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Citizenship in the constitution of the European Union: rhetoric or reality?

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Introduction

This paper will explore the nature of European Union citizenship in the context of the constitutionalisation¹ of the EC/EU. The concept was formally introduced by the Treaty on European Union (TEU) and presents many problems in its current state. Under the TEU, citizenship of the EU was granted to all nationals of EU member state countries, introducing changes to the EC Treaty which now contains a revised Article 8 detailing the beneficiaries and rights of citizenship. This is an important symbolic development in the evolving constitution of the Union; a formal recognition of the extra-economic character of the EC/EU. 'But an examination of its substance reveals EU citizenship to be disappointingly feeble and gives rise to questions concerning its nature and limits. Is it an inalienable right granted to all existing and future member state nationals? Could an EU citizen be deprived of this status by a state's choosing to end its membership of the Union? The relationship between nationality and citizenship is also crucial. As member states have different methods of determining nationality it could mean, for example, that an Irish American may be able to avail herself of EU citizenship but a Turkish national who has lived all her life in Germany may not. Since there are approximately 10-15 million legally settled non-nationals in the EU, the fact that they should be further disenfranchised is of concern. The relationship between citizens' rights and human rights has been of interest since the drafting of constitutions in the late 18th century; it is indicative that this problem also remains unresolved in relation to this new citizenship which emerged from Maastricht.

Citizenship, nationality, and human rights are all crucial to the future development of the Union. They are the weapons in the larger battle which has shaped and will continue to determine the personality of that Union; the division between member state sovereignty and a supranational Union. This paper will locate the issues in this overall context and examine the particular difficulties which they raise.

Citizenship

Citizenship is an instrument of both inclusion and exclusion - it serves to determine those who 'belong' and also acts as a 'powerful instrument of social closure' (Brubaker, 1992, p.23). From the initial development of the concept in the Athenian state the emphasis, or indeed whole purpose, of citizenship was the identification of a specific group of people with superior rights. The concept of *ciroyen*, which was perceived as being inclusive during the French revolutionary period was, however, also élitist in conception. In creating the revolutionary *ciroyen* its authors also created the foreigner and in addition introduced an inherent discrimination attached to citizenship - the active citizen versus the passive citizen. These distinctions were founded upon class and economic considerations; only the active - i.e. tax paying, property owning (male) - *ciroyen* could participate in political life. It is undoubtedly trite to recall the dominating race and gender implications of citizenship but it is interesting to observe the extent to which economic factors infiltrate the notion of citizenship from its early development to the definition of European Union citizenship. Citizenship, as well as clearly delineating a group of privileged persons entitled to certain rights, generally implied that these privileges were economically predicated - land ownership and/or the ability to make tax contributions were the usual criteria in the modern state (which clearly excluded, for example, women and slaves). The very declaration of citizenship has almost always

been defined by its denial to certain people.² The relationship between citizenship and the construction of the identity of the modern state is also important; a state is defined, constituted and empowered by its citizens - they belong to and may be controlled by it. The state's legitimacy is derived from its *demos*; in the contract that is citizenship, allegiances are demanded of citizens and limited rights granted in return. Citizenship also serves to legitimate the power and governance of the grantor.

Background to EU citizenship

From these essential attributes³ it is interesting to observe the nature of European Union citizenship, which was introduced by the Treaty on European Union (TEU) in 1992 ('the Maastricht Treaty'). As will be seen, this new 'citizenship'⁴ does conform to certain of the traditional standards, arguably the most negative ones. It is economically dictated; defined so as exclude; and contains unlisted duties. Indeed, the rights attached to it are so limited that it must be questioned whether its only justification lies in increasing the legitimacy of EU institutions and in acting as a mere sop in the campaign which seeks to construct a loyalty to the EC/EU.

The very foundations of citizenship are based on discrimination, privilege and deliberate exclusion. EU citizenship in this sense is not exceptional. If anything, EU citizenship has highlighted and increased the discrimination already inherent in the most tangible rights attached to citizenship - the 'free movement of persons' provisions of the EC Treaty. As will be seen below, these issues have already been argued before English courts and although an outcome is still awaited, the cases themselves serve not only to expose the extent to which EU citizenship is discriminatory but also show how it might possibly provide the means to remedy these faults.

