



---

---

---

---

---

---

NORBERT REICH

Union citizenship -  
yesterday, today  
and tomorrow!

---

---

---

---

---

---

RGSL WORKING PAPERS NR.3

RIGA 2001

Riga Graduate School of Law (RGSL) is a not-for-profit, limited liability company founded by the Governments of Sweden and Latvia, and the Soros Foundation Latvia. The activities of the School are currently regulated by the Agreement on the Foundation of the Riga Graduate School of Law entered into by the two governments and ratified on 20 November 1997 by the Latvian *Saeima* (Parliament). According to the Agreement, “*RGSL shall offer its students academic education based on the rule of law, respect for human rights and principles of political democracy. The academic program shall include international public law and international treaties, international private law, international trade law and international commercial transactions, the European Union law and substantive trade law*” (Section 1.5)

This is a series of papers aims at contributing to that program by documenting studies undertaken by academic staff, students and guest speakers.

#### **About the author:**

**Norbert Reich**, Dr. h.c. (University of Helsinki, 2000), Dr. Iur. (Frankfurt/Main 1966) Habilitation (Frankfurt/Main 1972). Born in Berlin in 1937, a high school education in Germany and the US was followed by law and political science studies in Frankfurt, Geneva and Georgetown University, Washington, DC. Research project on '*Sozialismus und Zivilrecht*' at the Max Planck Institute in Frankfurt and at the Lomonosov University in Moscow, 1968-1972. A long academic legal career is currently marked by presidency of ELFA (European Law Faculties Association), 2000-2002, presidency of IACCL (International Academy of Commercial and Consumer Law) 2000-2002 and, of course, rectorate of RGSL. Current research focuses on Citizen's Rights in the EU and Accession countries; Electronic commerce, EU Competition Law. Professor Reich is the author of numerous publications

Amended version of a paper originally delivered at the University of Helsinki Law School on the occasion of being awarded the title „Dr. iuris honoris causae“ on 5 May 2000, published in 2001 (7) *European Law Journal*, p.4-23, and presented on the occasion of the change-over in rectorship at the RGSL on 29 august 2001, updated by referring to the Court judgment of 20 September 2001 case C-184/99 *Rudy Grzelczyk and CPAS* at III 2.

## CONTENTS

<b>I. Citizenship yesterday (1): Great confusion and small rewards</b>	<b>5</b>
<b>II. Citizenship yesterday (2): The legal versus the sociological concept of citizenship</b>	<b>7</b>
1. The legal core of Union citizenship	7
2. Other criteria for establishing rights and duties in the Union	9
<b>III. Citizenship today (1): Vertical added value to citizenship? Ambiguities in legal practice and theory</b>	<b>14</b>
1. The hesitance of the European Court and the rhetorical overreach of some of its Advocates General	14
2. New trends in literature and in recent case law of the Court?	20
<b>IV. Citizenship today (2): Does it exist beyond the nation state?</b>	<b>24</b>
1. The status part	24
2. New (and radical) proposals by Marie José Garot and Helen Staples	26
3. New tendencies	29
<b>V. Citizenship tomorrow (1): The position of the accession states</b>	<b>33</b>
1. The ambiguities of the Europe agreements – the case of Latvia	33
2. The Commission paper of 6 March 2001	35
<b>VI. Citizenship tomorrow (2): From rights to duties?</b>	<b>38</b>
1. The European citizen „King“	38
2. Is there a duty to loyalty?	38
3. „Abus de droit“ and „social function of rights“ as a substitute to citizen’s obligations?	40
4. Should there be a duty of EU-citizens to pay taxes to the Union?	43
<b>VII. Conclusions</b>	<b>45</b>



## I. Citizenship yesterday (1): Great confusion and small rewards

Union citizenship - is it a „flag which fails to cover its cargo“, as Laurence Gormley says<sup>1</sup>, or may it be regarded as „a positive contribution to the legitimacy of the European Union which an active and participatory concept of social citizenship may make“, as Joe Shaw<sup>2</sup> has concluded? In a broader sense, is citizenship a mere metaphor „as creation of another type of expressiveness“, maybe even „a fiction as the creation of another type of semantic reality“ in the sense of the Flemish legal philosopher Jan Broekman<sup>3</sup>, or can it be regarded as a source of rights which extends the scope of existing citizen rights in the European Treaties, as I have argued elsewhere with regard to the principle of non-discrimination<sup>4</sup>? What about fundamental rights – a particular concern to Siofra O’Leary<sup>5</sup> who criticises the „failure to recognise an explicit link between fundamental rights and the scope and operation of the Community citizenship“?<sup>6</sup> Will this failure be overcome by the adoption of the “Charter of Fundamental Rights in the European Union”<sup>7</sup> which however only aims at restating the “*acquis*”?

---

<sup>1</sup> In: Kapteyn/VerLoren van Themaat, *Introduction to the Law of the European Communities*, 3<sup>rd</sup> Ed. (Kluwer 1999), p. 157.

<sup>2</sup> „Citizenship of the Union: Towards Post-National Membership?“, in: European University Institute (ed), *Collected Courses of the Academy of European Law*, Vol. VI-1 (Nijhoff 1998), 237 at 346.

<sup>3</sup> *A Philosophy of European Law* (Peeters 1999), p. 142

<sup>4</sup> Reich, *Bürgerrechte in der EU*, (Nomos 1999), p. 427-428

<sup>5</sup> „The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law“, [1995] CMLRev 519; *ibid*, *The Evolving Concept of Community Citizenship* (1996).

<sup>6</sup> At 537.

<sup>7</sup> Charter of 7.12.2000, OJEC C 364 of 18.12.2000; cf. S. Baer, „Grundrechtscharta ante Portas“, (2000) *Zeitschrift für Rechtspolitik* (ZRP) 361; J. Meyer/M. Engels, „Aufnahme von sozialen Grundrechten in die Europäische Grundrechtscharta“, (2000) ZRP 368; N. Reich, „Zur Notwendigkeit einer europäischen Grundrechtsbeschwerde“, (2000) ZRP 371; K. Ritgen, „Grundrechtsschutz in der EU“, (2000) ZRP 378; K. Laenerts, „Respect for Fundamental Rights as a Constitutional Principle of the EU“ (2000) *ColJEL* 1; J. Weiler, „Does the EU Truly Need a Charter of Rights?“ (2000) 6 *ELJ* 95; K. Laenerts/E. de Smijter, „A ‚Bill of Rights‘ for the European Union“, (2001) 38 *CMLRev* 273; De Burca, „The Drafting of the EU Charter of Fundamental Rights“, (2001) 21 *ELRev* 126-138

A first reading of the concept of citizenship as introduced by the Maastricht Treaty and reinforced by the Amsterdam Treaty seems to suggest its character as a metaphor. Article 8 of the Maastricht Treaty, now Art. 17 of the Amsterdam Treaty simply says that “citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union“. The Amsterdam Treaty added the following sentence: “Citizenship of the Union shall complement and not replace national citizenship“.

The following articles of the Treaty make clear that citizens of the Union enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby. The most important rights relate to free movement (Art. 18), the right to vote and to stand as a candidate for municipal elections and elections to the European Parliament (Art. 19), rights of diplomatic and consular protection (Art. 20), and rights of petition and protection by an ombudsman of the EP (Art. 21). Nothing is said about corresponding duties.

It is also well known that some of the rights which are included in Union citizenship have already been developed by Court practice in its extensive interpretation of the fundamental freedoms of the EC Treaty and the rights to non-discrimination based on nationality and gender. The combination of these developments was highlighted by the *Cowan* case of 1989<sup>8</sup> where the right of every tourist in the Union to receive services was taken as a basis for a general prohibition of discrimination based on nationality. What does Art. 18 add to this established right of the European citizen in his or her role as consumer? Is there a paradigm-change from granting rights not only to the market citizen (bourgeois) but also to the „Union citizens“ *strictu sensu* not enjoying an economic role (*citoyen*)?<sup>9</sup>

---

<sup>8</sup> See Case 186/86, *Cowan v. Trésor Public*, [1989] ECR 195; for a discussion T. Tridimas, *The General Principles of EC Law* (Oxford 1999) at 84.

<sup>9</sup> O’Leary *supra* note 5 at 524; Reich *supra* note 4 at p. 53

Or, to put it differently: Is citizenship merely a legal concept which defines a formal link of European citizens via nationality, or can it be extended to some fundamental, civic, political and social links as is suggested by a more general theory of citizenship as developed by the English sociologist T. Marshall<sup>10</sup> to which Joe Shaw in her several papers on EU citizenship<sup>11</sup> makes reference but who is practically unknown in Germany and France? Is there any element of *solidarity*<sup>12</sup> contained in the concept of Union citizenship – problems concerned with the concept of citizenship *in the past* (II)? Problems of *today* pose the question of whether the concept of citizenship has been and can be used to enhance and activate the existing rights of the European *bourgeois* or *citoyen* under Community law. An overview of existing European Court practice and some of the discussions surrounding it will be useful (III). Closely connected are enquiries about the *horizontal extent* of citizenship: Can one go beyond nationality as the basis of European citizenship (IV)? The problems of citizenship *in the future* relate to the status of accession countries and their nationals: will they immediately enjoy the fundamental freedoms the EU has promised to them, or will they have to wait “outside the door” for some years to come (V). Finally, a somewhat speculative but important question asks how far EU citizens’ rights are accompanied by genuine citizens’ *duties* (VI)?

## **II. Citizenship yesterday (2): The legal versus the sociological concept of citizenship**

### ***1. The legal core of Union citizenship***

From the very wording of Art. 17 and the history of its drafting one is tempted to conclude that Union citizenship is nothing but a corollary of nationality of one of the Member States. As the German author Kluth has expressed: „Diese

---

<sup>10</sup> *Citizenship and Social Class* (1950)

<sup>11</sup> *Supra* note 2 at 256-259; *ibid.*, „The Interpretation of European Union Citizenship“, [1998] ModLR 293at 297-302

<sup>12</sup> The Charter (note 7) contains a chapter on „Solidarity“ but only refers to workplace relations.

