EUROPEAN CITIZENSHIP: 15 YEARS AFTER THE MAASTRICHT TREATY

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Abstract
One of the most symbolic innovations of the Maastricht Treaty in 1992 was the second Part of the EC Treaty, called "Citizenship of the Union", that gave rights and duties to European citizens. The European citizenship was introduced following a Spanish proposal at the Intergovernmental Conference. The new concept was welcomed, even if some authors showed their scepticism regarding the real meaning of it.
15 years after the Maastricht Treaty, the paper analyses the concept of European citizenship in the light of the recent evolutions, thanks to the European Court of Justice as well as thanks to soft law (Reports of the Commission and the European Parliament). Fortunately, the meaning of the European citizenship has evolved in a certain extent that may augur the birth of a real new citizenship, that allows Europeans to participate in the future of their political community.

Keywords
European citizenship, rights of European citizens, nationality, residence

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1. Introduction

European Citizenship seems to come back at the heart of the debates on the future on the European Union, especially after the French and the Dutch "no" to the European Constitution. When it was first introduced by the European Community Treaty of 1992, it did not miss to make flowing rivers of ink. Then the passion cooled down and the topic was somehow left aside.

However European citizenship is still a decisive concept of the European construction, or at least, could become so. Today, European citizens benefit of some specific rights and duties: freedom of movement; right to vote and to stand in local and European elections in the Member State of residence; right to apply to the European Ombudsman; right to petition to the European Parliament; entitlement to protection, in a non-EU country in which a citizen's own Member State is not represented, by the diplomatic or consular authorities of any other Member State. Article 17 TCE precise that "Every person holding the nationality of a Member State shall be a citizen of the Union", and, since the Amsterdam Treaty: "Citizenship of the Union shall complement and not replace national citizenship".

15 years after the Maastricht Treaty, I would like to analyse the concept of European citizenship in the light of the recent evolutions, thanks to the European Court of Justice and thanks also to soft law (Reports of the Commission and the European Parliament). Fortunately, the meaning of the European citizenship has evolved in a certain extent that may augur the birth of a real new citizenship that allows Europeans to participate in the future of their political community.

In the first part of the presentation, I will analyse all the rights contained in the second part of the EC Treaty (free movement, "political" rights, right to a diplomatic protection, right to petition to the European Parliament and right to apply to the European Ombudsman). In the second part, I would like to show that the question "who is a European citizen?" is a different question from "who can be entitled of European citizenship rights?" This finding can have especial consequences on the meaning of European citizenship. Finally, I will do some proposals as final remarks in order to give a European and political dimension to the citizenship of the Union.

2. Citizenship of the Union as a set of rights

Since 1992, article 17 ECT provides that "Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby". The following articles entitle citizens to a set of rights from free movement to diplomatic protection. The Treaty of Amsterdam added later that "Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language" (art. 21 TCE).

All of theses rights can be classified into two categories : the first one encompasses all the rights that foster the free movement of citizens and the second one the rights that reinforce the protection of European citizens, independently of the fact that they move or not.

2.1 Rights aimed at fostering freedom of movement

2.1.1 The right to free movement

As Orsolya Farkas[1] mentioned regarding the right to free movement, article 18 TCE has operated a disconnection between free movement and economic activity. Therefore a large number of persons has been entitled to move and reside freely within the territory of the Member States. The directive 2004/38[2] has been adopted to clarify the legal framework of free movement of citizensand to recognize new rights relating to freedom of movement (for example, a permanent right of residence). It has been presented by the European Commission as a mean to "encourage mobility of Union citizens across the European Union, which in return will have a positive impact on the competitiveness and growth of European economies". Unfortunately, until now, only two Member States have transposed the directive, which demonstrates clearly the real will of Member States to give a full sense to free movement of citizens.