Citizenship's potential - perhaps unforeseen at the time of the drafting of the TEU - is evidenced by the fact that citizenship rights have so quickly been seized upon by litigants. There is little doubt that Article 8 EC was introduced in a blatant attempt at creating a semblance of democracy in the Union, as if placing a 'people'-flavoured icing onto the Treaty cake would solve the long -running and fundamental problems of EC/EU democratic legitimacy. Not all commentators are sceptical of Article 8 and its effects and it may well prove, with the cooperation of the ECJ, to be a significant element of further European integration. However, any hopes that a loyal *demos* would emerge after November 1993 (after the TEU entered into force) would have been overly optimistic, due to the inadequacy of the rights attached to the new concept. It is now widely accepted that progress in EU integration rests most fundamentally upon increased identification between the people who reside in the Union and the institutions which serve it and a related decrease in the alienation which integration has thus far produced. However, if EU citizenship represents the most serious attempt to achieve these objectives, then the exercise is flawed from the outset.

It may well be that citizenship will serve as an external identifier.⁵ It may also salve the conscience of the institutional machine to think that 350 million people now legitimate it. Whether it has had any impact upon the people it was supposed to benefit is doubtful, however.⁶ The notion that European integration should be accompanied by a concept of citizenship was not altogether novel at the time of the drafting of the TEU.⁷ The term 'Citizens' Europe' had been in circulation on an irregular basis since 1974, and rights conferred mainly under the EEC Treaty (1957), together with related jurisprudence, had created some elements of citizenship (see further Durand, 1979 and Evans, 1984). However, the TEU - ironically because it is arguably the least integrationist of the founding Treaties - provided the opportunity formally to introduce EU citizenship. The initiative was that of the Spanish government delegation and received the support of the European Commission and some member states, although others regarded it as vague or premature (see Closa, 1992, p.1154). However, as Closa (1992, p.1157) indicates, 'citizenship was not a very controversial topic' and one might justifiably imagine that the relatively paltry provisions⁸ which were introduced may have been regarded as merely declaratory and as having little substantive significance by most of the member states.⁹ Yet it may, if only on a symbolic level, be regarded as a meaningful gesture in the overall context of European integration that the fundamentally economic basis of the Communities has been exceeded and this overtly political aspect included in one of the founding treaties.¹⁰

The revisions introduced by the TEU resulted in the inclusion of a revised Part Two in the (renamed) EC Treaty, consisting of one Article (Article 8). In addition, there was a reference to citizenship in Article B of the Common Provisions of the TEU itself which states that amongst the objectives of the Union shall be '... the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union' (Article B TEU). The fact that citizenship is referred to in the two Treaties creates some confusion as to whether its application is to be confined to the sphere of activity of the EC Treaty or extends to the wider Union. Some symbolic relevance might possibly be attached to the location of the citizenship provisions in the Treaty, which suggests that they may be regarded as substantive and not merely declaratory (Closa, 1992, p.1158). The European Commission

adds credence to the fundamental character of citizenship and its associated rights by suggesting that '[t]he rights flowing from citizenship of the Union are in effect granted constitutional status by being enshrined in the Treaties themselves'.¹¹ The notion that Article 8 creates rights which go beyond the mere declaratory has received some endorsement in a judicial context¹² and, as a result of a reference to the ECJ arising from this case, that Court will have an opportunity to consider the nature of EU citizenship.¹³

Definition of EU citizenship

Whatever the declared status of citizenship, it is in examining the contents of Article 8 that more critical questions may be posed which expose the relatively threadbare character of the substance of the rights and the devalued nature of its meaning.

Consider first the definition of EU citizenship; Article 8 (1) reads 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.' Citizenship was, as it were, granted or bequeathed to the incumbents. It is not apparent whether there is anything facultative about the new citizenship; it is imposed upon nationals of the member states without any indication of a consensus element in this significant development.¹⁴ In this regard EU citizenship begins on a conservative note recalling and reinforcing the notion that citizens are created to define and empower the polity.¹⁵

A more petty contradiction raised by the definition is whether it is in fact EC/Community citizenship or Union citizenship; it is specifically declared to be 'of the Union' but the rights are seemingly limited to the EC Treaty. This is potentially important in at least two respects: human rights are specifically mentioned not in the EC Treaty but in the TEU (Article F. 2.); and citizens are denied participation in important spheres of activity of the Union (i.e. external affairs under Title V TEU (the '2nd Pillar') and justice and home affairs under Title VI ('3rd Pillar')).

