend does not appear to be inconsistent with trends in the turnout for national elections, the legitimacy problems of the EU are almost certainly more pronounced and more problematic than those of any particular Member State at present. The distance between the citizen and the European polity, which the Commission hopes will be reduced by the ‚new‘ political rights of voting and participation, does not yet appear to be lessening. Even more significantly for the purposes of the subject of this particular paper, the proportion of EU (as opposed to national) citizens entered on the electoral roll of their Member State of residence was low and varied greatly from country to country. However, the Commission suggests that the fall in turnout is at least partly explained by a combination of the fact that a very high proportion of those EU citizens living in a Member State other than that of their nationality are resident in Germany, and the fact that Germany had incorrectly transposed the Directive by requiring re-entry of EU citizens on the electoral roll in 1999. On the other hand, no figures are available on how many Community citizens residing in a Member State of

52 Turnout in the European Union as a whole apparently fell from 56.5% in 1994 to 49.7% in 1999, and at the first elections held in 1979, it was 63%.

which they were not nationals actually turned out to vote, so the general turnout figures are difficult to interpret in this respect.

The Commission's report draws attention to the fact, which is often pointed out as one of the reasons for the failure of European electoral rights and even of the European Parliament itself in generating a greater sense of connection between the citizen and the European polity, that political debate during the EP election campaign focuses little on European issues, but mainly on matters of national concern. Part of the problem, in the Commission's view, is that the right to set up and join political parties in the Member State of residence is not guaranteed in all Member States, and that without such a right to full participation in local political life, the right to stand in elections is incomplete. Very few non-national candidates stood for election and even fewer were elected

In its report on the 1994 Parliament elections, the Commission had concluded that not enough had been done to inform citizens of their new entitlements and it urged a substantial increase in efforts on the part of Member States to provide such information. On the occasion of the 1999 elections, the states which had sent information directly to potential electors showed a considerably higher rate of registration of EU citizens. The Commission in its communication suggests that the Member States ought to provide something more than the information it normally provides for its own nationals. And indeed the Commission goes a little further:

„The very nature of the exercise means that a case-by-case approach must be adopted rather than setting general criteria or thresholds in advance. The Commission considers that the Member States where the registration rate is lower than the EU average... should implement specific information measures, which might include sending personalised information by post or providing EU citizens with appropriate information whenever they have contact with the local or national authorities.“

Thus these proposals seem to envisage a mild form of positive action to promote alien suffrage in order to comply substantively with the directive and make it effective.

The right to diplomatic protection in Article 20 EC

Two decisions were adopted by the Member State governments in 1995: firstly a formal decision relating to protection of citizens of the Union by diplomatic and consular representations, and secondly a decision in rela-

tion to implementing measures to be adopted by consular official,⁵³ and in 1996 the Member States adopted a decision to lay down the rules for an emergency travel document.⁵⁴ By the time the second report on citizenship of the Union was written by the Commission, not all Member States had introduced the necessary arrangements to implement these decisions, and a review had been scheduled for 2001.⁵⁵ However, the third report on Citizenship of the Union which was due by the end of 2000, and in which further information on the development of these rights could be expected, has not yet appeared, and for reasons which will be explained below⁵⁶ it is not entirely clear whether or when this is due to appear.

The right to petition the Parliament and complain to the Ombudsman

On the right of petition and right of access to the Ombudsman, both of which were *de facto* legal rights prior to their restatement as dimensions of citizenship by the Maastricht Treaty, the European Parliament passed resolutions in 2000 on both of these. In relation to the Committee on Petitions, its role and effectiveness was rather weakly described in the 2000 general activities Report. In the report, after indicating that seven hundred petitions were examined it was simply reported without further detail or explanation that: „in certain cases, the intervention of the Commission and Parliament ensured that petitioners obtained satisfaction“.⁵⁷

The European Ombudsman published his fifth annual report for 1999 in April 2000, the year after having his mandate renewed following what is generally considered to be a successful first term of office. He noted that 70% of the complaints which he received and examined fell outside the scope of his powers, which presumably suggests that national administrative complaints machineries are in some way inadequate to deal with complaints against national authorities. The ombudsman called, as he has previously done, for a removal of the restrictions on his right of access to documents from the bodies and institutions whose actions or maladministration he is mandated to review. In recent years, in addition to his annual reports, the Ombudsman has published a number of special reports, including one on secrecy in the Commission's recruitment procedures, and one following the own-initiative inquiry into the existence and the public ac-

53 The first of these decisions, Decision 95/553/EC, was published in the Official Journal at OJ 1995 L 314/73, whereas the second was not.

54 Decision 96/409/CFSP in OJ 1996 L 168/4.

55 See the second citizenship report COM (97) 230.

56 See the annex to this report.

57 See paragraph 491 of the General Report 2000.

cessibility of a Code of good administrative behaviour in the different Community institutions and bodies.⁵⁸

7. The area of ,freedom, security and justice‘ for citizens

In the Commission’s 2000 report on the activities of the Union, certain dimensions of the ,area of freedom security and justice‘ which are likely to particularly affect the lives of citizens, even if they are not within the conventional categories of citizenship rights and practice, were picked out for mention. These include the instruments adopted concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in matrimonial matters and matters of parental responsibility for joint children, insolvency, service of documents, legal aid, greater rights for victims in criminal proceedings and mutual recognition of judgments.⁵⁹ The report also highlights the establishment of the European Refugee Fund⁶⁰ and the ,Eurojust‘ unit intended to combat organised crime, and the adoption of a drug prevention action plan for 2000–04. In this context, the ,security‘ dimension of citizenship is clearly being emphasised rather than the protection of civil liberties or freedoms from state intervention. Instead, the focus in this area is rather on the citizen interest in protection by the state against crime.