The role of the ECJ has been fundamental to realize the disconnection and to recognize that "the Union citizenship is destined to be the fundamental status of nationals of the Member States" (Grzelczyk, C- 184/99, 20 September 2001). The ECJ has interpreted largely the principle of non-discrimination established in article 12 of the ECT to apply it to every case of free movement. As the Commission explains clearly in the fourth report on Citizenship of the Union, "The Court of Justice gave a number of major judgments strengthening the protection of Union citizens in the context of Articles 12, 17 and 18 during the reporting period. It attaches particular importance to the principle of non-discrimination on the grounds of nationality in connection with Union citizenship: the fundamental status of Union citizenship enables those who are in the same situation to enjoy within the scope of the Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for. On the other hand, different situations must not be treated in the same way. Situations falling within the scope of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular of the right of free movement"[3].

[1] See Orsolya Farkas, Free movement and European citizenship : leaving behind the labour supply approach, Paper given at the Alumni Conference of the European University Institute, Oct. 2006.
[2] Directive on the right of Union citizens and the Members of their families to move and reside freely within the territory of the Member States. .
[3] Fourth report of the European Commission on Citizenship of the Union, 26/10/2004, COM (2004) 695 final.

2.1.2 The so-called "political" rights

One of the most important innovations of the European citizenship was the introduction of article 19 ECT that offers to every citizen of the Union a set of political rights. Contrary to other rights of the European citizenship that the Maastricht Treaty had only recognized "constitutionally" (like the right to move or the right to petition to the European Parliament), those rights appear for the first time in the European sphere in 1992.

The European citizen disposes of two new rights that give consequently a certain political dimension at the new born citizenship. The European citizen is entitled to a minimum of political rights, wherever he lives all over the territory of the Union : he can vote and stand as a candidate in municipal elections in the city he lives and vote and stand as a candidate in European elections in the State of his residence.

Globally, these rights seek two objectives: on the one hand, these two rights tend to reinforce the democratic legitimacy of the Union, by rendering it closer to the European citizens and so trying to interest them to the future of the European integration. On the other hand, the so-called "political" rights of the citizenship of the Union appear also to be an application of the principle of non-discrimination. They aim at fostering the political participation of non-national citizens in local and European spheres, and then to prevent that people who move from its country to another Member State be deprived of its full political rights.

Specifically, Art 19.2 ECT constitutionnalises at European level a right and a practice that existed before the Maastricht Treaty in some Member States, like Belgium, Netherlands, Ireland, Italy[4] and the United Kingdom[5].

Except the fact that art.19.2 ECT can be considered as an application of the principle of non- discrimination, the European Commission presented it in the memorandum of the Directive[6] as a mean to reinforce the legitimacy of the European Parliament : "article 8B.2 ECT aims to ensure that all the citizens of the Union could exercise effectively their right to vote and to stand at the European Parliament and to reinforce the democratic legitimacy of the European Parliament as well as to reduce the democratic deficit that has been very often denounced regarding the Community". Some authors were very enthusiastic with article 19 ECT, saying that « de l'élection, par les seuls nationaux, d'une assemblée représentant les peoples de chacun des Etats membres, on se dirige vers l'élection par les citoyens européens d'un Parlement représentant le peuple de l'Union, ce qui est de nature à modifier le principe même de représentativité et partant de la légitimité du Parlement européen »[7]. In other words, the European Parliament would have become the Assembly of the representatives of a "people of Europe" and not of "peoples of Europe".

[4] In the case of Italy, it was possible for a European national not only to vote in European elections but also to stand as a candidate.

[5] In the case of the United Kingdom, it is quite different because UK recognises the right to vote only to British citizens, Irish and to Qualified Commonwealth Citizens.

[6] COUNCIL DIRECTIVE 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals. *OJ L 329, 30.12.1993, p. 34–38*

[7] D. Simon et R. Kovar, "la citoyenneté européenne », Cahiers de Droit Européen, nº3-4, 1993.

