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# Introductory report [on European citizenship, fundamental rights and the third pillar].

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*Actes du Colloque des Chaires Jean Monnet sur  
la Conférence intergouvernementale de 1996*

Bruxelles, les 6 et 7 mai 1996

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October 1996

## **Groupe VII**

### **Citoyenneté européenne, droits fondamentaux et troisième pilier**

#### ***European citizenship, fundamental rights and the third pillar***

- **Rapports introductifs / *Introductory reports***
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- **Débats en séance plénière / *Plenary session debates***
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## ***Introductory report of Professor C. Lyons***

*(University of Leicester)*

*(written with Professor S. Perrakis)*

### **Introduction**

This session of the symposium is devoted to an examination of the subjects of European Union citizenship, fundamental rights and Title VI (third pillar) TEU in the context of the 1996 Intergovernmental Conference. There are strong links between these three important issues and other sessions of the symposium, in particular 'Elaboration of a fundamental treaty' (Session 1) and 'Democratization of the European Union' (Session 2). However, these three subjects were considered to be deserving of independent treatment given their widely perceived importance for the future of the Union.

It is appropriate that debate on these issues should, with Session 1, frame the discussions of this symposium as it is becoming increasingly recognized that the very existence of the European Union is threatened by a crisis of legitimacy founded in insufficient support from the people who make up the Union. Too long dominated by market-related ideologies, the EU has failed to evolve as an entity with which many can identify. This is a trend highlighted in the Reflection Group report and one which many Member States endorse. There is, therefore, a broad base of support for an attempt to tackle this problem and the objective of this session is to examine closely these issues which are at the centre of the legitimacy and democracy debate.

The aim of this Session 7 will be a discussion of the current status of these three subjects and to propose ways in which they may be reformed and rendered more meaningful. The themes themselves are interlinked and this will be considered below but they will be discussed separately. The extent to which the citizenship and fundamental rights debate underpins any discussion about the future of the Union will be stressed throughout and links between democratization and Title VI issues will be examined. Based on the papers contributed to the session, a number of themes emerge which will help to focus our

discussions. As will also be seen below, the emphasis in the papers and in this report is on the need for a meaningful reappraisal of these issues in the wider context of reform of the evolving Union.

Account will be taken of positions on these issues in the institutional contributions to the IGC as well as the Reflection Group report. This synthesis of positions combined with the academic input will assist in formulation of realistic but more than symbolic proposals for reform.

## **I. Background report on the issues**

These being three very important and wide-ranging issues, the object of this report is not to attempt to cover them in an in-depth manner but to offer some thoughts on the present state of these issues in the EC/EU and suggestions as to how they may feed into the IGC process.

### **A. Citizenship**

As we are all aware, European Union citizenship was formally introduced for the first time by the Treaty on European Union (TEU) which provided for a new Article 8 to the EC Treaty which defines the concept and outlines some related rights and duties.

Some points on the current state of citizenship are as follows:

It is stated to be citizenship of the Union but is located in the first pillar and does not seem to have tangible connections with Titles V and VI, both of which cover areas of extreme importance to nationals of the Member States (MS).

It was not a facultative citizenship; the nationals of only three MS were offered the opportunity to accept or reject this status.

Citizenship rights may be classed as economic and political rights: the main economic right being the freedom to move within and reside in the States of the Union; the political rights being EC and local election voting rights, diplomatic protection, petition and Ombudsman rights. Even within these rights a distinction has been made between those which are privileged in that

they are reserved for citizens only and those which may be exercised by all in the Union (the latter being petition and Ombudsman rights).

The free movement right: the main question is what the reiteration of this right in Article 8 adds to the pre-existing situation under Article 48 et al. and related secondary legislation. There are arguably residual, non-economic categories of persons who might not have benefited under the previous provisions — has their status now changed? Further, there was not equal parity pertaining to all categories of persons before Article 8 (in that regulations and directives offer varying degrees of rights); how has this position been affected by the ‘constitutional status’ of the Article 8 provision? The free movement right is often expressed to be ‘fundamental’. This, together with the status of Article 8, raises questions in relation to fact that it is clearly not available in an equal manner to all citizens, nor to all persons within the Union. Is this limiting of an economic right justified? It may be said to be contrary even to the principles of Articles 2 and 3 of the EC Treaty. There have been suggestions that this situation should be changed (see Council Report 6906/1/95 and Commission proposals for directives in this area).

Political rights: concretely, these rights (apart from EP voting rights) do not strictly relate to the EC/EU, though undeniably improving the situation of citizens who move. There is room for more substantive Union-related political rights. Secondly, although there are clearly problems relating to the granting of political rights to non-nationals, could Article 8 be a vehicle for offering improved rights to permanently resident non-nationals who contribute financially to the Union? (It might be considered as a demonstration of political maturity on the part of the MS to agree to this and would end an aspect of ‘taxation without representation’ which is inappropriate in the modern Union.)