(Unionsbürgerschaft, NR) ist immer akzessorisch zur Staatsangehörigkeit in einem Mitgliedsstaat.<sup>13</sup>“ [This (citizenship) always attaches to Member State nationality] This is in accordance with the *Micheletti*-judgment<sup>14</sup> of the European Court of Justice handed down in 1992 parallel to the adoption of the Maastricht Treaty. In this judgment the Court made clear that Member States, and Member States only, may determine the creation and abolition of nationality. They may, however, not put restrictions on it if another Member State has already granted nationality. The court said:

„Under international law, it is for each Member State, having due regard of Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty<sup>15</sup>.“

Closa<sup>16</sup> therefore comes to the conclusion that citizenship of the Union might be characterized as „a *derived* (author ‘s italics) condition of nationality“.

This legal concept of Union citizenship has a number of important consequences which will only be mentioned in passing:

Citizenship is *not an autonomous* concept of EC law such as residence, discrimination and the like, but is defined exclusively by the applicable Member State legislation whatever the basis of granting of nationality (*ius soli, ius sanguinis* or some sort of combination). This also means that there is no Community competence – whether exclusive or jointly with Member States - to set up its own criteria for defining and revoking nationality and hence citizenship. „There is no such thing as Community

---

<sup>13</sup> in: Chr. Callies/M. Ruffert (Hrsgs.), *Kommentar zum EUV* (Luchterhand 1999), Art. 17 Rdnr. 45; cf. also Sauerwald, *Die Unionsbürgerschaft* (Mohr 1996).

<sup>14</sup> Case C-369/90, *Micheletti v. Delegación del Gobierno en Cantabria*, [1992] ECR I-4239.

<sup>15</sup> At 4262 para

<sup>16</sup> „Citizenship of the Union and Nationality of Member States“, 32 [1995] CMLRev 487 at 510

nationality“, as d’Oliveira<sup>17</sup> has correctly stated. The Union, respectively Community, does not have competence to establish criteria of its own on awarding citizenship as a corollary of nationality.

The mutual recognition principle of Member State nationality as established by international, not Community law has a *positive and a negative* side:

1. Once a Member State has recognised a citizen as its national, this decision is to be respected Union-wide, even in case of a dual nationality as shown in *Micheletti*.

2. Mutual recognition in the negative sense means that once a Member state has revoked nationality according to its own law and procedural requirements, this decision has to be respected by every other Member State, unless a new bond of nationality to another state is established.

## ***2. Other criteria for establishing rights and duties in the Union***

Union citizenship of course does not exclude that rights of (natural) persons under EC law may be established by other criteria, especially those based on the concept of *residence*. This is particularly true, as we have shown elsewhere with rights of workers, consumers, and environmentally concerned citizens.<sup>18</sup> The Amsterdam Treaty, following insofar its predecessor, has created different subjective rights which are not based upon nationality = Union citizenship but on other criteria, especially residence: Art. 141 provides that „each Member state shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.“ This right to equal pay is obviously not dependent upon the nationality of the worker, but on work being done in the Union.<sup>19</sup> Art. 153 para 1 contains a „right of

---

<sup>17</sup> „Nationality and the EU after Amsterdam“, in: D. O’Keeffe/P. Twomey, *Legal Issues of the Amsterdam Treaty* (Hart 1999) at 397.

<sup>18</sup> *supra* note 4 at 61

<sup>19</sup> this is recognised by Art. 5 (1) of the Brussels Convention as amended, cf. for an interpretation case C-383/95, *Petrus Wilhelmus Rutten v. Medical Corp.*, [1997] ECR I-57

consumers to information, education and to organize themselves in order to safeguard their interests“ without any reference to citizenship or even residence.<sup>20</sup> Art. 194 gives „any citizen of the Union, and any natural or legal person residing or having its registered office in a Member state, the right to address individually or in association with other citizens or persons a petition to the European Parliament.<sup>21</sup>“ Art. 255 grants a right of access to European Parliament, Council and Commission documents to any citizen of the Union and any natural or legal person residing or having his registered office in a Member State.<sup>22</sup> Finally Art. 286 insists that from „1 January 1999 on, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of this Treaty“.

Secondary Community law, for instance Directives on worker, consumer, data, and environmental protection, contain many subjective rights of citizens not depending on nationality but on other criteria such as *residence*. The same is true with international or European conventions, e.g. on jurisdiction or conflict of laws. The concept of residence supplements and to some extent supersedes the traditional concept of nationality/citizenship as a basis of granting subjective rights to individuals. Only a rather limited extent of rights, especially free movement and voting rights, depend on citizenship. Why not abandon the concept of nationality, respectively citizenship, as such? We will come back to that question in section IV of our paper.

---

<sup>20</sup> for details cf. Reich, „Verbraucherpolitik und Verbraucherschutz im Vertrag von Amsterdam“, [1999] VuR 3; *ibid.*, „The rights of consumers enshrined in the Treaty“, in: *Report of the Proceedings of the Dublin Forum on Consumer Policy and the Amsterdam Treaty*, Oct. 2<sup>nd</sup> and 3<sup>rd</sup> 1998 (Dpt. of trade, Enterprise and Employment, 1998) 16-19

<sup>21</sup> This concept is further developed in the seminal paper by R. Rawlings, „Engaged Elites – Citizen Action and Institutional Attitudes in Commission Enforcement“, [2000] 6 ELJ 4; rejoinder by P.G. Bonnors, „Institutional Attitudes in Context“, 2001 (7) ELJ 120..

<sup>22</sup> D. Curtin, „Citizens‘ fundamental right of access to EU information“ [2000] 37 CMLRev 7; A. Guggenbühl, „Le citoyen et la transparence européenne », dans: L. le Hardy de Beaulieu (ed.): *L’Europe et ses citoyens* (Peter Lang 2000), p. 51.

### ***3. Is there a social base behind the legal core of citizenship?***

The classical concept of citizenship as developed by Marshall<sup>23</sup> and especially referred to by English authors defines citizenship as „full membership of a community.“ This membership gives the individual a bundle of rights which are distinguished into civic, political and social rights. Citizenship is hence the expression of an existing link between an individual and the Community in which s/he lives and where his or her position is defined. The personal status results from accumulating three successive levels of rights. The first group are civic rights expressing the basic legal equality of individuals before the law. Secondly, political rights entitle the individual to participate in the exercise of national sovereignty. Finally, social rights mark the final stage of development of citizenship.<sup>24</sup>

This social concept of citizenship is the basis for solidarity and participation: solidarity exists insofar as resources will be redistributed to guarantee rights to individuals, participation in order to make redistribution democratically justified. Somewhat simplistically one may distinguish between the *bourgeois* and the *citoyen*: the first concept of citizenship is defined in economic terms, the second by participation in decision making.<sup>25</sup>

Such a theory of citizenship is obviously a very long way from the reality of the Union or even the Community. There is no commonness of history, polity, language or law. Citizenship is, as Broekman<sup>26</sup> says:

„a legal construction, not the legal expression of something that is ontologically given. The EU possesses no specific territory and consequently no territorial sovereignty, its sovereignty results from contract as a legal construction, not from any reference to a given datum. Legitimation of citizenship must therefore

---

<sup>23</sup> *Supra* note 10 at 28-9

<sup>24</sup> Closa (1995) *supra* note 16 at 490

<sup>25</sup> the second concept is particularly emphasised in the paper by U.K. Preuß, „Problems of a Concept of European Citizenship“, (1995) 1 ELJ 267.

<sup>26</sup> *Supra* note 3 at p. 290

also be constructed and it is done so in many ways of *mimesis*. It means that there is no legal ground for citizenship without reference to the national Member States“.

It seems to me that this falling back to the more legal core of citizenship is minimalistic and perpetuates a somewhat sceptical treatment in the German Constitutional Court’s Maastricht judgment:<sup>27</sup>

„With the establishment of Union citizenship by the Maastricht Treaty, a legal bond is formed between the nationals of the individual Member States which is intended to be lasting and which, although it does not have a tightness comparable to the common nationality of a single state, provides a legally binding expression of the degree of *de facto* community already in existence“.

Quite remarkably, the Court goes on to say:

„The influence flowing from the citizens of the Union can eventually become a part of the democratic legitimation of the European institution to the extent that the conditions necessary for this purpose are fulfilled on the part of the peoples of the European Union“.

Even though the Maastricht judgment is certainly not recognised as an expression of Euro-enthusiasm<sup>28</sup>, it gives us a subtle indication of the development of a more political and social concept of citizenship. This depends on the further evolution of European democracy, polity and law. The bond which now exists between the Union citizen and the Union may merely be a legal one at the moment, but it may develop into more intense forms of civic, political and social rights which may come close to the concept of Marshall. Preuß<sup>29</sup> makes the following point:

„..... European citizenship is more an amplified bundle of options within a physically broadened and functionally more differentiated space than a

<sup>27</sup> *Brunner and others v. the European Union Treaty*, [1994] CMLR 57 at 86 para 40

<sup>28</sup> there have been numerous critiques voiced against the Maastricht judgment, the best one being by J. Weiler, „Does Europe need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision“, [1995] 1 ELJ 219; *ibid.*, “The State ‘Über Alles’: Demos, Telos and the German Maastricht Decision, in: Ole Due et al. (eds.), *Festschrift für Ulrich Everling* (1995), 651; cf. also M. Herdegen „Maastricht and the German Constitutional Court: Constitutional Restraints for an ‘ever closer union’“, [1994] 31 CMLRev 235. For recent case law of the BVerfG which is more in line with Community law cf. the report by Hoffmeister, [2001] 38 CMLRev 791

<sup>29</sup> *Supra* note 25 at 280.

definite legal status.... European citizenship would open the symbolic space for social activities which finally could lead to a European ‚*societas civilis sive politica*‘, i.e. a civil society beyond the physical boundaries of the nation-states...“

Weiler<sup>30</sup> suggests in a similar spirit:

„Can we not imagine a *demos* understood in non-organic terms, a coming together on the basis not of shared ethnos and/or organic culture, but a coming together on the basis of shared values, a shared understanding of rights and societal duties, and a shared rational, intellectual culture which transcend organic-national differences.“

As Everson/Preuß<sup>31</sup> have shown, there are two possible paths for extending the concept, the *rights path* and the *status path*. The rights path will ask which specific rights, beyond the existing ones, are attributed by the concept of citizenship to Union citizens. This has particularly been emphasised in the work of O’Leary<sup>32</sup> with regard to fundamental rights but shall not be pursued here. The status path is concerned with an horizontal extension to rights which originally belonged only to citizens and may be extended to *all* residents of Member States without necessarily being citizens, a development which we can already follow in labour, consumer and environmental law. Furthermore, we also have to discuss how far additional obligations will directly be imposed upon Union citizens by primary or secondary law beyond the status of the market citizen.