This is also confirmed by the fact that the Directive does not ask, in practice, for a length of residence in order to be able to vote or to stand. Article 5 says : "If, in order to vote or to stand as candidates, nationals of the Member State or residence must have spent a certain minimum period as a resident in the electoral territory of that State, Community voters and Community nationals entitled to stand as candidates shall be deemed to have fulfilled that condition where they have resided for an equivalent period in other Member States. This provision shall apply without prejudice to any specific conditions as to length of residence in a given constituency or locality." With no doubt, the fact that European citizens do not have to demonstrate any kind of integration in the Member State of residence (by length in that case) to be able to exercise their rights confirms that the election of the members of the European Parliament is not theoretically the election of the representatives of the Member States at the European Parliament but that theses elections are the elections of the representatives of the "people of Europe", every reference to nationality apart.

Unfortunately, the rate of participation of European citizens that live in a Member State different from their own is still very low. A communication of the Commission on the application of the Directive 93/109/EC declares that only 9 % of EU citizens residing in a Member State other than their own were registered to vote in the 1999 elections to the European Parliament, even if it represents a clear improvement on the 1994 elections. The right to stand was exercised even less, since there were only 62 non-national candidates at the 1999 elections, only 4 of who were elected (2 in Belgium, 1 in France and 1 in Italy)[8].

In the case of municipal elections, the Council adopted the directive 94/80 on December 1994[9] that obliges Member States to recognize to every European citizens the right to vote and to stand in municipal elections independently of their nationality. The directive is presented as "a new stage in the process of creating an ever-closer union among the peoples of Europe". It is based on the same principles as the directive for European elections. Concretely, "the right to vote and to stand as a candidate in municipal elections in the Member State of residence, embodied in Article 8b (1) of the Treaty establishing the European Community, is an instance of the application of the principle of equality and non-discrimination between nationals and non-nationals and a corollary of the right to move and reside freely enshrined in Article 8a of that Treaty". Then, says the Council, "Article 8b (1) does not presuppose complete harmonization of Member States' electoral systems; the aim of that provision is essentially to abolish the nationality requirement to which most Member States currently make the exercise of the right to vote and to stand as a candidate subject".

[8] Communication from the Commission on the application of Directive **93/109/EC** to the June 1999 elections to the European Parliament: Right of Union citizens residing in a Member State of which they are not nationals to vote and stand in elections to the European Parliament (**COM(2000) 843** final - Not published in the Official Journal)

[9] Official Journal L 368 of 31.12.1994 . Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals. The directive was amended by the Council Directive 96/30/EC of 13 May 1996, Official Journal L 122 of 22.05.1996 which, following the accession of Austria, Finland and Sweden to the European Union, lists the basic local governments units in those three countries.

As in the case of European elections, there is no condition of length of residency to be able to vote and to stand in municipal elections. It is then an automatic right related to the fact to move from one Member State to another. We can then perfectly imagine an Italian citizen just arriving in a Spanish *municipio*, legally entered to the electoral roll, becoming the mayor of the city.

However, two limits remain: first, the directive allows Member States to require a minimum period of residence when the proportion of Union citizens of voting age who reside on their territory, but are not its own nationals, exceeds 20 % of the total electorate (art.12 of the directive). In practice, this is only the case of Luxembourg.

Second, article 5 of the directive refers to another kind of limits: article 5.3 provides, on the one hand, that the Member States may reserve the office of elected head, deputy or member of the governing college of the executive for its own nationals. On the other hand, article 5.4 allows Member States to provide that European citizens who are elected members of a representative council may not take part in designating delegates who can vote in a parliamentary assembly or in electing the members of that assembly. Actually, article 5 was adopted to answer the French fears related to the fact that a non-french citizen could take part in the election of the French Senate.

Article 5 seems to be even more discriminative than article 12 of the directive in the sense that, the application of article 12 should be controlled regularly by the Commission, whereas in the case of article 5, every Member State is sovereign to decide to restrict or not the exercise of the right to vote and to stand as a candidate in municipal elections.