Duties: these have not been clarified under Article 8. There are suggestions that they might encompass taxation and military service but these are problematic. It might be suggested that, were citizenship to have been more elective, this aspect of Article 8 might receive more consideration.

This leads us to a brief consideration of how citizenship may feed into the IGC.

It has been suggested that the notion of a *pacte de citoyenneté* should be considered at the IGC. Before considering what this *pacte* might encompass, it is clearly necessary to solve the current problems with citizenship (some touched upon above) which devalue the concept. A *pacte* is a very positive

suggestion in that it incorporates the notion of citizenship as a contract between the incumbents and the grantors of same, rather than a unilateral statement of rights/duties. The *pacte* should avoid proffering a mere semblance of democracy and empowerment for the citizens of the Union. Citizenship undoubtedly offers an enormous potential as an instrument for continued effective European integration, but in order that maximum use may be made of this potential the concept needs to have a clear and open basis which is respectful of its beneficiaries.

## **B. Fundamental rights**

It is anticipated that fundamental rights will form part of the proposed *pacte*, in consideration of a possible accession of the EC to the European Convention on Human Rights (ECHR). This would undoubtedly be welcomed by the majority of Union citizens. (However, see below for a discussion of the recent ECJ opinion rejecting the possibility of accession based on the current state of the Treaties.) The very fact that human rights are being considered in this IGC (as they were also for the TEU) indicates how far the EC/EU has evolved since the beginnings of integration. It is interesting to consider that the evolution of human rights in the EC/EU has ironically been inverse to the historical development in other contexts. The EC/EU and its MS have been responsible for very high levels of development in social and economic rights and also 'fourth generation' rights including environmental rights. The situation with regard to civil and political rights remains less mature.

What is the current state of human rights in the EC/EU?

Within the EC the position of human rights as general principles of EC law is due to the initiative and support of the ECJ. However, it might be suggested that the Court, the contribution of which is undeniable in this regard, is at times a little uncomfortable with the position of rights in the EC (as cases such as *Grogan* demonstrate).

Human/fundamental rights also have a place in the Union. Firstly, respect for human rights and fundamental freedoms is mentioned in the Preamble to the TEU. Further, Article F(2) specifically refers to the ECHR and the constitutional tradition of the MS, essentially repeating the position of the ECJ. Rights are also mentioned in the second pillar; Article J.1 mentions human rights and fundamental freedoms as being part of the CFSP. What is interesting is that

this Article does not refer to the ECHR specifically, and potentially raises the question as to whether measures under Title V provide for the respect by the Union of rights in other international rights' instruments. Finally, Title VI contains a reference to the ECHR and the Geneva Convention on Refugees (Article K.2). There is no reference to 'the constitutional traditions' of the MS here.

There is, therefore, the possibility of potential confusion between the various positions on rights in the EC/EU. Of more significance is the fact that the various statements on human rights are all located in the TEU, a Treaty outside the jurisdiction of the ECJ (Article L). There is, therefore, no means of enforcing these rights in relation to the two pillars.

As regards the situation of the accession of the EC/EU to the ECHR as part of the *pacte*, this would undoubtedly be symbolically important for the Union and its citizens. It would not be an unproblematic development, however; as is well commented upon, the relationship between the ECJ and the Strasbourg Court would need to be refined. Secondly, the position of the ECHR in States where it is not directly applicable (such as the UK) would be affected by such an accession. More generally, it might be considered whether the rights of the ECHR are the most appropriate for the Union; much has been written on how they may be regarded as being outdated. Thirdly, there are aspects of Union competence which are not concretely covered by the ECHR — this is of particular importance in relation to the third pillar. This would support a suggestion that the Union needs an elaboration of rights specific to its current and future character (as well as accession to the ECHR).

### **C. Title VI, third pillar**

There is no doubt that the elaboration of Title VI TEU represented a very positive development compared with the previous position of the largely secret *ad hoc* activities and extra-communitarian measures. It is a significant and at first glance a surprising evolution that issues so intrinsic to national sovereignty (such as police cooperation, security, immigration and asylum) should be catered for in a founding Treaty.

However, the current state of Title VI can be criticized for several reasons. As the Commission has frankly pointed out in its report for the Reflection Group, the process has not worked and little has emerged from the third-pillar area.

The reasons for this failure include over-elaborate mechanisms (proliferation of committees, working parties), unanimity, the uncertain legal status of the measures which emerge and the confusing overlap with the EC pillar in some areas. However, of more substantive significance are the positions of the ECJ and EP in relation to the third pillar. Their limited involvement means a real lack of effective scrutiny over the third-pillar activities. Much is being written currently about the dilution of national sovereignty and MS rights in the EC/EU. The third pillar, however, effectively reinforces State rights, empowering the executive branch of our MS, allowing them to operate in sensitive areas without the kind of scrutiny which they might normally be subjected to in either a national or Community context. Article K.9 allows for the possibility of some judicial scrutiny.

There is no doubt that the third pillar needs to be carefully and sensitively handled. But the relationship between Title VI provisions and the democratization of the Union is not to be underestimated.