---

<sup>30</sup> In: Slaughter/Sweet/Weiler (eds.), *The European Courts and National Courts* (Hart 1998) at 384; for a review of this work cf. Reich, [1999] 5 ELJ 154 at 157

<sup>31</sup> M. Everson/U.K. Preuß, *Concepts, Foundations, and Limits of European Citizenship* (ZERP-dp 2/95), p. 17-19

<sup>32</sup> *Supra* note 5 with further references

### III. Citizenship today (1): Vertical added value to citizenship? Ambiguities in legal practice and theory

#### 1. *The hesitance of the European Court and the rhetorical overreach of some of its Advocates General*

What is the importance of the concept of citizenship in the development of EC law after Maastricht? Has it given a new impulse to creating, extending or safeguarding citizens' rights? Or has it merely given new rhetoric to old concepts of free movement?<sup>33</sup>

In its first judgment discussing citizenship, *Sknavi*<sup>34</sup>, the Court refused to discuss the application of the then Art. 8 which was considered to be residual. Somewhat more explicit is the *Boukhalfa*<sup>35</sup> judgment of 30 April 1996 where the status of a Belgian national working in the German embassy in Algiers had to be treated under the free movement rules. Since the referral by the Bundesarbeitsgericht only mentioned Art. 48 and not Art. 8 of the EC Treaty in its Maastricht version and Art. 7 of Regulation 1612/68, the Court limited itself to interpreting the free movement of workers rules. It found that there existed a sufficient link between the activity of Ms. Boukhalfa and the Community in order to enable her protection by the free movement rules. The Court said that this was the case despite work done outside the EC because German labour and social security law determined her status. Advocate General Léger<sup>36</sup> with whom the Court concurred was somewhat more explicit about rights conferred by the concept of citizenship:

„I should like to make one final remark. The Court has not yet had an opportunity to give a ruling on the ‚new‘ concept of European citizenship introduced by the European Union Treaty. The recognition of European citizenship, enshrined in Arts. 8 to 8e of the EC Treaty is of considerable

<sup>33</sup> H.U.J. d'Oliveira, „European Citizenship: Its Meaning, Its Potential“, in: Dehousse (ed.), *Europe after Maastricht* (LBE 1994) 126 at 132: free movement as „core and origin of European citizenship“

<sup>34</sup> Case C-193/94, *Sknavi v. Chryssanthakopoulos*, [1996] ECR I-929

<sup>35</sup> Case C-214/94, *Boukhalfa v. Bundesrepublik Deutschland*, [1996] ECR I-2253

<sup>36</sup> at 2271 para 63

symbolic value and is probably one of the advances in the construction of Europe which has received most public attention. Admittedly the concept embraces aspects which have already largely been established in the development of Community law and in this respect it represents a consolidation of existing Community law. However, it is for the Court to ensure that its full scope is attained. If all the conclusions inherent in that concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations.“

This remark was obviously an *obiter dictum* since the case could be decided on the traditional broad reading by the Court of the free movement-rules. What if this link had not existed? Then perhaps the supplementary function of Art. 8 (now Art. 17) could have been invoked.

A similar *obiter dictum* was made by AG Ruiz-Jarabo Colomer in his opinion in *Shingara and Radion*:<sup>37</sup>

“The creation of citizenship of the Union, with the corollary described above of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward in that... it separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union.”

The first express use of citizenship to extend the rights of Union citizens was the *Sala*-judgment of 12.5.1998.<sup>38</sup> The case concerned a Spanish resident in Germany who was out of work claiming a German child-raising allowance. Under German social security law her application was refused because she was not in possession of a valid residence permit. The Court did not accept this limiting condition upon access to child allowance. A reading of Art. 8 on Union citizenship in conjunction with Art. 6 on non-discrimination puts her under protection of the Treaty which cannot be denied by

---

<sup>37</sup> Joined cases C-65 + 111/95, *The Queen v. Secretary of State for the Home Department ex parte Shingara and Radion*, [1997] ECR I-3343 at 3354 para 34.

<sup>38</sup> Case C-86/96, *Matínez Sala v. Freistaat Bayern*, [1998] ECR I-2691

absence of a permanent residence permit. Even more explicit was the opinion of Advocate General La Pergola<sup>39</sup> who wrote:

“Art. 8a extracted the *kernel* (all italics La Pergola) from the other freedoms of movement - the freedom which we now fight characterised as the right, not only to move, but also to *reside* in every member State: a primary right, in the sense that it appears as the first of the rights ascribed to citizenship of the Union. That is how freedom of residence is conceived and systematised in the Treaty. It is not simply a derived right, but a right *inseparable* from citizenship of the Union in the same way as the other rights expressly crafted as necessary corollaries of such *status* - a new right, common to all citizens of the Member States without distinction. Citizenship of the Union comes through the *fiat* of the primary norm, being conferred directly on the individual, who is henceforth formally recognised as a subject of law who acquires and loses it together with citizenship of the national state to which he belongs and in no other way. Let us say that it is the *fundamental* legal status guaranteed to the citizen of every Member State by the legal order of the Community and now the Union. This results from the unequivocal terms of the two paragraphs of Art. 8 of the Treaty.”

In continuing the tradition as developed in *Cowan* the Court uses Art. 8/8a (now Art. 17/18) to extend the protection against discrimination based on nationality to every Union citizen; the former somewhat fictitious connection with one of the free movement rights is abandoned, thereby extending the scope of persons protected.

The same approach was later followed in the *Bickel and Franz* judgment of 24.11.1998<sup>40</sup>. Both persons, Mr. Bickel being a lorry driver of Austrian nationality, Mr. Franz a German tourist, violated Italian law while in the province of Bolzano where German is also spoken. By special regulation based on an Italian-Austrian agreement concluded well before their membership in the EU, the German language is to have the same status in the *Alto Adige* region as Italian so that German speaking Italian citizens were entitled to have a hearing in court in German. Could this also be extended to the defence of Mr. Bickel and Mr. Franz before a local court in the province of Bolzano?

---

<sup>39</sup> at 2702 para 18

<sup>40</sup> Case C-274/96, *Criminal proceedings against H.O. Bickel und U. Franz*, [1998] ECR I-7637 = [1999] 1 CMLR 348; comment Bulterman [1999] 36 CMLRev 1325

Both Advocate General Jacobs and the Court were willing to extend the prohibition of discrimination in Art. 6 (old version) or 12 (EC-Treaty new version) to all nationals coming under the free movement rules under Art. 8a/ 18. Advocate General Jacobs referred to *Cowan* and extended it to the right of an accused Union citizen in criminal proceedings. He took a very broad look at citizenship and said<sup>41</sup>:

„The notion of citizenship of the Union implies a commonality of rights and obligations uniting Union citizens by a common bond transcending Member State nationality... Freedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship.“

The Advocate General as well as the Court said that in refusing to allow German-speaking citizens from Austria or Germany to use their mother language in the province of Bolzano where this was allowed to German speaking Italians, amounted to a discrimination based on nationality. The Court said<sup>42</sup>:

„In that regard, the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a state on the same footing as its nationals.“

We will come back to the extent of this rather sweeping statement of the Court.

Two later judgments are however somewhat more restrictive as far as the application of the concept of citizenship is concerned. The Greek *Calfa*-case<sup>43</sup> concerned an Italian national who was caught drug dealing in Greece. According to Greek criminal law she faced expulsion from Greece and a lifetime ban on re-entry. This was obviously discriminatory in comparison to Greek nationals who, for constitutional reasons, could not be expelled. Even though the Greek *Areopagos* explicitly mentioned Art. 8/8a in conjunction with the free movement rules, both

---

<sup>41</sup> Paras 23 and 24 of his opinion

<sup>42</sup> Paras 16 of the judgment

<sup>43</sup> Case C-348/96, *Criminal proceedings against Donatella Calfa*, [1999] ECR I-11 = [1999] 2 CMLR 1138; comment Costello [2000] 37 CMLRev 817.

Advocate General La Pergola and the Court did not base their opinion or judgment on Union citizenship. Advocate General La Pergola<sup>44</sup> distinguished his opinion in the present case from his sweeping statement in *Sala* because:

„the settled case law referred to above already affords a complete reply to the question submitted by the national court. Ms. Calfa’s position is already properly protected by her status as a recipient of services as well as by the provisions of Directive 64/221. It is therefore superfluous, in my view, to have recourse to this further protection offered by Community citizenship.“

The Court followed his reasoning and referred to *Cowan* insisting that Ms. Calfa was a recipient of services<sup>45</sup> and therefore could not be made subject to unreasonable restrictions. Expulsion for life for mere drug dealing was disproportionate and therefore not justified by the free movement rules of Community law. We agree with the result but not with the rather traditional reasoning. Why refer to the European *bourgeois* when her rights as *citoyen* – to move freely for whatever purpose and under whatever condition, whether economic or not – are violated by Member State law? O’Leary is correct in insisting that where Community law intervenes „it does so to protect the fundamental Community objectives of market integration rather than to protect individual rights *per se*.<sup>46</sup>“

The last judgment in this context is a somewhat staged case of a Dutch national *Wijsenbeek*<sup>47</sup> who refused to show his passport at Schiphol airport and provoked a sanction by a Dutch criminal court. The Dutch court wanted to know whether the provisions on free movement in the Internal Market according to Art. 7a para 2/14 and Art. 8a /18 have direct effect and therefore forbid the presentation of passports at airports and the like. The Court was very restrictive in interpreting these provisions by rejecting their direct effect. It allowed identity controls at airports and the like because there were yet no common rules on the control of outer borders of the Community.