The progress of this new post-Tampere area of freedom security and justice is being monitored and displayed by the Commission on its

58 OI/1/98/OV, 11 April 2000.

59 The Commission lists the activities undertaken in these fields: in the field of judicial cooperation in civil matters in 2000, the 1968 Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters was transformed into a Community instrument; three regulations were adopted on insolvency, jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children, and on the service of documents. Further, the Commission in February 2000 adopted a Green Paper on legal aid COM(2000) 51, focusing on the problems encountered by citizens in cross-border litigation

60 Council Decision 2000/596/EC establishing a European Refugee Fund OJ 2000 L 252/12, which according to the Commission is intended to give balanced support to the efforts of the Member States to cope with the influx of refugees and displaced persons. See also the Commission’s proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States COM(2000)303 OJ 2000 C 311/251, and see the Commission proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status COM(2000)578 OJ 2001 C 62/231.

‘scoreboard’⁶¹ which includes measures adopted under the new Title IV of the EC Treaty and under Title VI of the Treaty on European Union, but not all of the activities generated by the incorporation of the Schengen *acquis*.⁶²

EU immigration policy, unsurprisingly in view of its politically controversial nature and significance, has been slow and painstaking in its development. Once again, the predominance of ‘security’ and the defence of borders over a ‘human rights’ or more open approach is evident. It is in this context that the exclusionary and discriminatory dimensions of European citizenship become most apparent. In March 2001 Council Regulation 539/2001 listing the third countries whose nationals must be in possession of a visa when crossing the EU’s external borders was finally adopted, again after lengthy debate and dispute,⁶³ and in late 2000 the Commission adopted a communication on a European immigration policy,⁶⁴ and a communication on a common asylum procedure and status.⁶⁵ A regulation setting up the controversial Eurodac system, to enable comparison of the fingerprints of applicants for asylum and other third-country nationals, was adopted by the Council in December,⁶⁶ and the Eurojust system to coordinate prosecution authorities was initiated and subsequently developed in the amendments to Articles 29–31 of the TEU by the Nice Treaty.⁶⁷ Other significant initiatives include the establishment of a European police college,⁶⁸ the setting up of a crime prevention network,

61 COM(2000) 167 http://europa.eu.int/comm/dgs/justice_home/index_en.htm.

62 The agreements with Iceland and Norway on their involvement in implementing and applying the Schengen *acquis*, on the one hand, and the United Kingdom and Ireland on the other hand, entered into force on 26 June. In September 2000 the Commission also gave a favourable opinion on Ireland’s request to take part in the provisions of the Schengen *acquis* relating to police and judicial cooperation in criminal matters, drugs, and the Schengen information system (SIS), and in December, the Council adopted a decision on the implementation of the Schengen *acquis* in the Denmark, Finland, Iceland, Norway and Sweden. The Council in March also set up a system of notifications to detect counterfeit travel documents, in order to improve the exchange of information between Member States.

63 OJ 2001 L 81/1–7. See also Council Regulation (EC) No 789/2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications OJ 2001 L 116/2.

64 COM(2000) 757

65 COM(2000)755

66 Council Regulation 2725/2000 OJ 2000 L 316/1.

67 See the initiative of Portugal, France, Sweden and Belgium in OJ 2000 C 243/15 and also the Commission’s communication on the establishment of Eurojust – COM(2000) 746.

68 Council Decision 2000/820/JHA

and the adoption of a number of actions in relation to child pornography, human trafficking and organized crime.

In addition to various moves in relation to judicial cooperation in civil matters, a wide range of measures in the criminal field have been initiated or undertaken,⁶⁹ although once again these relate to the idea of citizenship primarily in a negative way. They are neither empowering nor participative, but at best protective,⁷⁰ and they represent the gradual emergence and development of police and criminal justice powers at European level. To revert to the first of Marshall's three categories of citizenship rights discussed above, these developments draw attention to the need to articulate and strengthen of some of the basic civil liberties in European law, which have hardly been mentioned until now.⁷¹

8. Other areas of „citizen interest“ and EU citizenship initiatives

Rather more difficult to assess is the general field of what has been called ‚citizenship practice‘. Clearly there are a range of developing policy areas, such as education, vocational training, consumer protection and culture which directly affect the lives of citizens, and more significantly, which aim particularly to connect with European citizens in a way which is not specifically national, and to enhance the relationship between the citizen and the European polity. This aim can be seen in the way the EU institutions tend to define or describe these policies.

In reporting on the first phase of the Leonardo da Vinci vocational training action programme for 1995–1999, the Commission states that „The Leonardo da Vinci programme is a cornerstone of the Commission's policy to promote active citizenship across the Union and to draw closer to the vision of a Citizen's Europe“.⁷²

Further, new Community programmes on education, such as Socrates II, and those such as Culture 2000 and MEDIA plus are apparently „geared

69 See the various developments described in paragraphs 464–478 of the General Report on the Activities of the Union 2000.

70 To give an example of more benign developments, the Commission issued a communication in July 1999 on victims of crime and their standing in criminal proceedings, on which the European Parliament also made recommendations.