## **II. Summary and discussion of contributions**

There have been six written contributions to the session discussion; four on European Union citizenship (from Professor C. Kratz, Professor W. Lorenz, Professor M. Ross and Professor A. Syngellakis), one on human rights (Professor M. O'Neill) and, finally, one on Title VI TEU (Professor R. Fernhout).

### ***A. European Union citizenship***

**(a) Professor Catherine Kratz:** «Le pacte de citoyenneté européenne comme expression de l'alliance des peuples européens»

Professor Kratz presents a brief summary of the basic attributes of European Union citizenship before launching into the main part of her argument. She underlines, importantly, the perception of this status as not 'full' citizenship but 'economic citizenship'. The whole basis of this citizenship is the assumed existence of a 'European people'; this inevitably raises the question of the reality or otherwise of a 'European identity'. The relation between EU citizenship and free movement is critically explored — the emphasis on (economically based) free movement as foundational to citizenship leads to the questioning of whether Article 8 of the EC Treaty provides an empty ethos only. However,

it does provide the opportunity for a reappraisal of the role and function of free movement within the EU; is the intention actually to increase individual rights or is the main motivation to further the economic interests of the Community?

A further argument developed is the relationship between ideas of European culture and EU citizenship. From this a crucial point is made about the need to move away from 'nationality' as the basis for the furthering of individuals' rights in Europe — we need to go beyond nationality and develop an ethos of cultural plurality. This would have positive benefits for those currently classed as EU citizens under Article 8 of the EC Treaty in encouraging a greater sense of belonging to a collective adventure, but also for non-EC nationals living in the Union. In this respect the symbolism of the proposed *pacte de citoyenneté* is significant — in creating the impression of a devolution of cooperation to the people living in Europe rather than a distant, empty status granted from 'on high'. Free movement of persons ought to be seen not as an end in itself but as the key means of encouraging this *rapprochement* between the people who live in the Union. In this respect, it is clear that to succeed citizenship must be based on residence and not nationality.

**(b) Professor Walter Lorenz:** 'European citizenship between rights and lived reality'

Professor Lorenz's paper makes an important contribution to the ideological examination of the concept of (EU) citizenship. Here, also, we have a questioning of the role of nationalism in propping up (artificially?) the nation State and therefore the citizenship which flows from the latter. The paper succeeds in placing discussion of EU citizenship firmly within a more general, political science and historical discourse and will help promote discussion of the type which did not feed into the initial drafting of Article 8 of the EC Treaty. Some vital questions stemming from this discourse which further our analytical approach to EU citizenship are: to what extent citizenship constitutes community (or vice versa); its appropriateness as a means of ensuring solidarity amongst the members of a given polity; nationalism as a flawed and negative basis for that solidarity.

Citizenship has rarely had a connection with the expressed political will of its beneficiaries; rather it is a tool of the powerful centre most often founded upon expressions of exclusive nationalism, thus perpetuating inequality, limiting participation to a given group. The paper stresses, and this is crucial for the furthering of debates on Article 8, that 'equality must become a function of

citizenship and is therefore founded on diversity...' (p. 1). It proceeds to outline the important connections between citizenship status and social inequality. This is of vital interest to the developing EU as its Member States are all experiencing a change in the basis of welfare provision which fundamentally affects the State's relationship with its citizens and the notion of solidarity upon which this relationship is presumed to be based. This results directly in a fragmentation of that solidarity, the emergence of a social citizenship which increasingly has less connection with the centre of power and more with a combination of local or international-level allegiances. This, combined with a reduced level of interest in political participation, means a devaluation of the concept of citizenship (at the national level).

This contrasts sharply with the recognition of the importance of social enhancement as a factor in ensuring the continued existence of the EU. Are the current social policy initiatives capable of creating a social citizenship at EU level and therefore underpinning the status as defined in Article 8 (bearing in mind the fragmentation produced by the Social Policy Protocol)? Focusing on this facet of EU citizenship has the potential to bring about the base of solidarity required for the concept to have meaning. But it would be more honest to see EU citizenship as a 'dynamic' entity constantly requiring reevaluation and debate. In this regard, Professor Lorenz ends his paper with suggestions from the European Observatory on Citizenship as to how to analyse citizenship effectively as an ever changing concept.

**(c) Professor Malcolm Ross: 'Culture, citizenship and cohesion: constitutionalizing values in the European Union'**

Professor Ross's paper continues the trend highlighted in the discussion of Professor Lorenz's work which is to place the evaluation of EU citizenship in a wider ideological context in order that it may be rendered meaningful. The objectives are clearly laid out at the start of the paper and centre on the need for a values-based underpinning of the EU project and the extent to which this may be achieved through pre-existing concepts of citizenship, cultural goals and the cohesion processes. The potential and necessity of exploiting these concepts with a values mission in mind is located in the argument for furthering the constitutionalizing process in the Union.