---

<sup>44</sup> At para 10 of his opinion

<sup>45</sup> At para 16 of the judgment

<sup>46</sup> *Supra* note 5 at 538

<sup>47</sup> Case C-378/97, *Criminal proceedings against Florus Ariel Wijsenbeek*, [1999] ECR I-6207.

Member States insofar have exclusive powers to prescribe how these identity controls are enforced. They may not, however, impose disproportionate sanctions for instance imprisonment which had to be regarded as unjustified restriction to free movement.

The judgment of the Court probably reflects the status of Community law in the delicate area of free movement from third countries and border controls at international airports, but is not satisfactory as far as it restricts the direct effect of Art. 8a/18. Advocate General Cosmas in his somewhat lengthy opinion was much more explicit. He insisted on the constitutional vocabulary used by the Maastricht Treaty:

„L'Article en cause s'inspire de la même *philosophie anthropocentrique* que les autres dispositions du corps de règles dont elle fait partie (para 83, *italics Cosmas*)“.

(The Article in issue is inspired by the same *anthropocentric philosophy* as the other provisions of the body of rules of which they form part).

He goes on to explain the difference between the traditional free movement rules, possessing a functional character, to the new rules on citizenship as introduced by the Maastricht Treaty which have a *substantial* character:

„En d'autres termes, l'article 8a ne se contente pas de consacrer constitutionnellement ‚l'acquis communautaire‘, tel qu'il existait au moment où il à été inseré dans le Traité, et de le compléter en élargissant le cercle de personnes qui peuvent circuler librement à d'autres catégories de personnes qui n'exercent pas d'activité économique. L'article 8a consacre en outre *un droit de nature différente, un droit propre de circuler, découlant de la qualité du citoyen* de l' Union qui ne revêt pas une forme subsidiaire par rapport à l'unification européenne, économique ou non (para 85)“.

(Put differently, Article 8a does not content itself with constitutionally enshrining the body of EU law as it existed at the moment of its insertion into the Treaty, and of rounding it off by enlarging the circle of people with freedom of movement to other categories of individuals who are not carrying out some economic activity. Article 8a additionally enshrines *a right of a different nature, an individual right to free movement, flowing from the capacity of citizen* of the Union which does not assume a subsidiary form by reference to European unification, economic or not.)

It follows from these sweeping statements that Advocate General Cosmas, despite the restrictions written into Art. 8a/18, acknowledges the direct effect of citizenship:

„ La sauvegarde de la liberté de circuler ou de séjourner est la règle, qui doit être interprétée au sens large, alors que les limites qui lui sont posées revêtent le caractère d'exceptions, à interpréter et appliquer au sens stricte... La liberté de franchir les frontières forme en soi un élément constitutif important du droit, pour le citoyen, de circuler librement, et non simplement une modalité visant l'achèvement du marché commun (paras 97, 101)“.

(Safeguarding of freedom of movement or abode is a rule requiring broad interpretation, whereas the limits imposed on it appear in the form of exceptions to be strictly interpreted and applied... The freedom to cross borders in itself constitutes an important constituent element of the citizen's right to free movement, and not merely some way of seeking to put the finishing touches to the common market.)

Therefore, systematic controls are a restriction of this right to free circulation and must be justified according to national provisions. It is interesting to note that the Advocate General refers, as grounds for justification, to the Schengen Agreement which at the time could only be interpreted by national courts and not by the European Court. At the same time, he mentions the prospective changes which the Amsterdam Treaty will bring by integrating the Schengen acquis into existing Community law. The showing of a passport can therefore only be justified by specific reasons and not by the imperfections of Community law and practice on the control of outer borders. As a result, the Advocate General is much more sceptical towards the general duty to show a passport than is the Court of Justice.

## ***2. New trends in literature and in recent case law of the Court?***

Analysis of the Court's jurisprudence therefore reveals a certain hesitancy towards the full application of the concept of citizenship in extending citizens' rights, especially in the area of free movement. The opinions of the Advocates General seem to go much further, at least in rhetoric and maybe, to a lesser extent, in substance. What

are the limits of this approach? What are the implications for further developments? Let us take as a basis for discussion the *Bickel* case: What about a Finnish citizen who gets caught for a similar offence as Mr. Bickel on the roads of the province of Bolzano and, when defending his case before an Italian court insists on speaking German because he is quite perfect in German but, predictably enough, not in Italian. Is the privilege of talking German in an Italian court in the province of Bolzano limited to citizens of Germany and Austria *strictu sensu* where German is the official language, or do all citizens of the Union have an option to choose between Italian and German when they think this is to their advantage? What does the concept of discrimination mean in this context? Is the Finnish citizen discriminated against if he cannot use a language which he knows better than Italian? And what about the Italian court system which has to furnish the expertise and pay the additional costs to allow proceedings in both Italian and German? How does the concept of citizenship correspond with the traditional prerogatives of Member States in criminal procedure?

If we take a look at some recent literature, one could come to the conclusion that the concept of citizenship is paralleled by an increase of rights of citizens. I myself have argued elsewhere<sup>48</sup>, following Advocate General Léger that all Member State provisions based on nationality to determine the ambit of Community rights of citizens come into the sphere of application of the EC-Treaty in the sense of Art. 12. Nationality should be no criterion for differentiating between rights and duties of Member State nationals in the Union unless the specific type of cross-border conflict imposes different rules.

In a similar sense, Closa<sup>49</sup> writes:

“The Treaty on European Union has formalised or constitutionalised certain already existing rights within the Community ambit; it has introduced certain

---

<sup>48</sup> *Bürgerrechte* at p. 428

<sup>49</sup> „The Concept of Citizenship in the Treaty of the EU“, [1992] 29 CMLRev at 1168

new rights and, above all, it has provided a solid basis for further enlargement of the catalogue of rights attached to citizenship.“

A paper by Shaw<sup>50</sup> goes even further and develops „a framework of rights which constitute the citizen as an individual subject of law“. In taking up the ideas of Marshall, she distinguishes the civil, political and social rights of Union citizens. The concept of citizenship has a developmental and dynamic potential. Integration theory and citizenship theory thus become reconciled. Citizenship does have a constitutional dimension which requires further development and extension. It goes beyond the restricted *bourgeois* position and, in her opinion, comes closer to embracing the *citoyen*.

A recent case C-184/99<sup>51</sup>, *Rudy Grzelczyk v. le Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* before the Court demonstrates the inherent dynamism in citizenship. It concerns student benefits refused to a French national studying in Belgium. During the first three years, he earned money to pay for his studies. In the final year he wanted to concentrate on his exams (and not waste time jobbing around). He therefore asked for a special benefit available to Belgian students (*minimex*) under similar conditions. Art. 3 of directive 93/96/EC of the Council on the right of residence for students<sup>52</sup> excludes entitlements to the payment of maintenance grants. Can this limitation be overcome by directly applicable Community law, namely „social citizenship“ as a corollary to Union citizenship under Art. 17 EC as suggested by Borchardt<sup>53</sup>? What does the wording of Art. 18 mean whereby the right to residence is „subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect?“ Does this impose a narrow or a wide interpretation of the

---

<sup>50</sup> *Supra* note 2 at p. 294

<sup>51</sup> Cf. Borchardt, „*Der sozialrechtliche Gehalt der Unionsbürgerschaft*“, [2000] NJW (Neue Juristische Wochenschrift) 2057

<sup>52</sup> OJ L 317/59 of 18.12.93; cf. Reich (1999) *supra* note 4 at 191-192; for a recent interpretation of the financial requirements for students to get a residence permit: ECJ, case C-424/98 *Commission v. Italy* not yet reported (judgment of 25.5.2000)

<sup>53</sup> Borchardt *supra* note 51 at 2060.

limitations laid down in Dir. 93/96? Should one follow the path opened by *Sala*, namely that citizenship read together with non-discrimination extends social benefits to all Union citizens even when without work, or should the will of the Community legislator be respected, namely that free movement does not automatically give rise to benefits outside those enjoyed by regulations 1612/68 and 1407/71? We cannot go deeper into the subject matter but we can certainly voice agreement<sup>54</sup> with Borchardt insofar as he insists on a *positive and participatory element of citizenship*, and not just a negative right directed against Member State restrictions. This right is however not unlimited, as the very wording of Art. 18 shows, and therefore restrictions may still be justified depending on a balancing test.

AG Alber delivered his opinion on 28 September 2000. Quite in the spirit of linking Community rights not to an autonomous concept of citizenship, but rather to free movement rights of workers and other “market citizens” as in *Calfa*, the AG takes great pain to subsume Mr. Grzelczyk’s claim under Art. 7 of Reg. 1612/68. He might be regarded as a “worker” in the (broad) sense of Community law<sup>55</sup> because he worked to pay for his studies, thus doing more than occasional “student jobbing”. The AG also examines Mr. Grzelczyk’s autonomous rights as a student under Dir. 93/96 and Art. 17 EC Treaty but is much more hesitant in this respect, thus not following the sweeping argument of Borchardt. According to his opinion, a student may be entitled as a citizen to non-discriminatory treatment with regard to student benefits such as the *minimex*, but the Member State is entitled to revoke them if the status of a resident is in doubt. The right of residence of the student is therefore subject to reasonable limitations imposed by the host state and not an absolute one.

In the meantime, a Full Court has handed down its judgement on 20 September 2001, nearly one year after the opinion of the learned AG, which implies a lively

---

<sup>54</sup> Reich (1999) *supra* note 4 at 199.