2.2 Rights that reinforce the protection of European citizens

Besides of the rights that tend to promote free movement, the EC Treaty entitles European citizens to rights aimed to reinforce their protection, not only within the European Union against abuses of the European institutions or Member States, but also abroad. The EC Treaty codified the right to petition and gives European citizen the possibility to apply to the European Ombudsman, in case of maladministration in the activities of the Community institutions. Moreover, article 20 ECT strengthens the diplomatic protection of European citizens out of the Union.

2.2.1 Protecting the European citizen within the European Community

Article 21 TCE establishes two new rights in favor of European citizens: a right to petition to the European Parliament and a right to apply to the European Ombudsman. Actually, the right to petition has not been introduced by the Maastricht Treaty. In 1953, the *Assemblée Commune* of the European Coal and Steel Community recognized it to nationals of the Member States.

Theses two rights appear as a mean to remedy the few possibilities that European citizen benefits to complain directly to the European Court of Justice and to protect oneself against European acts.

Then, in that context, the recognition of a right to petition to the European Parliament and the right to complain to the European Ombudsman has an important relevance,

from a symbolic and practical point of view, because it can be considered as a new mechanism of protection. Theses two new mechanisms are not judicial but, at the time they contribute to improve the protection of European citizens against abuses or weaknesses of European Institutions and Member States, they can be considered also as a way to bring nearer the European citizens to European Institutions, and then at the end to reduce the so called "democratic deficit". The right introduced by the Amsterdam Treaty "to write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314" goes in the same direction.

As far as a petition is concerned, Article 194 ECT establishes that it must relate to a subject falling within the sphere of activity of the European Community and concern the petitioner directly. The *petition* may take different forms : it can be or a request arising from a general need, for example the protection of a cultural monument; or an individual grievance, such as the recognition of family allowance *rights*; or even an application to Parliament to take a position on a matter of public interest, like *human rights*.

It is clearly a mean of protection for the European citizen, that can at the same time make him feel more aware of European matters.

As far as the Ombudsman is concerned, it can be considered also as a new mechanism of protection offered to Europeans. According to article 195 ECT, the right is open to every person that may complain about an act of "mal-administration" by an EU institution or body, with the exception of the Court of Justice and the Court of First Instance. Such an act could be an administrative irregularity, unfairness, discrimination, abuse of power, lack or refusal of information, or unnecessary delay[10].

2.2.2 Protecting the European citizen abroad

Another innovation of the Maastricht Treaty is the recognition of a diplomatic and consular protection, disconnected from nationality. According to International Public Law, the diplomatic and consular protection is an exclusive competence of States. Only States can protect their nationals, and so their citizens. Then, when establishing the entitlement to protection, in a non-EU country in which a citizen's own Member State is not represented, by the diplomatic or consular authorities of any other Member State,

[10] According to the Ombudsman's report, As a result of the Ombudsman's activity, it is worth noting that between 1995 and 2002 the average rate of increase in complaints was 17.9% and that *in 2004* the rate was five times higher than the previous year with an amount of *3726 complaints received* out of which *3536 were from individual citizens* and 190 from companies and associations. 657 complaints came from the new Member States equivalent to *51%* of the rate of increase for 2004. The main types of maladministration justifying an enquiry were lack of transparency, including refusal of information (22%), discrimination (19%), avoidable delay (12%), unsatisfactory procedures (9%), unfairness or abuse of power (7%), failure to fulfil obligations deriving from Article 226 of the EC Treaty (7%), negligence (6%) and legal error (5%). These figures should not lead to underestimate the fact that, in addition to the enquiries opened, the Ombudsman gave complainants advice (in 2117 cases), recommending that they turn to a national or regional ombudsman (906 cases), address a petition to the European Parliament (179 complainants), or contact the European Commission (359 cases). He also transferred 71 complaints, including 54 to other ombudsmen, 13 to the European Parliament's Committee on Petitions and four to the European Commission

the Maastricht Treaty questions the traditional link nationality / citizenship / diplomatic protection. Indeed, article 20 ECT declares : "Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State."