The paper first of all examines the absence of a values-based underpinning to the European Union — this is an argument clearly pertinent to the citizenship debate but one which has much wider significance for the future and stability

of the EU. This values' lacuna may be explained by reference to the predominant single market mentality (and the inherent emphasis upon 'the national' in this context (see Kratz also here)), the evolution of variable geometry practice and philosophy within the Union and the dangers which fragmentation pose, and, finally, the failure to address the relevance of questions of identity. This succinct exposé of issues widely perceived to be fundamental to the serious appraisal of the EU's evolution is then applied to cultural protection, citizenship and cohesion in discussing how, through these concepts, a values-based constitution may be constructed.

The potential of (the TEU inserted) Article 128 is explored in Section 2 of the paper. This Article is revealed as offering one of the bases of competence located in the Treaties for addressing the paucity of values in the Union. It is a possibility which has not been widely explored, thus the significance of making this connection in this context. As well as the potential offered by this area of the Treaty, possible problems are also touched upon — such as how much local derogation would be permitted when establishing values under this heading.

Values are conceptually an inherent aspect of citizenship but in the case of the current state of EU citizenship it is, as Professor Ross points out, 'an empty vessel waiting to be filled' (p. 3). There is a possibility of using the nascent duties aspect of Article 8 to promote the development of shared citizenship which would be based on respect for diversity. The enormous capacity which the status offers in contributing to the emerging constitution has not even begun to be explored. Much the same might be said of economic and social cohesion and the extent to which this goes beyond a goal of the Union but may be used to articulate issues and problems constitutionally.

The final section restates the essential points underlining the extent to which values are both an ignored but essential aspect of the Union. Debate on this subject will serve as an important tool in addressing a problem perceived by many EU citizens — the erosion of sovereignty in their Member State which has been replaced by a far removed entity without readily observable or approachable principles.

**(d) Professor Anna Syngellakis:** 'The place on the agenda of the IGC of environmental rights and values as an expression of citizenship and human rights'

Professor Syngellakis's paper completes the analysis of EU citizenship for this symposium and it is appropriate that her work further elaborates ideas explored in the previous papers in calling for an increase in the substantial importance of citizenship which necessitates inputting foundational values. In particular, the paper interestingly makes the connection between environmental rights and values and the underpinning of citizenship status. This is a furthering of the arguments developed in Professor Ross's paper and also a precise example of the way in which citizenship has to be viewed as a multifaceted status, as evoked by Professor Lorenz. The arguments also demonstrate the extent to which we need to go beyond free movement as the only tangible benefit to citizens as discussed by Professor Kratz.

The paper pays close attention to the Reflection Group's report and locates in it the necessary impetus for striving to give real effectiveness to EU citizenship by means of attaching to the latter a substance which has direct meaning for the people who live in Europe and from whom the legitimacy of the EU has to be derived. The report is conscious of the current weaknesses in environmental policy and according to this paper allows for the IGC to clarify and strengthen existing policy. Environmental protection is classed among those issues which the Reflection Group acknowledged were of great public concern. Professor Syngellakis explains why environmental protection may be seen as intimately connected with the substantiating of citizenship rights by bequeathing a values base to the same. Environmental policy is ideally suited to incorporation within the fleshing-out of citizenship as it is already located within the Treaties. It is therefore possible to accept its constitutional status and infer a relationship with human rights.

This is a contribution which relates importantly to both the citizenship aspect of this session and also human rights — in exposing the potential scope of the latter with a revised Article 8 serving as the ideal tool to achieve this end. Environmental human rights are clearly an important element of a redefinition of rights which will occur in the future and the Union needs to be aware of this trend. Professor Syngellakis points out the irony of the Union legal machinery already offering procedural environmental rights but no substantive environmental right (p. 3).

The further justification for inputting an environmental strand in the Union's definition of citizenship rights is the relationship between the environment and employment taking account of the social significance of the latter for the people who make up the Union. This paper, overall, may be seen as exploring

an important, innovatory aspect of the definition of fundamental rights in the Union and their importance in terms of creating a values-based Union citizenship.

### ***B. Fundamental rights***

**Professor Michael O'Neill:** 'Accession to the European Convention on Human Rights: choices and challenges'

Professor O'Neill's paper deals with a subject which is of both topical and long-term importance to the nature of the Union and to the status of citizenship which is the question of the possible accession of the European Community to the European Convention on Human Rights. This is particularly topical given that the European Court of Justice has recently (28 March 1996) delivered an opinion on the question — Opinion No 2/94. This ECJ decision postdates Professor O'Neill's paper. An examination of the effect of this opinion will form an important part of this part of the session discussions.

Despite the very recent development in this area, this paper makes essential points relating to the significance of, and possible problems deriving from, potential ECHR accession. It should be pointed out at this stage that the Court's decision states that there is no current EC competence in the field and therefore many of the arguments in this paper remain pertinent for the future. The piece provides a history of the development of this question within the EC/EU — much of the impetus in the past coming from the European Commission and the European Parliament. As well as increasing individual protection within the EC/EU, accession would, it is argued, have political significance in 'reinforcing the status of the legal personality of the European Community' (p. 1).