What may also be noticed about this brief definition of citizenship is its awkward acknowledgement of the notion that member state sovereignty is being infringed upon in the concession to the superior position of the member states. Why is the definition of *Union* citizenship to be dependent upon the whims of an individual member state? If a comparison, perhaps more anticipatory than real, is made with federal structures elsewhere, then for the central authority to be deprived of the power to determine who shall constitute the people of the federation as a whole represents a unusual division of competencies. There are historical precedents for this, of course,¹⁶ but not in recent times. This is the kernel of one of the most fundamental issues of European integration; the division of competence between member states and the Community/Union. Nationality and citizenship constitute the very essence of sovereignty and it is not difficult to understand why Article 8 did not provide for EU citizenship to exist without the link with member state nationality. This link was re-enforced by the Declaration on Nationality attached to the TEU.¹⁷ As d'Oliveira (1993, p.628) remarks: '[t]he right to decide who is a "national of a Member State", if won by the EC, may harmonise the concept of "national", but paradoxically, will also be the end of the Member States; their sovereignty and existence are jeopardised'.

Nationality may prove to be a fertile ground for future conflicts and is one way in which member states may exert enormous influence over the future of the Union. As long as member state discretion remains absolute in the area of nationality, they will be able to determine the future inhabitants of the Union.¹⁸ This could be exercised either negatively, by states' having restrictive nationality or naturalisation laws, or more positively; the examples of Macau and Hong Kong respectively serve to demonstrate existing contrasting practices. There even exists the possibility for member states to adopt a wide definition of nationality which might affect economic considerations in the Union - for example the granting of Irish nationality to Irish Americans or Spanish nationality to Latin Americans. However, these possibilities must be seen in the context of the fact that 18 million East Germans entered the Community market following the unification of Germany without objection from other member states. Should a member state choose to 'abuse' its nationality powers, Article 5 EC may possibly be exercised against them.¹⁹ What, however, would be the status of EU citizens whose states (or part of a state - Greenland, for example) opts to leave the Union? Citizenship rights are lost as a result, which must cast doubts upon their 'fundamental' character.

A definition which leaves the member states as the privileged actors in citizenship rights inherently provides an uncertain future for the beneficiaries of such rights and means that EU citizenship, one of the fundamental pillars of future integration, is subject to member state action. If member state control in this context could be regarded as a method of retaining sovereignty or decreasing the 'democratic deficit' it might be understandable, but this is far from obvious.

However, problems with the very definition of citizenship call into question the motivations underlying the introduction of citizenship provisions into the Treaty; the most likely answer in a generous

light is a jumbled combination of a desire to create some allegiance with the Union and to reinforce 'people's' rights. Allegiances or loyalty can hardly be constructed - an elective citizenship (promising a decrease in powerlessness) would have been a more appropriate measure to achieve this end. If there was a genuine desire to create or reinforce rights it seems strange that rights which derive from the Union/Community and its separate legal and economic order are dependent upon and can be terminated by a member state's actions. It has obviously always been the case that individuals derive benefits from and participate in Community existence only via their member states and to the extent that the state desires,²⁰ and while there is still a prospect of a member state's leaving the Union,²¹ however unrealistic this may be in practice, it highlights the precarious nature of individually exercised rights.²² Underlining this essential element of EC/EU construction is the Article 8 definition - as long as the member states remain in control of the *demos*, the Community/Union will remain secondary and integration a reversible process. There is here a question to be asked concerning fundamental (human) rights, however; if a direct connection is to be made in the future between EU citizenship and human rights, the standing of such rights will be at issue if a member state may deprive one or all of its nationals of same - how fundamental can they be in this case?²³