<sup>55</sup> Cf. Reich (1999) *supra* note 4 at 168.

controversy within the Court itself. This is not concerned with whether Mr. Grzelczyk is a worker or not, but develops a right of its own of the Union citizen to be entitled to non-discriminatory treatment with regard to social security benefits, thus widening the path opened by *Sala*. It expressly rejects the submissions of several Member States, such as Belgium and Denmark, that “the concept of citizenship has no autonomous content” (para 21). Instead the Court insists that “Union citizenship is destined to be the *fundamental status of nationals of the Member States (italics NR)*, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for” (para 31). Art. 3 of Dir. 93/96 allows certain restrictions to be imposed on non-national students with regard to receiving social security benefits, but “in no case may such measures become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State’s social assistance system” (para 43).

#### **IV. Citizenship today (2): Does it exist beyond the nation state?**

##### ***1. The status part***

A more intense reading of citizenship as a source of rights will obviously increase the existing schism in the status of EU-citizens and third country-nationals. Broekman is correct in writing:

„If citizenship contributes little to the construction of an ever closer union between the peoples of Europe, it creates more and more problems for third country aliens. Three issues of indeterminacy seem important in this context: (1) the relation between citizenship and language, including the EU language programs for citizens, (2) the proximity of Parliament and other EC institutions, and (3) the ambiguities of citizenship in a global perspective.... It is clear that a redefinition of citizenship is a most urgent task for Union institutions in cooperation with regional and local authorities.“<sup>56</sup>

---

<sup>56</sup> *Supra* note 3 at 325-327.

At this point we must admit a fundamental conflict in values: on the one hand, the Treaty is quite explicit in coupling nationality and citizenship. Closa<sup>57</sup> is correct in insisting on the identity between nationality and citizenship. Mere legal residence cannot even indirectly confer the rights of citizenship. O’Leary observes that „citizenship refers to persons said to belong to a certain privileged category on the basis of specific conditions“<sup>58</sup>. D’Oliveira refers to Union citizenship as „exclusion“.<sup>59</sup>

From a theoretical point of view one must keep in mind that, in a global environment characterized by enormous migration movements, many subjective rights are no longer based upon citizenship but *on (lawful) residence*. Citizenship only plays a role in the context of political rights, such as voting entitlements and standing as a candidate in elections, and, as a residual category, for rights based on free movement. The latter may, however, be extended by appropriate Community rules and international treaties to certain third country nationals.<sup>60</sup> There is an inherent discrepancy between the privileged position of the Union citizen on the one hand and the permanent resident from a third country who, only to a limited extent, can enjoy Community rights, especially with regard to free movement, on the other.<sup>61</sup> How can this discrepancy be overcome? Can one treat „the overlap of citizenship and nationality as a matter of historical contingency“, as Elizabeth Meehan has suggested?<sup>62</sup> Should one insist on the „very conceptual decoupling of nationality from citizenship“, as Weiler proposes?<sup>63</sup> Preuß<sup>64</sup> makes the point in suggesting:

---

<sup>57</sup> *Supra* note 12 at 493

<sup>58</sup> *Supra* note 5 at 529.

<sup>59</sup> *Supra* note 28 at 141-146

<sup>60</sup> Concerning free movement, cf. Reich (1999) *supra* note 4 at 169-171 especially with regard to Turkish citizens where an abundant case exists which upgrades their status almost to that of EU citizens after certain years of participating in the regular labour market. Why shouldn’t they have a right to vote at least in municipal elections? Do they really need full nationality for that?

<sup>61</sup> Sieveking, „Der arbeits- und sozialrechtliche Status von Drittstaatsangehörigen in der Rechtsprechung des EuGH“, (1998) ZAR (Zeitschrift für Ausländerrecht) 201 at 207; E. Guild (ed.), *The Legal Framework and Social Consequences of Free movement in the EU* (Kluwer 1999); E. Guild, *European Community Law from a Migrant’s Perspectives* (Kluwer 2000); H. Staples, *The Legal Status of third country nationals resident in the EU* (Kluwer 1999).

<sup>62</sup> *Citizenship and the EU*, Discussion Paper C 63/2000, Centre for European Integration Studies, Bonn

<sup>63</sup> Weiler (1998) *supra* note 30 at 384

<sup>64</sup> Preuß (1995) *supra* note 31

„Whereas in the traditional nation-state framework a citizen could only be a national, in the last instance European citizenship could even be conferred on individuals who do not possess the nationality of any of the Member States.“

## ***2. New (and radical) proposals by Marie José Garot and Helen Staples***

A new study by Marie José Garot<sup>65</sup> on European citizenship has developed an interesting new theory which tries to decouple nationality and citizenship. She bases her analysis on French and US-American experiences where residence, at least if certain criteria of time and permanent integration are met, has been historically regarded as a substitute to formal nationality.

„Les deux types d'exemple qui viennent juste d'être étudiés montrent qu'il est possible de dissocier entre nationalité et citoyenneté et ainsi d'accorder certains droits politiques sur le principe de la résidence<sup>66</sup>“.

(The two kinds of example just examined illustrate the possibility of distinguishing between nationality and citizenship, thus according certain political rights on the residence principle)

She criticises opposing positions, for example, the German Constitutional Court's rejection of the right to vote and to stand as a candidate in municipal elections for non-German citizens<sup>67</sup>. Such a narrow view depends on the definition of democracy which, according to the Bundesverfassungsgericht is limited to the concept of „demos“ and not of residence. The French *Conseil Constitutionnel* took a similar view but was more concerned with the political sovereignty of the French nation. In both countries the Constitution had to be amended to allow for voting and standing as candidates to be extended to Union citizens.<sup>68</sup>

If residence is taken as a central criterion for citizenship, it is important to define it exactly. Here an autonomous interpretation of Community law is required, contrary

---

<sup>65</sup> *La citoyenneté de l'Union européenne* (L'Harmattan 1999)

<sup>66</sup> at 304.

<sup>67</sup> Judgment of 31.10.1989, published in official reports vol. 83 = BVerfGE 83, 37

<sup>68</sup> an overview is given by Garot (1999) at 130-132

to the concept of nationality, respectively citizenship. Therefore Garot develops the concept of residence from Court decisions and secondary law. According to her analysis, „ la Cour donne une définition très large de la résidence, la qualifiant de centre permanent des intérêts“<sup>69</sup>. (The Court gives a very broad definition of residence, designating it as permanent focus of interest) She suggests a formalisation of this concept which would extend the basic community law principle of mutual recognition also to persons - a concept which we already know from goods, services, and per *Micheletti* and Art. 17, nationality. Rights which now are only accorded to market citizens could therefore be extended to non-market citizens from third countries. She writes:

„La citoyenneté de l’Union reste sans nul doute l’une des innovations fondamentales du Traité instituant la Communauté Européenne de 1992, en reconnaissant l’existence du citoyen européen (et non plus seulement du consommateur européen ou du ressortissant communautaire, travailleur ou indépendant) dans la construction européenne... la citoyenneté Européenne pose problème car elle apparaît finalement bien peu ‚citoyenne‘ ..- et insuffisamment européenne. Il semble alors que pour faire en sorte que la citoyenneté européenne trouve ses lettres de noblesse, il faille envisager d’une part une réforme du système institutionnel, afin de donner un rôle actif à ce citoyen (lui donner une reconnaissance quasi constitutionnelle est une étape, lui donner un rôle bien défini en est une autre): elle deviendra alors plus ‚citoyenne‘; et d’autre part fonder la citoyenneté non plus sur la nationalité des états membres mais sur la résidence sur le territoire de la Communauté: elle deviendra véritablement européenne. Et pourtant la réforme récente du Traité instituant la Communauté Européenne n’a pas fait montrer d’un grand empressement dans cette direction.<sup>70</sup>“

(Union citizenship undoubtedly remains one of the fundamental innovations of the 1992 Treaty setting up the European Community, recognizing the existence of the European citizen (not merely of the European consumer or of a worker or individual falling within community jurisdiction) within the European framework... European citizenship presents a problem since, at the end of the day, it manifests very little of the ‘citizen’.. – and is insufficiently European. Thus it seems that in order to arrange for European citizenship to obtain its letters patent of nobility, it would be necessary to contemplate, on the one hand, a reform of the institutional system, with a view to giving an

---

<sup>69</sup> at 329; cf. also P. Oliver, „Electoral Rights under Art. 8b of the Treaty of Rome“, [1996] 33 CMLRev 473 at 482-482.

<sup>70</sup> at 340

active role to this citizen (giving quasi-constitutional recognition is one stage, giving a well-defined role is another): it would then become more ‘citizen-like’; and on the other hand no longer to base citizenship on nationality of member states but on residence in Community territory: it would become truly European. And yet, recent reform of the Treaty setting up the European Community has not demonstrated any great haste in that direction)

The thorough study of Helen Staples on the “Legal Status of Third Country Nationals Resident in the EU”<sup>71</sup> comes to similar conclusions after having first analysed the existing and unsatisfactory state of Community law. She proposes a decoupling of nationality and Union citizenship for a number of reasons:

Third country nationals contribute to the social policies of the states in which they legally reside in the same way as nationals and therefore contribute towards the economic aims of European integration.

Third country nationals legally residing in the Union are affected by decision making in the European polity in nearly the same way as nationals.

Globalisation has brought forward a plurality of citizenship and has decoupled democratic governance from nationality.

She proposes an amendment of Art. 17 of the Amsterdam Treaty which would read:

Citizenship of the Union is hereby established. A person holding the nationality of a Member State *or who has been lawfully resident in the territory of a Member State for five years* (italics mine, NR) shall be a citizen of the Union.

At present it seems to be that this extension of status rights inherent in European citizenship to non-nationals is contrary to „fremdenfeindliche“, i.e. *xenophobic* tendencies in many countries. Citizenship of resident non-nationals will thus not even be a metaphor but a fiction. On the other hand, from a purely legal point of view Art.

---

<sup>71</sup> supra note 61 at 335-349.

17 does not forbid the extension of citizenship to non-nationals; it only provides for an automatic conferral of the status of Union citizen to every Member State national, but says nothing about the status of third country-nationals legally residing in the Union.