71 See the campaign waged for a number of years now by the Statewatch organization, which monitors these developments at EU level and has been vigilant in calling for the protection of citizens rights and interests which are being jeopardized in the process. See www.statewatch.org

72 See COM(2000)863.

primarily towards...equal opportunities and active citizenship“⁷³ And in its report on the implementation of the Socrates programme for 1995–1999,⁷⁴ the Commission criticised the vagueness of the programme’s objectives in 1995, and announced that its report would focus on „the objectives primarily linked to the resolve to develop European citizenship“. This section is worth quoting in some detail, given the emphasis which the Commission places on the citizenship dimension of these European educational programmes:

„In higher education, students who have benefited from Erasmus continue to rank the broadening of their cultural and linguistic horizons during their stay in another country amongst the major achievements of their experience. In the other actions of the programme, the participants have to a very large extent stressed the contribution of the programme to a tangible approach to European citizenship. This is particularly true for the countries of Central and Eastern Europe which have applied to join the European Union and in relation to which SOCRATES has played a pioneering role when it comes to integrating the education players from the point of view of European citizenship. The SOCRATES programme has nevertheless so far done more to develop the idea of European citizenship in general than to strengthen the European dimension in studies as such“.⁷⁵

New plans on electronic learning, and to promote transnational mobility of EU citizens in the field of education training and youth were approved by the European Council at Nice, although the Commission in its report on the Socrates programme argued that mobility in itself should not be an aim, but only in so far as it contributes to the development of a sense of European citizenship.

Other areas of importance for the European citizen to consider in this context, which again do not involve particular ‚citizenship rights‘ but rather which bear more generally on social and economic welfare of European citizens are those of employment policy and ‚cohesion‘. Since the Lisbon European Council summit in 2000, there has been particular emphasis on the development of these areas of European activity, with a move to the newer „open method of coordination“ as a mode of governance. The capacity of this new method of coordinating national policy to deliver better

73 General Report on the Activities of the Union 2000, para 493. See also the integration of the language of citizenship into some of the Community’s anti-discrimination activities, e.g. the Commission report on the implementation of the Action Plan against Racism (01/2000)

74 COM(2001)75

75 Ibid., para 2.1

socio-economic policies to the European citizen remains to be tested, but it clearly is an area of importance to be observed.

9. Concluding Remarks

I will not attempt here to provide a summary of the further development of citizenship in the European Union, since the approach of this report has, for practical reasons, been selective and limited in scope. Instead, a few key themes will be noted.

On the one hand, one might identify the beginnings of what could be called a partial 'mainstreaming' approach on the part of the European Commission, and possibly also – although there are as yet an insufficient number of cases to draw any firm conclusions – the Court of Justice. By 'partial mainstreaming' I mean the attempt to bring the norms and values of citizenship to bear on other relevant policies, and to revise existing policies such as the free movement of persons in the light of the new status. The language and rhetoric of citizenship can also be seen at work in some of the developing areas of European policy such as education, culture and vocational training, and in the field of anti-racism also.

Secondly, the tension between the enhanced protection for EU nationals brought about by the citizenship status on the one hand, and the failure to fulfil the supposed commitment to a human rights approach to non-EU nationals in migration and refugee policy on the other hand, remains stark. Policy movements in the direction of improving the position of long-term resident third country nationals should be closely watched to see how real the commitment may be.

Thirdly, the political rights of citizenship introduced by the Maastricht Treaty continue to disappoint, not only because of uneven implementation by Member States of the relevant secondary legislation, but also because of more general political apathy in relation to the EU and the ever-decreasing turnout for European Parliament elections. The hope that some of the democratic legitimacy problems of the European Union might be addressed by the creation and exercise of a limited form of alien suffrage, and of voting and participation rights in European Parliament elections has clearly not been realised. The development of the office and role of the European Ombudsman, on the other hand, has so far been promising as a channel of complaint and proposed reform, despite the shortcomings recognised and pointed out by the current office-holder.

The area of 'freedom justice and security' yields the most ambivalent conclusions from the point of view of the development of European Union citizenship. On the one hand it is one of the fastest growing and busiest

areas of EU policy activity, but on the other hand many of the actions adopted – on immigration, policing, crime – do not concern the participative dimension but at best the more defensive aspects of citizenship. In other words, they relate much less to the facilitation of an active dimension of European citizenship, and much more to the security aspects of protecting the European citizen. Further, these very activities raise citizenship concerns of a traditional civil libertarian kind about the growth of policing and control powers at this transnational and supranational level. The tendency of the Member States and the EU institutions, even within the context of positive developments such as the emergence of access to information norms, to fall back on ill-defined security and sensitivity vetoes, does little to allay these concerns.

Apart from the continued development of the EU's anti-discrimination and equality policies, the potentially most exciting developments in the field of citizenship may be yet to come. It is to be hoped that this will be seen in the reinvigoration or rediscovery of the elusive European civil society,⁷⁶ so as to breathe life and legitimacy into the debate on the constitutional future of Europe.

76 See K. Armstrong „The rediscovery of civil society in the production of governance“, footnote 15 above.

Annex

A Saga of an EU citizen's search for information on EU citizenship

The story recounted below traces the attempt of a particular EU citizen – who was perhaps a little better informed on the technicalities of European law and institutions than the average citizen – to obtain some information about European citizenship. It reveals the comic and tortuous path which that quest has followed to date, while still (at the time of writing) remaining unanswered. It reveals something too about the inadequacy of the Commission's resources, which make it rather difficult for the rhetoric and aspirations of the 'citizenship project' to be realised in practice.