Citizenship duties

Citizenship as a political tool has an inherent attraction for conservative forces in any society, given the identification of a people with a polity and the latter's right to demand allegiance or duties because of this citizenship link. In this regard EU citizenship conforms to the traditional notion of the concept, as Article 8 (2) reads 'Citizens of the Union shall ... be subject to the duties imposed [by the Treaty]'. Considering the extent to which nationals of member states were allowed any form of vote on the inclusion of Article 8 in the EC Treaty, this wording must be regarded as a breach of democratic trust at the very least and negates the notion that Article 8 exists to decrease sentiments of powerlessness and exclusion in the EC/EU. What kinds of duties are at issue? They are still to be detailed, but it is indicative that this remains a potentially more expansive aspect of citizenship than the weak rights which are listed. Duties which may be conceived are the duty to pay taxes or the duty to take part in EU defence activities. Both of these possibilities are problematic; people other than EU citizens are required to pay taxes yet are excluded from citizenship-related rights; a duty to fight in an EU army or undertake military service at that level would be objected to not least by the nationals of those militarily neutral member states.

Citizenship rights

When the specific rights attached to Union citizenship are examined, it further emerges as a problematic innovation which will require substantial revision, if it is to be seriously considered as forming one of the foundations of the constitutionalisation of the Union. Consideration of the enumerated rights also highlights the exclusiveness of this status. The most important and significant of the rights are reserved for citizens, whereas those perceived to be less important are open to use by everybody. It should be remembered at this juncture that the rights attached to Union citizenship are to be found throughout the EC Treaty as per the wording of Article 8 (2) and are not limited to those specifically mentioned in Article 8.²⁴ Why did the drafters choose to emphasise certain rights? Some are new (for example the right to take part in local elections in a member state other than that of your nationality) but it is questionable whether the repetition of pre-existing rights in Article 8 adds anything to their value or scope.²⁵ If positive reasons for the enumeration may not be discovered (i.e. if there is no amelioration in the significance of these rights) then negative implications may be adduced and the selection of such rights seen as an attempt to delineate the boundaries of these relatively important rights (in the sense that they have tangible and very obvious benefits for people) by confining them to citizens only. If further developments of this nature are to be observed (in particular the association of human rights with citizenship) the indications are towards increasing elitism and social closure within the EU - Europe for (white) Europeans only.

It is in so significantly attaching economic rights to political ones that the problems have been created (as will be seen, the primary right attached to citizenship is free movement, essentially an economic right as that movement has traditionally been limited to persons in specified economic categories). The issue of whether political rights should be confined to nationals, so to speak, is not without problems,²⁶ but the justifications for the deprivation of economic rights are difficult to perceive when it is obviously of benefit to the EU market as a whole to allow maximum

participation in goods and services markets.²⁷ The continued refusal to allow economic participation on nationality grounds may come to be regarded in the future as an embarrassing phase in European integration, when its obvious racist motivations and effects are fully appreciated.²⁸

The free movement right

The affiliation of citizenship with the economic is made very clear in the specific rights to which Article 8 refers. Article 8a (I) lists as the first right of citizens the 'right to move and reside freely within the territory of the Member States ...'. On the most cursory of glances this seems to suggest a duplication of rights; free movement provisions have been enshrined in the EC Treaty since the establishment of the EEC in 1957. Have these provisions now seemingly been transformed into a constitutionally significant semi-political right? Articles 48-66 EC Treaty provide the basic provisions governing free movement of persons and services within the Community and as such constitute one of the fundamental freedoms of the E(E)C.²⁹ Though described as free movement of 'persons', the provisions are more limited and relate mainly to the free movement of economic actors; those who were seen as contributing to, and whose contribution was regarded as necessary for, the economic community - namely workers and self-employed persons.³⁰ As with many aspects of the EC Treaty, the ECJ has played a major role in what might generously be described as 'interpreting' these provisions. Thus, its jurisprudence has been responsible for confirming that only EC national workers may benefit from free movement. However, the Court has also extended the provisions of the Treaty to categories not specifically mentioned.³¹

Thus free movement rights prior to the introduction of EU citizenship covered most categories except non-nationals and residual non-economic actors such as children or gypsies. The association of free movement with citizenship does not make it clear whether this is an attempt to confine the rights in some manner or whether it is intended that they be expanded to cover persons not previously covered. Article 8a (1) reads 'subject to the limitations and conditions laid down in this Treaty'. If it is the case that this right is so subject, then it would appear that, even though identified as the primary element of citizenship, it is not available to all nationals of member states but only to those economically active. The *Adams* case³² may well provide some answers from the ECJ on these issues. However, this analysis of Article 8 exposes its obvious inherent weaknesses. These defects may be the product of loose drafting, but if any real significance beyond the purely symbolic was intended in the invention of citizenship it ought perhaps to have merited more careful consideration.³³ If citizenship is to be regarded as a formal element of constitutionalisation of the Treaties it does not evidence any serious consideration on the part of the member states.