However, despite the obvious and arguably necessary benefits of ECHR accession, several legal and practical problems are raised; these include the ECHR rights focus which is mainly in the area of civil and political rights (rather than social and economic), the problems posed by the necessary 'redefinition of adjudicative jurisdiction in the Community' (p. 2) located in the potential conflict between the ECJ and the European Court of Human Rights (ECourtHR) and finally the appropriate legal/constitutional mechanism for accession. It is particularly appropriate that this point is developed at length in the paper as it was essentially this question which the ECJ recently

pronounced upon. Professor O'Neill bases his examination of the questions upon an analysis of the ECJ decisions relating to the European Economic Area to the extent which they expose problems of the nature of the EC's legal order.

In addition, some of the specific problems of accession are addressed including the potential need for a 'major reappraisal of the current concept of European citizenship' (p. 3) given that this is a discriminatory status. Even though the Court has now pronounced upon this question, many of the arguments raised in this paper continue to be pertinent — such as the nature of ECJ jurisdiction and problems of coordination between the ECJ and the ECourtHR.

### *C. Title VI TEU (the 'third pillar')*

**Professor Roel Fernhout:** 'Justice and home affairs: immigration and asylum policy — from JHA cooperation to communitarization'

Professor Fernhout's expert, lengthy paper constitutes a fundamental insight into the issues raised by this area of the Maastricht Treaty as well as proposing innovative suggestions for reform of this aspect of the EU's functioning. The paper explicitly deals with one area only of the justice and home affairs (JHA) pillar, namely immigration and asylum. (Discussions during the session will, however, take some account of other aspects of Title VI operation in the areas of police cooperation and control of terrorism.)

The paper presents a comprehensive and authoritative account of the development and current state of the functioning of this aspect of the EU. Many of the problems which may currently be identified with the third pillar in the area of immigration and asylum may be located in the examination of how this area came to be developed in the first place. Questions of competence have been characteristic of this area since the late 1970s when the Commission first manifested an attempt to legislate in the area (given the political sensitivities involved there have been clashes with the Member States many times); this resulted in the setting-up of the *ad hoc* system of cooperation in this area which is in turn now reflected in the structure and ethos of the third pillar. This emphasis on the competence dilemma in this area links importantly with other subjects being discussed in this symposium — particularly constitutionalism. The EU cannot be viewed as a mature political entity until this fundamental issue has been clarified and it therefore continues to be the basis of constitutional debate.

The ongoing Community versus intergovernmental debate was (arguably) unsatisfactorily resolved in the drafting of Title VI TEU. Professor Fernhout records the influences upon this section of the Treaty, among them the Luxembourg and Dutch Government proposals. This dispute-based background resulted in what is appropriately described as the 'schizophrenic' structure of the third pillar. There are manifestations of both intergovernmental and communitarian principles and practices and these are at the root of the lack of success and flawed functioning of the pillar. The paper outlines in very incisive detail the various decision-making processes which exist and the different forms of instruments which may emerge from this pillar mechanism. The minimal success of JHA is charted, demonstrating (as the Commission clearly pointed out in its report on the functioning of the TEU, 10 May 1995) that this pillar has in effect failed to operate successfully. The only real tangible output has been the establishment of information exchange systems (CIBGA and CIBGCI).

The particular weaknesses are examined in turn: the legal status of JHA instruments, the unanimity requirement, the limited role of the Commission, the cumbersome decision-making process, lack of democratic and judicial supervision. Professor Fernhout's paper concludes with a consideration of the possibilities for reforming the third pillar — among the options discussed are: full communitarization, abandonment of Title VI, clarification of the legal status of instruments, the streamlining of decision-making, judicial and democratic supervision and substantive amendments. The paper expresses the opinion that full communitarization will not be possible given the current state of political will in relation to this area of EU activity. However, a number of positive, substantive suggestions are made which, even in the absence of full communitarization, would serve to render the third pillar more effective and reflective of the concerns expressed about its operation so far. These include an indication of principles and objectives rather than a mere statement of policy areas to be covered, and a clarification of the relationship between the Community pillar and Title VI where conflict exists. The paper makes extensive reference to the recommendations of the Dutch Standing Committee on this subject.

There is an important suggestion made with regard to the relationship between Title VI and the definition of EU citizenship, placing the reform of the former within a larger framework of a Union based on the abolition of racial discrimination and promotion of equality (reference to emphasis on plurality and values in previous papers) in suggesting a change to Article 8 allowing EU citizenship to be based on five years' residence in the EU. In terms of judicial

supervision, another constitutional aspect of this pillar, the Standing Committee suggestion is a simplification of Article K.9 at the IGC or alternatively, in the guise of a more radical step, a suggestion as to a redrafting of Article 100c which would allow for more communitarization. The value of this paper cannot be underestimated both in its knowledgeable account of the history and operation of Title VI but, more fundamentally, in its exposé of the issues which are of concern and in proposing alternative and realistic suggestions for reform.