### 3. *New tendencies*

The theories of Garot and Staples are interesting proposals for creating a timely concept of citizenship but seem to be in conflict with the criteria applied by Art. 17, namely nationality. The newly introduced Art. 63 EC may however provide the basis of an extension of rights traditionally limited to citizenship in the sense of Garot. It gives the Council power, according to para (4), to adopt „measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.“ There is some ambiguity in the wording because it seems to exclude legislation on access to the labour market as such, as was formerly possible under Art. K.3 Nr. 3 lit a) of the Maastricht Union Treaty resulting in the Commission proposal of 30 July 1997 for a Convention on Member States' migration policies<sup>72</sup> – a wording not taken up in the Amsterdam version after heated discussion among the Conference delegates as to how far this should be left to national competence.<sup>73</sup>

The European Parliament has recommended the abolition of discrimination between Member State nationals and other residents of the Union.<sup>74</sup> The Tampere summit of the European Council of 15 and 16 October 1999 addressed the issue of legally resident third country nationals and stressed the need to develop a common approach to ensure the integration of third country nationals lawfully resident in the

---

<sup>72</sup> OJ C 337/10 of 7.11.97; Comment by S. Peers, “Rising Minimum Standards, or Racing for the Bottom? The Commission’s Proposed Migration Convention”, in Guild note 63 at 149-166

<sup>73</sup> for a discussion cf. J. Heimann, *Visa, Asyl, Einwanderung und andere Politiken betreffend den freien Personenverkehr*, ZERP-Diskussionspapier 2/99, 1999, p. 31; Bardenhewer, in: Lenz (Hrsg.), *EG-Vertrag, Kommentar 2. A.* (Bundesanzeiger 1999), art. 63 No. 12.

<sup>74</sup> cf. Kingston, „Citizenship in the EU“, in: Gardner (ed.): *Citizenship - The White Paper* (1997) at 315.

EU. It advocated a “more vigorous integration policy” concerning economic, social and cultural issues which should aim at granting them rights and obligations comparable to those of EU citizens: right of residence, education rights, economic rights and non-discrimination vis-à-vis the nationals of the host country.<sup>75</sup> What has been the theoretical and practical outcome of these ambitious plans?

A first step in this direction has been taken in decisions of the Association Council with Turkey as interpreted by the European Court. A Turkish national who has achieved a certain time lapse (3 to 4 years) and is in a stable and secure situation as a member of the labour force as defined by the European Court in its judgments *Günaydin* of 30.9.97<sup>76</sup> and *Birden* of 26.11.98<sup>77</sup>, will be entitled to a residence permit from a Member State.<sup>78</sup> Under existing conditions, the right to enter the labour force and the right to residence are limited to the host state and not automatically extended to the entire Union. Why shouldn't it be possible to grant these rights for the entire Union as an area where the “free movement of persons” is assured – without, as we know since *Wijsenbeek*<sup>79</sup>, having a direct effect. This extension could be supported by the fact that the right to residence to which Art. 63 (4) refers, the right to free movement, and access to labour markets in Member States are closely interrelated to each other in the case law of the European Court of Justice. Such broadening of the concept of “legal residence” in the Union in favour of third country nationals would create a “*quasi-citizenship*” which is placed between Union citizenship in the sense of Art. 17 on the one hand and the classical position of “alien” determined by international and Member State law on the other. It would imply that a third country national who is legally entitled to work and to reside (for himself and his family) in one Member State

---

<sup>75</sup> Editorial comment, [1999] 36 CMLRev 1119 atg 1122.

<sup>76</sup> Case C-36/96, *Günaydin et al v. Freistaat Bayern*, [1997] ECR I-5143.

<sup>77</sup> Case C-1/97, *Mehmet Birden v. Stadtgemeinde Bremen*, [1998] ECR I-7747 at 7784 No. 55.

<sup>78</sup> For further discussion especially under German law cf. H. Lichtenberg (ed.), *Gastarbeiter – Einwanderer – Bürger?* (Nomos 1996); K. Groenendijk/E. Guild, “Converging Criteria: Creating an Area of Security of Residence for Europe’s Third Country Nationals”, (2001) 3 European Journal of Migration & Law 37 at 52.

<sup>79</sup> supra note 4.

can do so in *all Member States*. He/she may even be granted political rights by secondary Community law, such as the right to vote and to stand as a candidate in municipal elections, namely as a „condition under which (he)... may reside in other Member States”, per Art. 63 (4). I agree with Staples<sup>80</sup> that “the Community institutions should adopt legislation that enables third country nationals to share in the economic and social benefits of European integration.”

On the other hand, Art. 63 (4) is “unique among the provisions of Art. 62 and 63”, as Kuijper correctly observes.<sup>81</sup> There is no *acquis* in this area, and it is not subject to the five year deadline for adoption of measures by the Council.<sup>82</sup> All depends on further political and social developments in Community law concerning the status and place of third country nationals legally residing in the Union. The role of the Court of Justice seems to be restricted to ratifying what has been agreed somewhere else. Judicial activism has expressly been excluded by the fathers of the Amsterdam Treaty.

This somewhat unsatisfactory state of affairs will not change after the adoption of the “Charter of Fundamental Rights in the EU”. This will contain an Art. 45(2) “whereby freedom of movement and residence may be granted, in accordance with the Treaty establishing the EC, to nationals of third countries legally resident in the territory of a Member State.” The explanations refer expressly to Art. 18 and 63 (4) EC – thus the circle is closed, and the above mentioned controversies on the scope and extent of Union citizenship with regard to third country nationals will start anew.

As the next step in the direction of extending rights of nationals of third countries living legally for a longer time in the Union, the Commission

---

<sup>80</sup> Supra note 63 at 337.

<sup>81</sup> P.J. Kuijper, „Some Legal Problems associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis”, [2000] 37 CMLRev 345 at 363.

<sup>82</sup> Staples note 63 at 335.

Communication of 22 November 2000<sup>83</sup> should be mentioned. The Commission discusses measures “to ensure fair treatment of third country nationals residing legally on the territories of the Member States through an integration policy aimed at granting them rights and obligations comparable to those of EU citizens<sup>84</sup>.”

In the meantime, a directive has been proposed by the Commission<sup>85</sup> to create the status under EC law of a *long-term immigrant*. After 5 years of legal residence, the third country national would be entitled to nearly the same free movement rights as an EU citizen, including equal treatment and the right to take residence in any member state. Family members share these rights, including a right to family reunions (Nachzugsrecht). Art. 12 grants them equal conditions of access to the labour market. Election rights are however exempted, unless member states decide to do so on their own. Obviously there is much opposition to this proposal, eg in Germany by the ministers of interior of the Länder who fear an uncontrolled free movement of third country nationals and an exploitation of generous social security systems like those in Germany.<sup>86</sup> On the other hand, this proposal merely concretises the resolutions of the Tampere summit of 15 and 16 October 1999 and the Recommendation of the Committee of Ministers of the Council of Europe of September 2000.<sup>87</sup>

---

<sup>83</sup> Com (2000) 757 final

<sup>84</sup> at p. 9.

<sup>85</sup> Com (2001) 127 final of 13.3.2001.

<sup>86</sup> cf note on „Beschlüsse der 167. Innenministerkonferenz in Neue Juristische Wochenschrift 2001/25 p.

XIII.

<sup>87</sup> Groenendijk/Guild *supra* note 78 at 49-52.

## V. Citizenship tomorrow (1): The position of the accession states

### 1. *The ambiguities of the Europe agreements – the case of Latvia*

Since citizenship depends on nationality, the nationals of accession countries will only be EU citizens after accession. This means that the fundamental right of free movement granted to EU citizens by virtue of Art. 18 EC and by the specific provisions on free movement of persons, namely Art. 39 on workers and 43 EC on establishment cannot yet be invoked by nationals of these countries, including citizens from Latvia. They are in a similar position to that of any third country national. Only after accession will citizenship be extended to nationals of new member countries – perhaps with some restrictions and limitations about which we will talk later.

It is of course legally possible to extend the rights to third country nationals in the EU by international treaties. The most important instruments in this respect have been association agreements between the EU and third countries. The latest round of the treaties under international law have been the Europe Agreements between the accession states, including the one concluded with Latvia on 19 Dec. 1997 to which we will turn now.<sup>88</sup>

The Europe Agreements have the intention to prepare the accession states for membership in the EU and to help them to take over the *acquis communautaire* within the transition period.<sup>89</sup> This corresponds to an extension of the rights of nationals and residents of these countries, however in a limited way. In an EC context, these rights have direct effect only in those cases where they are sufficiently specific and unconditional enough to be invoked before national and European jurisdictions. With

---

<sup>88</sup> OJ L 26/1 of 2.2.98

<sup>89</sup> for a discussion, cf. Inglis, “The Europe Agreements compared in the light of their pre-accession orientation”. [2000] 37 CMLRev 1173-1210; Hedemann-Robinson, “An overview of recent legal developments at Community level in relation to third country nationals within the EU”, [2001] 38 CMLRev 525-586 at 570-576.

regard to accession countries, their enforceability depends on the status of international law in the respective jurisdictions, eg in Latvia about which I am not competent to talk.

Title IV of the Europe Agreement is concerned with movement of workers, establishment and supply of services. It should be noted that, as opposed to normal EC-terminology, nothing is said about *freedom of movement*, per Art. 3 lit c), 14 (2) EC! This makes clear the different spirit and content under which the position of Latvian nationals seeking access to the labour market of and residence in EU member countries must be seen.

Art. 37 grants Latvian citizens – and similar provisions can be found in other Europe Agreements – legally employed in a member country the right to *non-discrimination*. Legally resident spouses and children of a legally employed worker shall have access to the labour market during the period of the worker's authorized stay of employment.

Art. 37 makes a very fine yet important distinction: it is up to the member state to grant an employment permit to nationals of accession countries, and this may be regulated by bilateral agreements, e.g. as between Germany and Poland. There is yet no Community authority to do so. Once this permit has been granted, the upgrading of the legal position of the worker and his family members is foreseen by Community law. There are several cases now before the European Court to establish whether this right to non-discrimination has direct effect.<sup>89a</sup> Personally I think that direct effect cannot be denied because the provision is sufficiently precise and self-executive to be invoked before courts of law.<sup>90</sup> It does not need to be concretised by decisions of the Association Council as foreseen in the Europe Agreements. This is now the position of

---

<sup>89a</sup> With regard to establishment, cf. cases C-257/99 *The Queen and Secretary of State for the Home Dept. ex parte Julius Barkoci and Marcel Malik*, C-63/99 *ex parte Wieslaw and Elzbieta Grłszczuk*, C-235/99 *ex parte Eleanova Ivanovna Kondova* [2001] ECR I-0000 (judgments of 27 Sept. 2001), insisting however that Member States retain powers to control entry.