In preparing this report on 'further development of citizenship in the EU', I was hoping to learn about some of the most recent developments by reading the three-yearly report which the Commission is required, under Article 22 of the EC Treaty, to publish. The third report was due by the end of 2000, but my website and library searches revealed only the 1994 and 1997 Citizenship reports. At the beginning of April 2001, I finally decided to contact the Commission – without having any „inside contacts“ or more direct sources of information – as an ordinary information-seeking citizen.

This first message was sent on 1 April, to the contact address which is given for the employment and social affairs directorate of the Commission.

-----Original Message-----

From: De Burca, Grainne

[]

Sent: dimanche 1 avril 2001 17:39

To: EMPL INFO

Subject: information on citizenship

I would like to know when the third Commission report on Citizenship of the Union is likely to be available, please. Apparently it was to be published by the end of 2000, but I presume the target date has been revised. Could

you please let me know the date when it is expected to be completed and available?
Thank you.

When, five weeks later, I had received no reply and no acknowledgement that my email had been received, I grew somewhat frustrated and sent a second email, this time to the internal market directorate also, since I was uncertain who would be primarily responsible for the report.

-----Original Message-----

From: De Burca, Grainne
[]
Sent: dimanche 6 mai 2001 15:54
To: MARKT A4; EMPL INFO
Subject: citizenship

Some months ago I sent an email request to empl-info@cec.eu.int, asking for an indication of when the third Commission report on citizenship of the Union (which was due at the end of 2000) was likely to appear.

It is extremely frustrating not only to have had no response to this request, but to have had no response at all, nor any acknowledgement of my query. If I have emailed the wrong DG or section, then I would be grateful if you could inform me of this and let me know who I should contact.

I am assuming that the repeated assurances of the Commission as to its willingness and determination to be responsive, open, accountable, closer to the citizen etc. are not false and I would very much appreciate a reply to this email.

Thank you.
Gráinne de Búrca

Following this perhaps rather intemperate message, I received a pleasant reply, to an interesting version of my name, from the social affairs and employment directorate, to explain that I had sent my initial request to the wrong directorate.

-----Original Message-----

From: Rita.Verschuren

Sent: Monday, May 07, 2001 4:38 PM

To: De Burca, Grainne

Subject: RE: information on citizenship

Dear Ms Graine,

your request has been transferred to the DG in charge of this subject:

Directorate General Internal market. Sorry about this. We should have informed you.

Please write to them directly at the following address:

markt-info@cec.eu.int

Rita Verschuren

Rita Verschuren

Commission européenne - DG „Emploi et affaires sociales“

Communication - Centre d'Information

Tél: +32-2-296.95.36

Fax: +32-2-296.23.93

E-mail: rita.verschuren@cec.eu.int

Some time later that day, I received what I presume was a demonstration in action of the right which is newly guaranteed to me under Article 21 of the EC Treaty, namely to have an answer in any one of the official languages of the EU. So I received this very useful answer in virtually *all* of the languages!

-----Original Message-----

From: Markt-Info@cec.eu.int

Sent: Monday, May 07, 2001 5:58 PM

To: De Burca, Grainne

Subject: Out of Office AutoReply: request for information on citizenship

Madame, Monsieur,

Nous avons bien reçu votre message/ demande d'informations et nous vous en remercions. Nous nous efforcerons d'y répondre dans les meilleurs délais.

Bien à vous,

Dear Sir, dear Madam,

Thank you for your inquiry. We are currently working on your request and we will send you the required informations as soon as possible.

Best regards,

Sehr geehrte Frau,

Sehr geehrter Herr,

Wir möchten Ihnen hiermit den Eingang Ihres Schreibens bestätigen und bedanken uns sehr für Ihr Interesse.

Ihre Anfrage ist an die zuständige Einheit im Haus weitergeleitet worden und wird derzeit bearbeitet. Die Antwort lassen wir Ihnen innerhalb weniger Tage zukommen.

Mit freundlichen Grüßen,

Geachte Mevrouw, geachte heer,

Wij hebben uw bericht in goede orde ontvangen en we zetten alles in het werk om u zo spoedig mogelijk te antwoorden.

Beleefde groeten,

Ex.mo(a) Sr.(a),

Agradecemos a sua mensagem/pergunta relacionada com as actividades da União Europeia. Faremos todos os possíveis para lhe responder o mais rapidamente possível.

Atenciosamente.

Egregia signora, egregio signore,

Vi ringraziamo per il vostro interesse nelle attività dell'Unione europea.

Faremo tutto il nostro possibile per rispondere alla vostra domanda il più presto possibile.

Distinti saluti,

Estimada señora, estimado señor,

Les agradecemos por su mensaje/ pregunta sobre las actividades de la Unión

europaea. Haremos todo el posible para contestar a él/ ella sin demora.

Muy atentamente,

MARKT-INFO

DG INTERNAL MARKET

The following day I received, by email, another interesting pro-forma letter, pointing out that my request as to when the third Citizenship report was due, would require „in depth examination“.