### **III. Themes/questions for debate**

#### *(a) Citizenship*

- General broadening of citizenship status going beyond the definition and rights in Article 8;
- The function and reality of the provisions for the free movement of persons;
- The need to move away from nationality as a reference point for fundamental rights;
- The need for an ideological input into the examination of citizenship, thus furthering a real assessment of the function and role of citizenship;
- Emphasis on diversity, plurality and equality to feed into citizenship and the development of fundamental rights;
- EU citizenship as an ongoing project reflecting the changing social context as well as the evolving EU;
- The need to identify appropriate values in the EU;
- The position of non-EC nationals resident in the EU;
- The emphasis on citizens' need for security and the extent to which this affects fundamental rights;
- The need to render citizenship a meaningful concept;

- Non-discrimination as an overarching theme for these three issues;
- The role of citizenship duties;
- Competence as a connecting factor between the three aspects of this session and their relationship with constitutionalism in the Union;
- The need to develop new ways of approaching and evaluating the concept of citizenship in this supranational context — a novel development requiring new analysis;
- The opportunities offered by the undeveloped edifice of citizenship — for example to develop an innovatory approach to citizens' rights (which would encompass environmental rights).

(b) *Fundamental rights*

- Accession to the ECHR;
- Impact of the recent ECJ opinion in this regard;
- Time to consider the development of fundamental rights specific to the character of the Union;
- The opportunity to exploit existing areas of the Treaties (e.g. environmental policy);
- The importance of making a connection with social policy in this context;
- Alternatives to ECHR accession.

(c) *Title VI TEU*

- JHA — a key constitutional area;
- JHA and questions of competence and sovereignty;
- Protection of individual rights under JHA;

- Reform of the juridical and institutional lacunae under JHA;
- The need for policy objectives under JHA.

#### **IV. Concluding remarks**

It is clear that citizenship, fundamental rights and the third pillar will, in some form, and to varying degrees, be considered in the IGC. There is an undoubted enormous potential in all these issues to guarantee further effective European integration. Whether that potential will be fully exercised by the MS remains to be seen. One of the fundamental dilemmas for the future is the relationship between political union and market integration. The very fact that citizenship, fundamental rights and third-pillar issues are already present in founding Treaties signifies that a bridge has been established between these two directions. Future integration may well depend upon how far across the bridge our MS are willing to go. It would be a negative development were the MS to consider these areas appropriate for diversification, i.e. subject them to the principles of variable geometry; citizenship and fundamental rights are inherently inappropriate for an *à la carte* treatment. Progress of a positive nature, on the other hand, would be ensured by our MS being fully cognizant of their responsibility in internally shaping the very character of the Union by identifying its moral underpinning and also importantly, externally, in demonstrating to the world the Union's commitment to democracy and rights, which, after all, constituted the very basis of the origin of European integration.

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## *Plenary session debates*

### *Report of Professor Lyons*

This report represents a short summary of the debates and discussion which took place during the group session.

Some preliminary points to be emphasized concerning our discussions are:

- (i) the nature of consensus reached in Group VII;
- (ii) the two aims of Group VII: first, to make concrete suggestions concerning these areas of the Union's future and, secondly, to highlight the need for new approaches to these issues because the current stage of the Union development requires new formulations of entirely new, non-nation State based theories of citizenship and human rights.

#### *A. Citizenship*

Concerning the concrete suggestions made by Group VII, its members firstly wished to insist that the IGC recognizes that the citizens of the Union need more than gestures or declaratory statements. Citizens' intelligence ought to be respected in acknowledging that they will realize that Article 8 offers very little in its current state. There is a clear need to go beyond aspirations and provide a real substance for Union citizenship.

There is currently a fundamental problem concerning Union citizenship which is that its true function is in fact uncertain. It is not clear whether it has a narrow function (i.e. to bring the citizen closer to the institutions of the EU and thereby legitimize them) or whether it has a larger ambition (i.e. assisting in the creation of a European society which furthers European integration). In the absence of unambiguous expression of the function of Article 8 of the EC Treaty it is difficult to ensure positive progress in this area.

Group VII identified two major objectives that the IGC might concentrate on:

- (i) to improve the rights of citizens as currently defined in Article 8 of the EC Treaty;

(ii) to address the impact of Article 8 on those excluded from its benefits.

There was very strong support in the group for the need to input a values' element into any revised definition of citizenship, and in doing so to go beyond a traditional definition of values, and include social, environmental and cultural values.

There is also a need to review the economic emphasis currently underlying the Article 8 definition of citizenship. Suggestions made included the possibility of having residence rather than nationality as the basis of acquisition of EU citizenship (this could be either a pan-European defined criterion or Member State based) or alternatively the granting of rights listed in Article 8 to all permanently resident non-nationals. Whatever changes are made to the definition, it is crucial that progress be made towards really rendering the so-called 'fundamental' right to free movement truly fundamental; this is currently the primary right of citizens and given the extent to which it is a clear manifestation of the real benefits of European integration it is important that its limitations be recognized and tackled. Finally, in this respect also, the continuing exclusiveness of free movement right (in that it is available largely to economically active Member State nationals) must be recognized as the discriminatory aberration it is.