According to art 20 ECT, the Council adopted a decision in 1995 regarding the protection for European citizens by the diplomatic and consular representations[11]. Article 3 of the decision provides that "Diplomatic and consular representations which give protection shall treat a person seeking help as if he were a national of the Member State which they represent." The idea is then to recognize to every European citizen, whatever is her nationality a minimum consular protection from a diplomatic and consular representation of a Member State.

The diplomatic protection, as understood by the Maastricht Treaty, is not a protection *stricto sensu*. It deals then much more with assistance than with a real protection. The protection offered by embassies of other EU States may cover: assistance in cases of death, assistance in cases serious accident *or* illness, assistance in cases *arrest* or detention, assistance to victims of violent crime, the relief and repatriation of distressed citizens of the Union. This list is, however, not exhaustive.

Concretely, a citizen can ask for assistance to a diplomatic or consular representation if its own State has no representation there. This solution is inspired by article 8 of the Vienne Convention (24 of April of 1963) that provides that "upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State". Then the innovation of the European regulation consists of the possibility for the European citizen to seek help to whatever European Member State. If a Member State refuses to help him, he could perfectly seek help and assistance to another Member State. This innovation should contribute with no doubt to reinforce the protection of European citizens abroad, as well as the European consciousness of people, thanks to the idea of an "European solidarity". Even if one can deplore that European citizens receive protection on behalf of another Member State and not on behalf of the European Union.

To conclude the first part, it can be said that in 1992, the second part of the Maastricht Treaty was rightly presented as a wonderful innovation and as the symbol of the evolution of the European Community from an economic Union to a more political one. The rights contained in that part were clearly established "to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union". Unfortunately, their meaning did not tend to promote the participation of European citizens in the future of the European Union.

[11] 95/553/EC : Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations *OJ L 314, 28.12.1995, p. 73–76*

3. "Who is a European citizen?" is not the same as "who is entitled to European citizenship rights"

3.1 Who is a European citizen?

The question of the entitlement of citizenship rights is posed by the article 17 TCE that provides that "Every person holding the nationality of a Member State shall be a citizen of the Union". A priori, only nationals of Member States are European citizens and then entitled to European citizenship rights.

All nationals, as citizens of a Member State, are also citizens of the Union. Consequently, excluded from Union citizenship are all persons having no connecting legal ties with the EU through the intermediary of a Member States. Acquisition or loss of Union citizenship is therefore dependent on one's acquisition or loss of nationality of a Member State. The recognition and exercise of citizenship are not subject, a priori, to any other condition apart from that of nationality.

Similarly, the Member States took the opportunity to specify in a Declaration on nationality of a Member State, annexed to the Union Treaty, that they alone were competent to define their own nationals:

The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, 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 a declaration lodged with the Presidency and may amend any such declaration when necessary.

This kind of declarations appears, according to the very terms of this Declaration, to serve a strictly informative purpose, as was demonstrated by the declarations of the United Kingdom and the Federal Republic of Germany.

Furthermore, at the European Council of Edinburgh of the 11 and 12 December 1992, it was recalled that :

The provisions of the Part Two the EC Treaty relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.

This is still the same formulation as presently indicated above : the Union in no way intervenes in the identification process of those entitled to European citizenship. Only the Member States have competence in this regard.

This solution was equally confirmed, or, to be more precise, anticipated by the jurisprudence. In fact, since the entry into force of the Maastricht Treaty, it has not been

necessary for the Court of Luxemburg to rule on the exclusive competence of the Member States with respect to nationality. The Court has already done so on 7 July 1992 in the case Micheletti[12]. In this case, the Court declared in particular as follows :

The provisions of Community law on freedom of establishment preclude a Member State from denying a national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host State deems him to be a national of a non-member country.