-----Original Message-----

From: Karla.Werniers@cec.eu.int
[]

Sent: Tuesday, May 08, 2001 12:27 PM

To: De Burca, Grainne

Subject: RE: citizenship



EUROPEAN COMMISSION
Internal Market DG
FUNCTIONING AND IMPACT OF THE INTERNAL MARKET. COORDINATION.
DATA PROTECTION
Internal Market: dialogue and promotion

Brussels, 12 August 2001
MARKT/A4 D(2001) 105

Mrs Gráinne de Búrca

Dear Mrs de Búrca,

Receipt of your mail of 6 May 2001

Thank you for your mail, which has received our fullest attention.
Your letter raises issues requiring an in-depth examination.
The matter is being handled by Mr Bernard HELIN, information officer at
Justice and Home Affairs DG, tel. 32-2-2963256.

Yours sincerely,
(signed)
Elsa Deijaert
Information Cell

Some time later, I received the following friendly message which suggested to me that my original request had not been fully understood.

-----Original Message-----

From: Els.Deijaert@cec.eu.int
[]

Sent: Friday, May 18, 2001 11:22 AM

To: De Burca, Grainne

Cc: Karla.Werniers@cec.eu.int

Subject: European citizenship

Following your demand, please find enclosed website where you can obtain the requested documentation:

Yours faithfully,
Else Deijaert

I replied to this message, pointing out what my request had actually been, and that the documentation indicated did not correspond to this request:

-----Original Message-----

From: De Burca, Grainne

Sent: Friday, May 18, 2001 11:58 AM

To: 'Els.Deijaert@cec.eu.int'

Cc: Karla.Werniers@cec.eu.int

Subject: RE: European citizenship

Dear Ms Deijaert

Thank you for your email and for the information. I do in fact already have this document from 1999 concerning Directive 64/221 which is mentioned on the website address you gave me, but my query was actually about something else.

To repeat the original query, under Article 22 of the EC Treaty the Commission is required to issue a report on European citizenship every three years. The first report was issued in 1994, the second in 1997, and the third was due by the end of 2000. This report hasn't yet appeared, and I assume it has been delayed, but what I need is some information about when the Commission anticipates it is likely to appear.

Thank you very much for your assistance

Gráinne de Búrca

As I write, it is now two and a half months since my rather simple request about whether and when the 2000 Citizenship report would appear was first made, and this complicated matter is clearly still under „in-depth examination“! More charitably, as suggested above, it reflects an inadequacy of resources and the persistence of an institutional culture which may be difficult to change. It suggests that the promises and good intentions of the European institutions to be more open and more responsive to the citizen may take somewhat longer than desired to realise in practice.

Report on the further development of citizenship in the European Union

GRÁINNE DE BÚRCA

Summary

This report attempts to assess some of the legal developments relevant to the domain of EU citizenship which have taken place over the years since the Maastricht Treaty, and to comment on the significance of those developments. Apart from the actual „citizenship chapter“ in Articles 17–22 of the EC Treaty and its implementation through directives, a number of other areas of law and policy will be touched upon which can be considered as a part of the corpus of European citizenship law. Some of these are policy areas which have been consciously identified or categorised by EU institutional actors as an aspect of citizenship policy, while others are areas of action which, even if not formally identified as within the domain of EU citizenship, are of particular relevance to what can broadly be considered one of the incidents of citizenship: rights, identity, participation in and membership of the political community.

The areas on which the report concentrates are firstly, the original ‚free movement and residence‘ rights as they have been gradually extended to non-economically active persons by secondary law, and as they are developing in their newer ‚citizenship‘ guise. Some of the legally recognized exceptions to these original rights, as set out in Directive 64/221, have recently been revisited by the Commission with a view to reconsidering them in the light of European citizenship, and the Court of Justice has also given some attention to the citizenship dimension of these more traditional legal rights. Secondly, the report examines the more recent political and electoral rights enshrined by the Maastricht Treaty, the most important of which are conferred exclusively on those who are nationals of an EU Member State. These provisions cover the right to vote in and to stand for European Parliament and municipal elections, diplomatic representation outside the EU, the right to petition the European Parliament, to apply to the Ombudsman and most recently, the right to a reply from any of the EU institutions in any one of the official languages. Thirdly, it will consider the dimension of ‚freedom, security and justice‘ as it has been termed in the Amsterdam Treaty, previously known as „Justice and Home Affairs“ under the original third pillar of the Maastricht Treaty on European Union. This covers issues such as immigration, asylum, visa policy, policing and judicial cooperation, and is

judicial cooperation, and is governed both by the provisions of the reformed third pillar and the new Title IV of the EC Treaty. Fourthly a number of other areas of ‚citizen practice‘ fostered by or developed within EU policies (on education and vocational training in particular) are considered and discussed. The report touches also on issues of increasing significance for the citizen such as access to information and transparency, and considers the increasing profile and role of „civil society“ in EU institutional discussions and in public debate on the European Union. Finally, although the Charter of Fundamental Rights is clearly very relevant, both in its content and in the manner of its drafting, to the development of European citizenship, this topic is not covered since it is dealt with in detail in the paper of Professor Rodotà.