### *B. Fundamental rights*

Concerning the question of fundamental rights, most of the audience will be aware of the European Court of Justice's recent opinion (No 2/94) on the competence of the Treaty to facilitate accession to the European Convention on Human Rights, which essentially ruled that the scope of Article 235 of the EC Treaty is insufficient for this purpose. This ruling presents the IGC with an opportunity to consider the position of fundamental rights; Group VII suggested that there was a real need to go beyond the question of this accession to consider developing a dedicated system of fundamental rights for all the pillars of the EU which reflects the special nature of the Union and its competences.

There were, in addition, several suggestions in this context: to amend Article L TEU to include Article F, to introduce a positive statement on fundamental rights in the first pillar, to change Article 3 of the EC Treaty to include a reference to the prevention of racism and xenophobia, finally, to consider a formulation of rights beyond the civil and political and to include social, environmental and cultural rights.

### *C. Title VI TEU (third pillar)*

Group VII considers that there are specific issues that the IGC should look at:

- (i) a fundamental consideration of the revision of the pillar structure as inappropriate to the issues currently located in the third pillar;
- (ii) policy objectives to be incorporated in the third pillar;
- (iii) gradual communitarization of some of the areas found in the first pillar;
- (iv) a change to Article K.9 to render the procedure easier to implement;
- (v) tackling the confusion in the overlap between Article 100c and the third pillar;
- (vi) taking account of the importance of some form of democratic control over the important issues currently found in the third pillar.

This report has had to be brief given the time constraints but a few final words: it is true that the spirit of Jean Monnet has been very present throughout these two days; one of his important statements was ‘Nous ne coalisons pas des États, mais nous unissons des hommes’; in that sense, we must really recognize how these three issues must be treated as an important part of the Union of the future.

### *Discussion*

About citizenship, Professor Stephanou admits the legal residence criteria as criteria for free movement but does not agree with the extension of these residence criteria for the other rights. We cannot avoid the difference between the English liberal cosmopolitan view of citizenship and the continental view of citizenship which, to some extent, involves some kind of exclusion (the second view is favoured by Professor Stephanou).

Le professeur Pechstein revient sur la question de la citoyenneté. Le concept de citoyenneté européenne n'existe pas jusqu'à présent; on a ressorti d'anciennes notions, et la seule chose vraiment nouvelle est le droit de vote aux élections communales (et encore, cette disposition est limitée). Il faut se demander comment on pourrait codifier les droits fondamentaux d'une manière accepta-

ble par tous. De plus, les droits sociaux et culturels n'ont pas une valeur juridique équivalente à celle des droits fondamentaux classiques. Ceux-ci ne bénéficient pour le moment que d'une faible protection dans le cadre de la convention européenne des droits de l'homme (les dispositions relatives à la propriété, par exemple, ne sont d'aucune aide réelle pour les particuliers). Cette convention sert uniquement à rassurer les peuples.

Concernant le troisième pilier, le problème n'est pas la complexité de la procédure prévue à l'article K 9, mais le manque de volonté politique d'utiliser cet article.

Le professeur Pertek revient sur la question de la citoyenneté. Si on s'interroge sur ce qu'on pourrait modifier dans l'article 8, il y a trois possibilités: changer la définition, élargir les droits ou supprimer les restrictions. Concernant la première possibilité, il est difficile d'envisager que la notion de citoyens européens comprenne les nationaux et les résidents. La vraie question est: Quels sont les droits des résidents des États tiers? Il faudrait donc indiquer dans le traité que les droits ne sont pas limités aux citoyens et pourraient être étendus à d'autres catégories, en application du droit communautaire ou du droit national. Concernant la deuxième possibilité, il est difficile d'imaginer d'autres droits à invoquer. Concernant la dernière possibilité, il faut souligner que la libre circulation est encore limitée par des restrictions très importantes (par exemple articles 48, paragraphe 4, et 55); il est contradictoire qu'on puisse être parlementaire européen et représenter un pays dont on n'a pas la nationalité, mais qu'on ne puisse pas être haut fonctionnaire dans ce pays. Il faudrait à terme abolir ces restrictions.

Professor Lyons concludes by responding briefly to Professor Stephanou. There is a problem with the redefinition of citizenship in Article 8 but the motivations for doing so are an important starting point; the need to promote diversity and non-discrimination has been considered by Group VII as being a better starting point than looking at more formal problems concerning different definitions of citizenship.

Concerning Professor Pechstein's intervention, until the free movement of persons is rendered truly effective, it will not serve all the citizens in the way it is supposed to. Professor Lyons disagrees with Professor Pechstein's opinion that non-classical rights such as environmental rights cannot be considered or rendered fundamental; environmental rights are actually already guaranteed by

some national constitutions. Why limit the development of rights in the EU to classic nation State based rights? We have an opportunity to go beyond that in developing the Union, so we should take it. Concerning the European Convention on Human Rights, in going beyond the Convention, at least you could begin to deal with some of its inconsistencies.