Political rights

Can the same be said of the other rights granted under Article 8? Citizenship was loudly hailed as creating a direct political link between the people of Europe and the EC/EU.³⁴ How real is this claim? Article 8b asserts the right of citizens to vote and stand as a candidate in both European Parliament (Article 8b (2)) and local elections (Article 8b (1)) in member states in which they reside.³⁵ There is no doubt that these are innovatory rights. It might be asked, however, what connection there is between the Union and the right to vote in local elections?³⁶ The position of non-EC nationals is a further consideration in this regard; many will have been resident for many years in member states without having acquired the nationality of that state and are often therefore deprived of political rights, despite actively contributing to the economy of those states.³⁷ Thus Article 8b (1) creates a situation whereby long-term resident non-EC nationals have few or no political rights, but an EC citizen is able to exercise greater political rights based on a short period of residence. This creates and increases discrimination. With some consideration, rights of this nature could have been based on residence rather than nationality and seen as a positive contribution to an anti-racism statement on the part of the EU.³⁸

As regards the EP election rights, it cannot be said to be insignificant that such rights are now available. However, they must be seen in the context of the role and powers of the European Parliament, both of which are relatively limited. There is a tendency to the notion that increasing EP powers and further connections between citizens and the Parliament will somehow solve the democratic deficit. This, of course, is not the case and it is disingenuous for the Commission to continue to propagate such notions. At any rate, the extent to which people vote in EP elections rather negates the view that they feel it to represent them or that it is the institution they identify with.³⁹

Additional rights

The additional rights attached to citizenship are the right to diplomatic protection in a third country if their own state is not represented (Article 8c) and the rights to petition the European Parliament and to complain to the Ombudsman (Article 8d). These rights can only be seen as an attempt to pad out this section of the Treaty to give the impression of a healthy bundle of rights. Article 8c demonstrates a certain arrogance on the part of the EU, in that there may well be third states who will not recognise protection by another Member State and also a duplication, as this can hardly be described as a substantial right, given the widespread representation of EU states.

There is a certain archaically attractive sound to the petition right, reminiscent, as it were, of more monarchical type of government. But in reality the right will be familiar as it existed prior to the TEU - Article 138d EC. Interestingly, further reading of this article reveals that it is not confined to privileged EU citizens and also that it is limited to 'the Community's fields of activity'. So it is neither a new right, nor a citizenship right, nor does it relate to the Union as a whole. The right to complain to the Ombudsman 'concerning instances of maladministration in the activities of the Community institutions or bodies' is equally open to all residents in the EU. It does represent a Maastricht innovation but can hardly be said to advance the cause of democratic legitimacy.

Conclusion

That there would be a European Union citizenship was undoubtedly inconceivable even 10-15 years ago, let alone at the time of the formation of the Communities. Whether one regards this development as positive or otherwise depends upon one's position on the current state of European integration. It is ostensibly a step towards increased supra-nationality of the Union but its substance reflects little commitment on the part of the member states. If Article 8 is to remain no more than a symbolic statement then it insults the very people whom it proposes to benefit.

Citizenship and human rights will necessarily form part of any discussion of the constitutionalisation of the Treaties. Continued European integration rests upon a serious consideration of these matters, perhaps in a less heated and politically sensitive environment than that of the IGC negotiations.