<sup>90</sup> In this sense Hedemann-Robinson at 573.

the French Administrative Appeal Court of Nancy which found a similar provision in the EA Poland to be sufficiently clear to be given direct effect.<sup>91</sup> Under existing European law, the right of non-discrimination with regard to nationality, gender and race has a very broad sphere of application: it forbids not only direct, but also indirect discrimination, and can be invoked not only against the state but also against private parties, e.g., employers.<sup>92</sup>

Persons coming under the establishment and provision of service rules enjoy certain derivative rights of residence and work permit on which I will not comment here.

On the other hand, citizenship under Union law, as we mentioned in the foregoing, contains a bundle of different rights like freedom to look for work, right to take residence where desired, possibility of family reunion and so on. Obviously these rights have not yet been extended to the nationals of countries of the Europe Agreements. This depends on the status of the accession countries themselves, and has to be negotiated in the respective Treaties. The Commission has put forward certain proposals on whether the *acquis* should be taken over immediately in favour of the citizens of the new member countries or not. We will turn to that rather delicate problem now.

## ***2. The Commission paper of 6 March 2001***

You all know that particularly the German government has insisted on a 7-year transition period before full citizenship rights are extended to nationals of acceding member countries, including Latvia. To be quite frank, I personally disagree with this position of the German government and think it does not go along with the spirit of

---

<sup>91</sup> Inglis at 1202.

<sup>92</sup> Case C-282/98 *Angonese* [ECR] 2000 I- (judgment of 6 June 2000); for more details, cf Reich *supra* no 4 at 63-75;

creating a greater Europe after the fall of the Soviet regime. A new European or Communitarian spirit should be based on the fundamental freedoms and equal rights of all its citizens. If citizenship is linked, as I have explained, to nationality of member states, then the becoming of a member of the EU should automatically confer on its nationals the rights foreseen in Art. 17 et seq., and the corresponding free movement rights of Art. 39 et seq. This position is confirmed by Art. 15 (2) of the European Charter of Fundamental Rights whereby every union citizen has the right to look for work, to work, to establish himself and to provide services in every member state, subject of course to legally imposed restrictions meeting the proportionality and essence of rights tests under Art. 52 (1).

On the other hand it must be admitted that Art. 18 itself allows for restrictions of the citizens' right to free movement and residence. This may be done by secondary law, and, even more important, by the accession treaties themselves. A similar observation is true with regard to Art. 39 concerning free movement of workers. The wide range of rights guaranteed under this provision, the abundant and very citizen friendly case law of the Court<sup>93</sup>, and the specific positive rights under Reg. 1612/68 can legally be restricted and/or postponed by the accession treaties, as had been done before in the case of Greece, Spain and Portugal.

The Commission document also shows that the feared disruptions of the labour market in member countries by immediately granting free movement to workers did not materialize in the past, and that the transitory arrangements foreseen in the respective treaties did not really matter very much. In its information note of 6 March 2001, the Commission is therefore hesitant to propose one single approach to the question of free movement of workers from accession countries. Instead, it discusses five options, namely

1. Full and immediate application of the *acquis*

---

<sup>93</sup> Reich at 158-180

2. Safeguard clauses
3. Flexible systems of transitional arrangements
4. Establishment of fixed quota systems
5. General non-application of the *acquis* for a limited period of time.

The paper shows quite clearly that the Commission is not in favour of option 5 which, in its own words,

“is the most rigid one as it changes only marginally the status quo. It is by definition familiar for member states and easy to implement. It can be expected to fully reassure populations in present member states. However, it ignores the potential economic need to adjust the rules to the experienced challenges or needs after accession, and would hinder the full functioning of the internal market. This option does not include any opening of present EU labour markets or predictability and would therefore be extremely difficult to negotiate with candidate countries.”<sup>94</sup>

The other options, which I will not discuss in detail, allow for more flexibility, with option 1 being the most favourable to accession countries. In the process of negotiating the accession treaties, it should be possible to find a compromise which fulfils the expectations of the new member countries as well as the (in my opinion: unjustified) fears of old member countries, especially labour unions. It should allow, as its basic objective, nationals of the accession countries to be integrated into the full plethora of rights which citizenship promises to all their European fellow countrymen and which has been to the benefit of all of them. In its paper of 6 March 2001, the Commission quite correctly observes, based on research done on the past accession rounds:

“...most research suggests that immigration confers small net gains in terms of per capita output to the host country, but the benefits are not necessarily distributed evenly across the population<sup>95</sup>.”

However, if I am correctly informed there is agreement among Member States and some accession countries like Latvia that a seven year transition period will be

---

<sup>94</sup> at 24

<sup>95</sup> at p. 10

foreseen in the accession treaties – a suspension of the *acquis* which is quite contrary to the spirit of the EC Constitution itself!

## **VI. Citizenship tomorrow (2): From rights to duties?**

### ***1. The European citizen „King“***

Citizens' rights in Member States are invariably followed by a list of citizenship duties. Shaw<sup>96</sup> specifies the duty to „obey lawful rules“, the „defence of the country“, the duty to „pay taxes“ and the „duty to work.“

Fortunately enough, so far the ordinary Union citizen has successfully escaped from such obligations!<sup>97</sup> This is a result of the hybrid status of the Union/Community between an international organisation and a state. The duty to obey lawful rules will usually be imposed by primary Community law and regulations, but is limited to market citizens. Directives, according to the case law of the Court, cannot directly impose obligations on individuals.<sup>98</sup> The duty to pay taxes, other duties and tariffs is again coupled to the position of the market citizen; the Community has no power to levy taxes unless by a unanimous act of the Council, per article 94, 95 para 2. The draft Nizza Treaty has not changed this rule even though it attempted to get rid of the requirement of unanimity for Council decision making in Community legislation.<sup>99</sup>

### ***2. Is there a duty to loyalty?***

Can one at least talk of a duty of loyalty of the Union citizen to Union institutions and Community law? This question is usually discussed in the relationship

---

<sup>96</sup> *Supra* note 2 at 343.

<sup>97</sup> For a general critique, cf. J.H.H.Weiler, “To be a European Citizen – Eros and Civilization”, In: *ibid*, *The Constitution of Europe* (Cambridge Univ. Press 1999), 324-357.

<sup>98</sup> Case C-91/92, *Faccini Dori v. Recreb sarl*, [1994] ECR I-3325 and later cases; the problem will not be discussed in detail here, cf. A. Arnulf, *The European Union and its Court of Justice* (Oxford Univ. Press 1999) at 140.

<sup>99</sup> K. H. Fischer, *Der Vertrag von Nizza* (Nomos 2001), p. 74.

between Community respectively Union and Member State institutions. Article 10 is a basis for such a mutual loyalty obligation. There is no similar duty imposed on individuals. As Shaw<sup>100</sup> correctly remarks:

„The tendency of any discourse of citizenship duties is to construct the figure of the citizen in the light of some conception - however vague - of moral virtue.“

This „moral virtue“ has not yet been transposed into a legal obligation, and it is hardly realistic that this will ever be done in the near future. It would be contrary to the *liberal spirit of EC law* and Union citizenship itself which focuses exclusively on rights and not on duties. For example, EC law has greatly extended consumer rights but has done little to impose corresponding environmental obligations, as Krämer and Wilhelmsson have rightly and critically pointed out.<sup>101</sup> As an example, the package holiday directive 90/314/ EEC of the Council of 13.6.1990<sup>102</sup> has developed extensive tourist rights including a directly applicable safety net in case of the insolvency of the tour operator<sup>103</sup>, but no corresponding obligations relating to environmental protection.<sup>104</sup> As another example, the packaging waste directive 94/62/EC of the EP and the Council of 20.12.94<sup>105</sup> makes it an indirect duty of the consumer/citizen to participate in waste management and prevention, for example through information about recycling systems, but does not prescribe a moral, even less a legal obligation to limit waste.<sup>106</sup>

---

<sup>100</sup> *Supra* note 2 at 344

<sup>101</sup> In this sense the critique of Krämer, „On the interrelation between consumer and environmental policies“, [1993] 16 *Journal of Consumer Policy* 455; Wilhelmsson, „Consumer Law and the Environment: From Consumer to Citizen“, [1998] 21 *Journal of Consumer Policy* 45

<sup>102</sup> OJ L 158/59 of 23.6.90

<sup>103</sup> This is obviously the substance of the case law of the Court, eg joined cases C-178 + 179, 188, 190/94 *Dillenkofer and others v. Bundesrepublik Deutschland*, [1996] ECR I-4845; C-364/96, *Verein für Konsumenteninformation v. Österreichische Kreditversicherungs AG*, [1998] ECR I-2949; C-140/97, *Walter Rechberger und Renate Grundl v. Republik Österreich*, (1999) ECR I-3499; an exception has been case C-237/97, *re International Cultural Program AFS* [1999] ECR I-825.

<sup>104</sup> for an attempt to develop such duties see the contributions of Derleder, „Touristenschutz contra Umwelterhaltung“ and Tonner, „Europäische Tourismuspolitik und nachhaltige Entwicklung“, in: Reich/Heine-Mernik (Hrg.), *Umweltverfassung und nachhaltige Entwicklung in der EU* (Nomos 1997) at 89 and 99.

<sup>105</sup> OJ L 361/10 of 31.12.94.

<sup>106</sup> Reich (1999) *supra* note 5 at 412-413; Krämer, *EC Environmental Law* (Sweet & Maxwell, 4<sup>th</sup> ed. 2000) at 256-257 is silent on that point.