Professor Pechstein underlines that if the EU has access to the European Court of Human Rights at Strasbourg there will be a procedural problem; it does not seem to be a good thing.

Professor Lyons responds by reminding the group that the ECJ's recent opinion on this question (2/94) dealt with this question and it was discussed in the group session where, however, it was generally agreed that there was a need to have a wider perspective on rights and that the issue raised by ECHR accession is only one aspect of the development of rights in the EU.

## *Conclusions of Group VII*

### *Report of Professor C. Lyons*

#### **General remarks**

It is considered crucial that the IGC treats citizenship, fundamental rights and the third pillar in a serious and meaningful way, fully cognizant of their importance for both the people who live in Europe and the positive evolution of the Union itself. In that regard, there are four general considerations:

- (i) the need to avoid mere gestures or declaratory statements;
- (ii) the need to avoid perpetuating discrimination in any way in the development of these issues;
- (iii) the need to take account of the impact of enlargement on these aspects of the Union;
- (iv) in examining the changes necessary in these areas the IGC should consider the larger question of what kind of Europe/European Union is being created.

#### **I. Citizenship**

An important question to assist in framing the discussion of possible changes is:

What is the true function of European citizenship as introduced by Article 8 of the EC Treaty?

Considerations for reform include a twofold objective:

- (a) the need to improve the rights of EU citizens (as currently defined);
- (b) the need to address the impact of Article 8 of the EC Treaty on permanently resident non-nationals.

The IGC should consider:

- reviewing the economic emphasis behind the Article 8 definition and rights and duties;
- changing the definition of citizenship in Article 8(1), incorporating a move away from nationality as a basis of the definition towards a less discriminatory definition based on residence;
- (or alternatively) granting the rights listed and referred to in Article 8 to all permanently resident non-nationals;
- the importance of inputting a values-based system as fundamental to citizenship of the EU (in particular social, environmental and cultural values);
- re-examining as an imperative the ‘fundamental’ right to free movement of persons and rendering it truly fundamental by removing restrictions which operate in this regard. The symbolic and practical effects of improvement in this regard cannot be underestimated in giving citizens an impression of real benefits derived from European integration;
- taking account of the importance of a social policy orientation element in citizenship of the Union.

## **II. Fundamental rights**

The discussion group underlined two significant general considerations in this regard:

- (a) that the IGC should regard the European Court of Justice’s recent opinion (Opinion 2/94 — 28 March 1996) as a valuable opportunity to introduce positive reforms in this regard;
- (b) that the IGC cannot ignore the importance of having an identifiable fundamental rights element relating to all pillars of the Union.

The following suggestions for reform were made:

- that the IGC looks beyond the question of accession to the European Convention on Human Rights, because the evolving Union demands a dedicated system of fundamental rights which takes account of Union

competences and also, importantly, of the unique and novel nature of the Union as a political and legal entity requiring a new formulation of, and approach to, fundamental rights;

- an amendment to Article L TEU to include Article F TEU;
- the introduction of a positive statement on fundamental rights in the first pillar (EC);
- an amendment to Article 3 of the EC Treaty to include a reference to the prevention of racism and xenophobia;
- that the IGC takes account of rights beyond the civil and political, in particular fundamental social rights, as well as the development of environmental and cultural rights.

### **III. Title VI TEU (third pillar)**

- Consideration of a revision of the pillar structure as being inherently inappropriate to issues included in the third pillar;
- Policy objectives to be input into Title VI TEU;
- Gradual communitarization, for example in the form of extending Article 100c to the areas of asylum and immigration;
- Change Article K.9 TEU to render the procedures envisaged easier to implement;
- Tackle the confusion currently operating in the overlap between the first and third pillars in this context;
- Take cognizance of the importance of democratic control in the third pillar in the larger context of issues of democratization and legitimacy.

*Liste des contributions des participants / List of participants' papers*

**Dr. Boruta** (université de Lodz, Pologne): «Les droits sociaux fondamentaux — les droits fondamentaux (proprement dits) de seconde génération».

**Prof. Fernhout** (universiteit Nijmegen): 'Justice and home affairs: immigration and asylum policy — from JHA cooperation to communitarization'.

**Prof. Kratz** (Lancaster University): «Projet de réflexion sur la citoyenneté européenne — Le pacte de citoyenneté européenne comme expression de l'alliance des peuples européens».

**Prof. Lorenz** (University College, Cork): 'European citizenship between rights and lived reality'.

**Prof. O'Neill** (University College, Galway): 'Accession to the European Convention on Human Rights: choices and challenges'.

**Prof. Ross** (University of Leicester): 'Culture, citizenship and cohesion: constitutionalizing values in the European Union'.

**Prof. Syngellakis** (University of Portsmouth): 'The place on the agenda of the IGC of environmental rights and values as an expression of citizenship and human rights'.



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