Notes

1. This is a current buzz word in much EC/EU legal and political scholarship partly supported by developments at institutional level; the European Parliament has prepared a draft EU Constitution (EP 203.601, A3-003/94) and the Commission has endorsed a constitutional approach for the forthcoming Inter-governmental Conference. For recent discussion on the subject see Bellamy (1995) and Harden (1994), amongst others.
2. 'The equality of political rights, which is the first mark of American citizenship, was proclaimed in the accepted absence of its absolute denial' (Shklar, 1991, p.1).
3. For longer discussions on citizenship generally see Brubaker (1992), Clarke (1994) and van Steenberg (1994), amongst others.
4. Arguably, EU citizenship is so limited in nature that it is doubtful whether it merits classification as such.
5. *Piermont v France*, (March 1995), European Court of Human Rights case in which the Court partly based its decision upon the existence of EU citizenship (case involving the deportation of a German national from French Polynesia).
6. If the number of people who voted in the 1994 European parliament elections in another member state is an indication of the level of awareness of the rights attached to EU citizenship, then it appears that it remains a relatively closely guarded secret (*European Commission - Rapport sur le Fonctionnement du TUE*, Brussels, 10 May 1995, Annex I). The percentages vary from 32.29 percent in Ireland to 1.57 percent in Greece, with the average across the Community being approximately 10 percent of those eligible having voted. These figures will have been affected by the degree to which 'host' member states publicised the availability of the right. Here, as in many aspects of EU citizenship, we see that effective exercise of rights is determined to some extent by member state discretion.
7. For details of the background to the introduction of EU Citizenship see Closa (1992), Kovar and Simon (1993), Meehan (1993a and b) and d' Oliveira (1994), amongst others.
8. It had been intended that there would be a direct link between citizenship and fundamental rights but this was not achieved and can be regarded as a major inadequacy (see further O'Leary, 1995). It could

be argued, however, that an association between fundamental rights and citizenship would render the concept even more elitist in excluding fundamental rights protection from non-EU citizens in the field of EC law.

- 9 The question of whether EU citizenship can be regarded as declaratory or not was considered in the High Court in *R v. Secretary of State for the Home Department ex parte Gerard Adams*, 29 July 1994.
- 10 That is not to say that there had not already been non-economic developments in the EC; in particular the jurisprudence of the ECJ has been responsible in this regard. However, the functioning of the EC/EU remains fundamentally economically dictated.
- 11 Commission of the European Communities, *Report on the Citizenship of the Union*, COM (93) 702 adopted in accordance with the provisions of Article 8e, although because of delays in ratification of the TEU there was little to report on at that stage (December 1993). The Commission's Report on the Functioning of the TEU (effectively its first formal contribution to the 1996 IGC negotiations) contains a more in-depth and critical review of Article 8 and its implementation (see note 6 above).
- 12 *R v. Secretary of State for the Home Department ex parte G Adams*, High Court, 29 July 1994.
- 13 Citizenship-based arguments have also been raised in another case in the English courts - the *Phull* case - where the provisions of Article 8a have been invoked (in the High Court and the Court of Appeal) in order to prevent the deportation of the wife of a British citizen to India.
- 14 'The magic wand of dramatic language is waved in Article 8 (1) ... [it is] reminiscent of the first verses of the Gospel according to Saint John [and] defies the incredulity of doubting Thomases who believe that "*ex nihilo nihir*" (d'Oliveira, 1994, p.131).
- 15 Nationals of only three member states - Denmark, France and Ireland - participated in referenda concerning the ratification of the TEU. One can easily identify figures in public life who would wish to disassociate themselves from the concept, let alone imagine the many millions of less public nationals who might object to this forcible linking with the EU.
- 16 One example is the right which states in the United States had to determine citizenship of individual states prior to the creation of federal citizenship under the Fourteenth Amendment to the Constitution. This practice resulted in citizenship criteria varying from state to state depending upon the state's needs. See Raskin (1993) for lengthy discussion of these issues.
- 17 Declaration No 2' ... the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of declaration ... '. The second sentence implies that the discretion of the member states may operate so as to extend or reduce the category of nationals for Community purposes. See Closa (1995), O'Leary (1992) and d'Oliveira (1993) for further discussion of these issues.
- 18 The way in which member state discretion may be exercised in this context is demonstrated by two short examples: a high profile case in which UK citizenship was refused to Mohamed Al Fayed and Ali Fayed (resident in the UK for 30 years), allegedly because of their involvement in an anti-government scandal (*The Guardian* and *The Times*, 4 March 1995); and a recent Conseil d'Etat decision in France quashing a refusal to renaturalise long-time resident nationals of Mali and the Central African Republic because they were potentially polygamous and therefore unable to assimilate (see note of Errera, 1994, p.495). Future problems may be anticipated from the way in which potential EU states are developing their nationality laws and thereby excluding large minorities of long term residents - e.g. Latvia, where a recent Nationality Act has prevented many residents of ex-Soviet nationality from acquiring Latvian nationality.
- 19 Article 5 EC '[Member States] shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty'.
- 20 The UK 'opt-out' from the Social Protocol and Agreement under the TEU is an obvious example.
- 21 The European Parliament, in a Report on a Constitution for the EU (A3-0031/94 - 27 January 1994), implies in Article 47 of the Draft Constitution that member states which have not ratified the Constitution would have to choose to leave the Union.
- 22 This situation contrasts with other federal structures where it is not conceivable that a state would leave the federation and fundamental rights (political and social) are protected by federal instruments.
- 23 It is almost certain that fundamental rights will be discussed at the 1996 IGC as several member states - including Spain, where the first meeting will be held in December 1995 - and the Commission and Parliament have raised these issues.
- 24 Although this raises problems in connection with the UK Social Protocol and Agreement 'opt out' as UK national EU Citizens cannot be said to have exact parity of status with other EU citizens.
- 25 Initially the Commission suggested that such rights are granted 'constitutional status' (see note 11 above) and the *Adams* ECJ reference may elucidate what this means. But it is not clear that duplicate references for some rights can alter their status. The Commission JGC Report (note 6 above) however, acknowledges that Article 8 enumeration does not improve the rights to any extent (p.8). This