Citizens' duties are indirectly contained in EC directives on waste, eg. Art. 9 of Dir. 75/439/EEC of 16 June 1975 on used oils<sup>107</sup> and Art. 8 of Dir. 75/442/EEC of 15 July 1975 on waste.<sup>108</sup> They impose obligations on Member States which consequently have to make citizens responsible for orderly waste management. They cannot directly put duties upon citizens due to their character as *leges imperfectae*. The only exception to my knowledge where obligations are imposed directly on citizens is Art. 9 of Reg. 338/97 of 9 Dec. 1996 on the protection of species of wild fauna and flora by regulating trade therein<sup>109</sup>, banning movement of certain live specimens which also obliges private persons and is not limited – unlike Art. 8 – to commercial activities.

### **3. „Abus de droit“ and „social function of rights“ as a substitute to citizen's obligations?**

A liberal concept of citizenship and subjective rights of citizens which is the one adhered to by the EU should at least develop a minimalist concept of limiting these rights in case of obvious abuse. It would be interesting to enter into the debates of the 19<sup>th</sup> century where the concept of „abus de droit“, supplemented by a broader theory of „social function of rights“, first evolved in French law,<sup>110</sup> was then taken over by German and Swiss law and even introduced into post-revolutionary Soviet law.<sup>111</sup> It imposed a certain „socialisation“ of individual rights originally created in favour of the „bourgeois“ in the spirit of a liberal theory of law and state – a concept quite close to the beginnings of a distinctive European law and polity.

The extensive grant of rights to European citizens, especially in the free movement area as the strongest pillar of EU-law, should at least in a theory of „socialisation of law“ be protected against unilateral abuse. This „immanente

---

<sup>107</sup> OJ L 194/31 of 25.7.75.

<sup>108</sup> OJ 194/47 of 25.7.197

<sup>109</sup> OJ L 61/1 of 3.3.1997.

<sup>110</sup> for an account cf. Grimm, *Solidarität als Rechtsprinzip* (Athenäum 1972).

<sup>111</sup> cf. for a development in socialist law Reich, *Sozialismus und Zivilrecht* (Athenäum 1972) at 175-186

Schranke“ (inherent limitation) has been recognized by the Court in the *Paletta-II*-case where it refers to having „consistently held that Community law cannot be relied on for purposes of abuse or fraud“.<sup>112</sup> At the same time the Court insisted that the defence of „*abus de droit*“ should not make impossible the exercise of Community rights. Therefore it is up to the person charging „abuse or fraudulent conduct“ to give adequate proof that this is the case; mere allegations are not sufficient in that respect. The Court did not even try to develop objective criteria for specifying “*abus de droit*”, such as preventing a circumvention of protective provisions justified by fair labour conditions.

The Court repeated its rather unsatisfactory case law in its well-known *Centros*-judgment of 9 March 1999.<sup>113</sup> The case concerned the registration of the Danish branch of a private limited company formed in accordance with British law with the intention to do business mainly in Denmark. AG La Pergola as well as the Court rejected the argument of the Danish authorities that the sole purpose of the company formation was to circumvent the application of the national law governing private companies intending to protect its creditors. While AG La Pergola gave a sweeping support of the theory of “competition of legal orders”<sup>114</sup>, the Court in a more cautious fashion referred to its earlier case law forbidding an improper circumvention of national legislation under cover of the rights created by the Treaty. As a result, the Court confirmed the opinion of the AG in holding that:

“(t)he right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent, in a single market, of the freedom of establishment guaranteed by the Treaty.<sup>115</sup>”

<sup>112</sup> case C-206/94, *Brennet v. Paletta*, [1996] ECR I-2357 at 2391 para 24; cf. also AG Cosmas relying on the Roman law principle „*fraus omnia corrumpit*“ at 2373 para 51; in *Günaydin v. Freisstaat Bayern*, case C-36/96, [1997] ECR I-5143 the Court did not find „*abus de droit*“ by Turkish migrant workers who had signed a paper agreeing on their only temporary work permit and later wanting to remain in the receiving country.

<sup>113</sup> Case C-212/97, *Centros v. Erhvers-og Selbskabsstyrelsen*, [1999] ECR I-1459; comment Roth [2000] 37 CMLRev 147

<sup>114</sup> at 1477; cf. for a differentiated reading of this concept: Reich, “Competition between Legal Orders – A New Paradigm of Community Law?” [1992] 30 CMLRev 861; C. Barnard, “Social dumping and the race to the bottom: some lessons for the EU from Delaware?”, [2000] 25 ELRev 57.

<sup>115</sup> at 1493 No. 27.

This argument however misses the point since the case did not concern the establishment of branches as such, but more specifically the intention of a company to do its main national business through a branch as “principal establishment” while the main office was merely chosen to avoid the more restrictive company legislation of the host country.<sup>116</sup>

As a result of *Paletta II* and *Centros*, the Court verbally recognises the possibility of “*abus de droit*” of Union citizens invoking their rights guaranteed by the Treaty against restrictive but still justified Member State provisions, but is not willing to flesh it out more specifically in the sense of an inherent and implied duty as a corollary to the effective granting of free movement rights.<sup>117</sup> Such a one-sided concept of citizenship may satisfy an exclusively liberal reading of Community law in general and Union citizenship in particular. But it is naive to conceptualise rights without duties, as Art. 14 of the German Fundamental Law so clearly demonstrates: “*Eigentum verpflichtet – property imposes obligations*”! In an environment which is characterised by a growing dependence of citizens on each other, by the evolution of elements of solidarity inherent in the concept of citizenship itself, and by the principle of “proportionality”, per Art. 5 (3) EC-Treaty which requires the balancing of different rights, this unilateral liberal reading of citizenship merely generating rights and setting aside duties becomes dated and will need a reshaping by “post-modern” legal theory.<sup>118</sup>

It remains to be seen whether the express reference to the concept of “*abuse of rights*”, as used in Art. 17 EHRC, by Art. 54 of the “Charter of Fundamental Rights in the EU” will provoke a change of thinking in the direction as suggested here. The case-law of the ECHR so far has treated only extreme situations where eg. the right to freedom of expression was used by radical movements denying democratic values as

---

<sup>116</sup> cf. The critique of Schilling, „Bestand und allgemeine Lehren der bürgerschützenden allgemeinen Grundsätze des Gemeinschaftsrechts“, [2000] Europäische Grundrechtszeitschrift (EuGRZ) 3 at 39.

<sup>117</sup> Schilling *supra* at 40.

<sup>118</sup> cf. Reich, “Reflexive Law and Reflexive Legal Theory”, in: Gedächtnisschrift für A. Argyriadis (Athens 1996), 773 at 786.

such.<sup>119</sup> Community law which is much closer to everyday entitlements of citizens therefore needs a more focused approach on a theory of “*abus de droit*” which still awaits development.

#### ***4. Should there be a duty of EU-citizens to pay taxes to the Union?***

As mentioned before, EU Citizens are exempted from paying direct or indirect taxes to the Union, even though they obviously have to pay for the expenses of the Union based upon a complicated and highly intransparent scheme on allocating parts of the national value added tax revenues as direct means to the EU. Any legislation creating a taxation power of the Union would require unanimity in the Council which seems impossible to reach at this moment.

On the other hand, as Weiler correctly points out,<sup>120</sup> the duty to pay taxes increases the democratic rights inherent in citizenship because it makes the recipient of these taxes – in our case: the EU – more accountable to them. He writes:

“But from the perspective of citizenship the problem of the Union is, in some respects, one of representation (flawed, to be sure) with no taxation. The subjecthood of individuals as non-citizens is no more evident in the financing of the Union.... What if Community financing or a portion of it derived directly from income tax and that portion were designated as such...? This is a proposal which will be rejected by all concerned: the states because of the empowerment of the Union to levy direct taxation; the Union because it will fear the wrath of the taxpayers who might suddenly take an interest in the finances of the beast; the individual because they will, directly, have to shell out. But taxation, although levied on residents too, is a classical and meaningful artefact of citizenship: it instils accountability, it provokes citizen interest, it becomes an electoral issue, *par excellence*. It also establishes a duty – even an unpleasant one – towards the polity”.

---

<sup>119</sup> cf. J. Frowein/M. Peukert, *EMRK-Kommentar*, 2. A. (Engel 1995) Art. 17 Rdnr. 2.  
<sup>120</sup> *supra* Fn 97, at 354-355

A similar proposal has recently been voiced by Luxembourg Prime Minister Juncker.<sup>121</sup> He argues for a change of the existing system of financing through so-called own means by introducing a “*Europa-Steuer*” (euro tax). This would make the financing of the EC household more transparent and increase efficiency on the expenditure side. This argument is the more remarkable since Luxembourg is known to have resisted (with the UK) all harmonisation in the area of (direct) taxes. To my view, the levying of such a European tax would be highly unpopular, but would make duties correspond to rights existing under EC law, would make it clear to people that they cannot have rights as EU citizens as a “free lunch”, and make the organs of the Union more accountable for the management of these funds.

---

<sup>121</sup> Frankfurter Allgemeine Zeitung (FAZ)v. 2.8.2001, p. 7

## VII. Conclusions

This analysis of the role of Union citizenship in EU law and policy yesterday, today and tomorrow leaves us with a somewhat puzzling result. The hopes which some authors have put into this new concept in the past have not yet been put into effect. To come back to our question asked at the beginning: citizenship was, in the beginning, a rather insignificant source of rights; it was used to close certain gaps which an expanding case law left in the areas of free movement. Later, one important question, namely on establishing a general charter of rights based on the principle of non-discrimination having direct effect, was positively answered by the Court in its judgment of 20 September 2001, case C-184/99 *Rudy Grzelczyk and CAPS*. The other question, namely of an extension of the substance of citizenship to third-country nationals who have lawfully lived in the Union for longer periods of time, has not yet been answered, even though some new initiatives have been generated under the Amsterdam Treaty and the Tampere summit. The questions of tomorrow, namely of extending citizenship to nationals of accession countries without undue delay, and the interrelation between rights and duties, still have to be tackled; not very many encouraging signs can be detected so far. It depends on the political will - and its legal implementation - of the EU, upcoming member states and European citizens to build the road to a truly *European area of citizenship*.