A number of trends can be identified in the areas examined in the report. On the one hand, there are the beginnings of what might be called a partial ‚mainstreaming‘ approach by the European Commission, and possibly also by the Court of Justice, in apparently bringing the norms and values of citizenship to bear on other relevant policies, and to revise existing policies such as the free movement of persons in the light of the newer constitutional status. Secondly, a clear tension remains between the enhanced protection for EU nationals brought about by the citizenship status on the one hand, and the failure to fulfil the declared commitment to a human rights approach to non-EU nationals in migration and refugee policy on the other hand. Policy movements in the direction of improving the position of long-term resident third country nationals ought to be closely observed. Thirdly, the impact of political rights of citizenship introduced by the Maastricht Treaty has been somewhat disappointing, partly because of uneven implementation by Member States of the relevant secondary legislation, but mostly because of more general popular apathy in relation to the EU and the ever-decreasing turnout for European Parliament elections. The development of the office and role of the European Ombudsman, on the other hand, has so far been promising as a channel of complaint and proposed reform.

Fourthly, the area of ‚freedom justice and security‘, which is one of the fastest growing and busiest areas of EU policy activity, is less concerned with the participative dimension but rather with the more defensive aspects of citizenship, as can be seen in the initiatives on immigration, policing and crime for example. These EU-level activities indeed themselves raise citizenship concerns about the growth of policing and control powers at this transnational and supranational level. The response of the Member States and the EU institutions in other policy areas which might address these concerns, such as in the context of the emergence of access to infor-

mation laws, has been far from reassuring, since they have relied strongly on poorly-defined security and „sensitivity“ exceptions. Finally, it could be argued that, apart from the continued development of the EU’s anti-discrimination and equality policies, the potentially most exciting developments in the field of citizenship may be yet to come in the reinvigoration or rediscovery of the elusive „European civil society“, which has the capacity to breathe life and legitimacy into the debate on the constitutional future of Europe.

Rapport sur l'évolution de la citoyenneté dans l'Union européenne

GRÁINNE DE BÚRCA

Resumé

Le présent rapport tente d'évaluer certains faits juridiques nouveaux en matière de citoyenneté européenne, intervenus depuis le Traité de Maastricht, et de commenter l'importance de ces développements. Outre le „chapitre citoyenneté“ proprement dit, qui figure dans les articles 17 à 22 du Traité CE, et son application dans les directives, un certain nombre d'autres domaines juridiques et politiques, considérés comme des composantes du corpus du droit européen sur la citoyenneté, seront également touchés. Certains d'entre eux sont des domaines politiques, soigneusement identifiés ou classés par les acteurs institutionnels de l'UE comme un aspect de la politique de citoyenneté, tandis que d'autres sont des champs d'action qui, même s'ils ne sont pas identifiés officiellement comme faisant partie du domaine de la citoyenneté de l'UE, présentent une importance particulière pour ce qui peut globalement être considéré comme un des éléments de la citoyenneté: les droits, l'identité, la participation à la communauté politique et l'appartenance à celle-ci.

Les domaines sur lesquels le rapport se concentre sont, en premier lieu, les droits originaux de „liberté de mouvement et de résidence“, parce qu'ils ont été progressivement étendus, par le droit dérivé, aux personnes non-économiquement actives et se développent en empruntant les habits neufs de la „citoyenneté“. Certaines exceptions, légalement reconnues, à ces droits originaux, telles qu'elles sont exposées dans la directive 64/221, ont récemment été réexaminées par la Commission afin de les reconsidérer à la lumière de la citoyenneté européenne. La Cour de Justice a également accordé une certaine attention à la dimension citoyenne de ces droits légaux plus traditionnels. En deuxième lieu, le rapport examine les droits politiques et électoraux plus récents consacrés par le Traité de Maastricht, dont les principaux sont exclusivement conférés aux ressortissants d'un Etat membre de l'UE. Ces dispositions couvrent le droit de voter au Parlement européen et aux élections municipales et de militer en leur faveur, la représentation diplomatique hors de l'UE, le droit d'adresser une requête au Parlement européen, de faire appel au médiateur et, plus récemment, le droit de répondre à une quelconque des institutions de l'UE dans n'importe quelle langue officielle. En troisième lieu, il examinera la di-

mension de „liberté, de sécurité et de justice“ telle qu'elle est formulée dans le Traité d'Amsterdam, préalablement connue sous la dénomination de „Justice et Affaires intérieures“ en vertu du troisième pilier original du Traité de Maastricht sur l'Union européenne. Cet examen couvre des questions telles que l'immigration, l'asile, la politique des visas, le maintien de l'ordre et la coopération judiciaire, et est régi par les dispositions du troisième pilier réformé et le nouveau Titre IV du Traité CE. En quatrième lieu, un certain nombre d'autres domaines de „pratique citoyenne“ stimulés ou développés dans le cadre des politiques de l'UE (sur l'éducation et la formation professionnelle en particulier) sont pris en compte et examinés. Le rapport touche également des questions qui revêtent une importance croissante pour le citoyen, telles que l'accès à l'information et la transparence, et il examine le rôle croissant de la „société civile“ dans les discussions institutionnelles de l'UE et dans le débat public sur l'Union européenne. Enfin, bien que la Charte des droits fondamentaux soit manifestement très importante, tant dans son contenu que dans son mode de rédaction, pour le développement de la citoyenneté européenne, ce sujet n'est pas couvert parce qu'il est traité en détail dans le document du Professeur Rodotta.