inconsistency does not aid in analysis of the implications of Article 8 and further highlights its weaknesses.

- 26 See Raskin (1993) for discussion of this issue in the United States.
- 27 The implications of excluding a potential 10-15 million long term resident non-nationals from the employment and service markets of the Union is, apart from its discriminatory consequences, arguably contrary to Articles 2 and 3 EC Treaty in its potential to distort competition within the EU (Hoogenboom, 1993). See generally Spencer (1994a and b).
- 28 See Hoogenboom (1993) and Groenendijk (1993), both of whom emphasise the fact that a group of second-class persons has been created by EC free movement provisions. The Commission has recently adopted a proposal for a Directive which extends limited free movement benefits to non-nationals.
- 29 For a longer discussion of free movement of persons in the EC see, for example, Steiner (1994).
- 30 There are many commentaries on the reasons why free movement rights came to be regarded as the privilege of specified sectors when arguably the original drafters may not have intended such limitations.
- 31 For example, receivers of services in the *Cowan* case - *Cowan v Tesor Public* (case 186/87) [1989] ECR 195 - a potentially crucial case as this category has the ability to encompass most persons who go to another member state, whatever their purpose. See O'Keeffe (1993) who suggests that *Cowan* may be used to justify extending free movement rights to non-nationals (p.520). However, in *Adams* the High Court rejected *Cowan* as a basis for allowing free movement to G. Adams. This appears to constitute an erroneous interpretation of *Cowan*.
- 32 See note 9 above.
- 33 The Commission JGC Report (note 6 above) acknowledges the weak nature of citizenship outlining its sporadic and incomplete rights.
- 34 See Commission Report on Citizenship, COM (93) 702.
- 35 Article 8b (1) was found to be incompatible with the French Constitution by the Conseil Constitutionnel and this was one of the reasons why a referendum was held in France before the ratification of the TEU. See Oliver (1994).
- 36 See d' Oliveira (1994, p.139). He also questions whether this right to vote is to be regarded as a right, or as a duty, as it is in some member states.
- 37 Citizenship may not have been acquired either because of restrictive *jus sanguinis* nationality laws (such as in Germany) or perhaps because dual citizenship is not permitted by the nationality laws of the non-EC country they might be affiliated with (such as Turkey). Brubaker (1992, p.27) draws attention to this effective taxation without representation and observes; '[T]hat the exclusion of non-citizens from the franchise for national elections has nowhere been seriously challenged, even in the many European states with sizable populations of long-term resident non-citizens, testifies to the force - indeed the axiomatic status - of nationalism in modern states'.
- 38 The EC makes many public gestures towards tackling racism (such as at the Corfu European Council) but ignored the implications of citizenship and the opportunities it presented.
- 39 One might suggest that an input into the determination of the Commission President would be perceived by many as a more direct representation 'in Brussels', given the high profile of this post. The Commission IGC Report provided figures for the level of take up of the Article 8b (2) rights in the June 1994 EP elections: only one non-national candidate was elected out of a total of 57 who stood as candidates; see note 6 above for voting figures.

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