Un certain nombre de tendances peuvent être identifiées dans les domaines examinés dans le rapport. Il s'agit, d'une part, des prémisses de ce qui pourrait être qualifié d'approche „d'intégration“ partielle adoptée par la Commission européenne et peut-être aussi par la Cour de Justice, en amenant apparemment les normes et valeurs de la citoyenneté à s'intéresser à d'autres politiques importantes et à réviser les politiques existantes, telles que la liberté de mouvement des personnes à la lumière de la situation constitutionnelle récente. D'autre part, il subsiste une tension manifeste entre l'amélioration de la protection des ressortissants de l'UE, engendrée par le statut de citoyen, et l'incapacité d'aboutir à l'engagement déclaré en faveur d'une approche axée sur les droits de la personne à l'égard des non-ressortissants de l'UE en migration et la politique des réfugiés. Les mouvements politiques visant à améliorer la situation des ressortissants de pays tiers et des résidents à long terme devraient être observés attentivement. Enfin, l'impact des droits politiques liés à la citoyenneté, introduits par le Traité de Maastricht, est quelque peu décevant, en partie en raison de l'application inégale par les Etats membres de la législation dérivée appropriée, mais principalement à cause de l'apathie croissante de la population à l'égard de l'UE et la baisse constante de la participation aux élections du Parlement européen. L'évolution de la mission et du rôle du médiateur européen, en tant que canal d'expression des plaintes et de la réforme proposée, est également prometteur.

Quatrièmement, le domaine de la „liberté, de la justice et de la sécurité“, qui est un des principaux domaines de l’activité politique de l’UE qui croît le plus rapidement, est moins concerné par la dimension participative mais davantage par les aspects plus défensifs de la citoyenneté comme on peut le voir dans les initiatives sur l’immigration, le maintien de l’ordre et le crime, par exemple. Ces activités communautaires posent en fait eux-mêmes des problèmes de citoyenneté concernant la croissance des pouvoirs de contrôle et de maintien de l’ordre à ce niveau transnational et supranational. La réponse des Etats membres et des institutions de l’UE dans d’autres domaines politiques qui pourraient aborder ces questions, comme dans le contexte de l’émergence de l’accès aux droits à l’information, est loin d’être rassurante car elles dépendent fortement d’exceptions mal définies en matière de sécurité et de „sensibilité“. On pourrait enfin affirmer que, outre le développement continu des politiques de l’UE en matière d’anti-discrimination et d’égalité, les progrès potentiellement les plus intéressants dans le domaine de la citoyenneté restent peut-être à accomplir avec la revigoration ou la redécouverte de la „société civile européenne“ indéfinissable qui a la capacité d’insuffler de la vie et de la légitimité dans le débat sur l’avenir constitutionnel de l’Europe.

Bericht über die Entwicklung der Staatsbürgerschaft in der Europäischen Union

GRÁINNE DE BÚRCA

Auszug

Der hier vorliegende Bericht versucht, einige neue juristische Sachverhalte hinsichtlich der europäischen Staatsbürgerschaft, die seit dem Maastrichter Vertrag eingetreten sind, zu beurteilen und die Wichtigkeit dieser Entwicklungen zu kommentieren. Abgesehen von dem eigentlichen „Kapitel zur Staatsbürgerschaft“, das in Artikel 17–22 des Vertrags der Europäischen Union vorkommt und seiner Durchführung in den Direktiven, werden gleichermaßen einige andere juristische und politische Bereiche angeschnitten, die als Bestandteile des europäischen Staatsbürgerrechts betrachtet werden. Bei einigen dieser Bestandteile handelt es sich um politische Bereiche, die von den beteiligten Institutionen der Europäischen Union als Staatsbürgerschaftspolitik sorgfältig identifiziert und klassifiziert wurden, während es sich bei einigen anderen um Wirkungsbereiche handelt, die, selbst wenn sie nicht offiziell als Bestandteil des Bereichs der Staatsbürgerschaft der Europäischen Union identifiziert wurden, eine besondere Bedeutung dafür darstellen, was in seiner Gesamtheit als ein Element der Staatsbürgerschaft betrachtet werden kann: die Rechte, die Identität, die Teilnahme an der politischen Gemeinschaft und die Zugehörigkeit zu dieser.

Die Bereiche, auf die sich dieser Bericht konzentriert, sind an erster Stelle die ursprünglichen Rechte der „Bewegungs- und Wohnsitzfreiheit“, weil diese vom abgeleiteten Recht schrittweise auf nicht-wirtschaftlich tätige Personen ausgedehnt wurden und sich weiterentwickeln, in dem sie in den neuen Gewändern der „Staatsbürgerschaft“ erscheinen. Einige rechtlich anerkannte Ausnahmen dieser ursprünglichen Rechte, wie diese in der Direktive 64/221 dargelegt sind, wurden erst kürzlich von der Kommission noch einmal überprüft, um diese anhand der europäischen Staatsbürgerschaft nochmals zu überdenken. Das Gericht hat gleichermaßen der staatsbürgerlichen Dimension dieser mehr traditionellen legalen Rechte Beachtung geschenkt. An zweiter Stelle untersucht der Bericht die neueren politischen Rechte und Wahlrechte, die der Maastrichter Vertrag enthält und von denen die Wichtigsten ausschließlich den Staatsangehörigen eines Mitgliedstaats der Europäischen Union vorbehalten sind. Diese Bestimmungen umfassen das Wahlrecht für das Europäische Parlament und für Kommunalwahlen und das Recht, sich aktiv für diese einzusetzen,

Kommunalwahlen und das Recht, sich aktiv für diese einzusetzen, die diplomatische Vertretung außerhalb der Europäischen Union, das Recht beim Europäischen Parlament ein Gesuch einzureichen, sich an einen Ombudsmann zu wenden, und seit kurzem das Recht, auf eine Antwort von egal welcher Institution der Europäischen Union in egal welcher der offiziellen Sprache. An dritter Stelle untersucht dieser Bericht die Dimension der „Freiheit, Sicherheit und Gerechtigkeit“, wie es im Amsterdamer Vertrag formuliert wurde, früher unter der Bezeichnung „Justiz und Innere Angelegenheiten“ als dritter Grundpfeiler des Maastrichter Vertrags bekannt. Diese Untersuchung umfasst Fragen wie Immigration, Asyl, Einreisepolitik, die Wahrung der Ordnung und der justiziellen Zusammenarbeit, und wird von den Bestimmungen des dritten umgestalteten Grundpfeilers und des neuen Titels IV des Vertrags der Europäischen Union geregelt. An vierter Stelle sind andere Bereiche der „staatsbürgerlichen Praxis“, die im Rahmen der Gemeinschaftspolitik (für Erziehung und Berufsausbildung im Besonderen) angeregt und entwickelt wurden, berücksichtigt und untersucht worden. Dieser Bericht schneidet auch Fragen an, die für den Staatsbürger immer größere Bedeutung erlangen, wie der Zugang zu Informationen und Transparenz und untersucht die wachsende Rolle der „Zivilgesellschaft“ in den institutionellen Diskussionen der Europäischen Union und in der öffentlichen Debatte über die Europäische Union. Und schließlich, selbst wenn die Charta der Grundrechte sowohl inhaltlich als auch formal offensichtlich für die Entwicklung der europäischen Staatsbürgerschaft sehr wichtig ist, ist dieses Thema nicht abgedeckt, wie es in dem Beitrag von Professor Rodotà im Einzelnen dargestellt wurde.

In den Bereichen, die von dem Bericht untersucht werden, können einige Tendenzen erkannt werden. Einerseits handelt es sich um Ansätze, die als „Mainstream“ bezeichnet werden könnten, und die zum Teil von der Europäischen Kommission und vielleicht auch vom Gericht übernommen worden sind, indem offensichtlich Normen und Werte der Staatsbürgerschaft auf andere wichtige Rechtsgebiete angewandt werden, was dazu führt, daß die bestehende Rechtsordnung überprüft wird, wie z. B. die Freizügigkeit der Personen auf Grund des neuesten verfassungsmäßigen Status. Andererseits besteht noch eine offensichtliche Spannung zwischen der Verbesserung des Schutzes der Staatsangehörigen der Europäischen Union durch den Status des Staatsbürgers, und der Unfähigkeit, den Menschenrechtsansatz auch auf Nicht-EU-Bürger in Migration oder auf die Flüchtlingspolitik anzuwenden. Die politischen Bewegungen, welche die Verbesserung der Situation von langfristig hier wohnenden Staatsangehörigen von Drittländern zum Ziel haben, müssen aufmerksam beobachtet werden. Schließlich ist der Einfluss der politischen Rechte der Staatsbür-

gerschaft, die vom Maastrichter Vertrag eingeführt wurden, eher enttäuschend, und dies zum Teil wegen der ungleichen Durchsetzung im Sekundärrecht durch die Mitgliedstaaten, aber hauptsächlich auf Grund der stetig zunehmenden Apathie der Bevölkerung, was die Europäische Union betrifft, und des stetigen Rückgangs der Wahlbeteiligung für das Europäische Parlament. Die Entwicklung des Auftrags und der Rolle des Europäischen Ombudsmann als Weg, um den Beschwerden und der vorgeschlagenen Reform Ausdruck zu verleihen, ist ebenfalls viel versprechend.

Viertens, der Bereich der „Freiheit, Sicherheit und Gerechtigkeit“, einer der Hauptbereiche der politischen Aktivität der Europäischen Union, der am schnellsten wächst, ist weniger von der Dimension der Beteiligung betroffen als von den mehr defensiveren Aspekten der Staatsbürgerschaft, wie man zum Beispiel in den Initiativen zur Immigration, Erhaltung der Ordnung und Verbrechensbekämpfung sehen kann. Diese Aktivitäten auf Ebene der Europäischen Union werfen in der Tat selbst Probleme der Staatsbürgerschaft auf und dies in Hinsicht auf die Zunahme der Kontroll- und Ordnungsorgane auf dieser multinationalen und überstaatlichen Ebene. Die Antwort der Mitgliedstaaten und der Institutionen der Europäischen Union in anderen politischen Bereichen, die diese Fragen zur Sprache bringen könnten, wie beim Auftreten des Zugangs zu Informationsrechten, ist weit davon entfernt, beruhigend zu sein, da diese in starkem Maße von schlecht definierten Ausnahmen im Bereich der Sicherheit und der „Sensibilität“ abhängen. Abgesehen von der kontinuierlichen Entwicklung der Politik der Europäischen Union hinsichtlich der Anti-Diskriminierung und der Gleichheit könnte schließlich behauptet werden, dass die potentiell am interessantesten Fortschritte im Bereich der Staatsbürgerschaft vielleicht mit der Wiederbelebung oder Wiederentdeckung der nicht zu definierenden „europäischen Zivilgesellschaft“, die die Fähigkeit hat, Leben und Legitimität in der Debatte über die konstitutionelle Zukunft Europas zu erwecken, noch ausstehen.