At the paragraph ten of the judgment, the Court recalled that the terms of the conditions fro the acquisition and loss of nationality remained within the competence of each Member State, "having due regard to Community law".

The principle articulated in Article 17 TCE is one which also appears in international law. Again, the notion is maintained that the States alone, as sovereign entities, are competent to define their nationals. Furthermore, it as acknowledged that, without exception, the State is alone competent to define its nationals whether the State's law regarding nationality is based on *ius soli* or *ius sangiunis*. The Hague Convention of the 12 April 1930 concerning "Certain questions with respect to conflicts of Law on Nationality" legally establishes the principle. Article 1 declares as follows :

It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality.

This formulation of the law was confirmed by the International Court of Justice in the famous *Nottebohm* case[13].

Access to European citizenship therefore clearly results from the competence alone of the Member States. The determinant criterion is the possession of nationality of one of these States. It follows that, to date, each State remains sovereign to establish the criteria of access to its nationality. Generally, these criteria are based on two principles: *ius sanguinis* and *ius soli*. The adoption of one or the other principle reflects the conception that a State maintains of its Nation (the law of nationality can be conceived as the law of entry into the Nation). The adoption of *ius soli* as the principal criterion for the attribution of nationality coincides with an open conception of the Nation: the law of nationality is open to the claimants of this nationality. By contrast, a law of nationality based on *ius sanguinis* reflects a closed nation, which defines itself as a principally ethnic entity. Entry into this group will thus be more difficult, the conditions being based of familial affiliation.

Meanwhile, as well as one can ideally classify the laws of nationality into two categories (ius soli and ius sanguinis), there exists no Nation State in Europe whose law of nationality corresponds exactly to one of these categories. Typically, a combination of the two principles is observed. That which distinguishes the law of one State to another is the proportion used of the two principles; it is a question of dominance.

[12] Micheltti, Case 369-90, [1992], ECR 4239
[13] Nottebohm, Liechtenstein v. Guatemala, 2nd stage, [1955] ICJR, p 23

Accordingly, for example, France or Ireland are characterised by a primarily open law of nationality based principally on *ius soli* (but which still contains some criteria of the *ius sanguinis*). On the other hand, the German or the Greek laws appear "closed" since they are based almost exclusively on *ius sanguinis*.

Each Member State determines itself the criteria of access to its nationality and, consequently, the criteria for access to Union citizenship. These criteria are the result of a combination of factors, including historical, demographic, and political aspects. This means that each law of nationality is particular to each Member State. Moreover, this means that the conditions of access to European citizenship necessarily vary with the different Member States. In other words, there is a risk of a certain amount of inequality where the access to Union citizenship derives from a naturalisation process according to the law of one or another Member State. As a result, and since there is no Community policy on the harmonisation of nationality laws, it would appear that, indeed, access to Union citizenship would be easier through a Member State whose law of nationality is based primarily on *ius soli*, as opposed to a Member State whose law is based instead on *ius sanguinis*.

Therefore, two conclusions result from Art 17 TCE: on the one hand, the Union in no way intervenes in the process of identification of its own citizens, and on the other hand, given that each Member State alone determines the conditions of access to its own nationality, and consequently, to European citizenship, disparities in access inevitably exist. The problem is well appreciated when one takes into account that there are presently on the Union territory 17 million people who are not nationals of Member States, and who are thus excluded from European citizenship[14].

3.2. Who is entitled to European citizenship rights?

This question is rather different from the first one, related to who is a European citizen? Actually, some rights contained in Part Two of the EC Treaty are recognized not only to Europeans citizens but also to non-citizens. Article 21 TCE refers to articles 194 and 195 TCE that open the rights to petition to the European Parliament and to apply to the European Ombudsman to "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State". In the case of the right to petition, even the rule 191 of the Rules of Procedure of the European Parliament refers to the case of "Petitions addressed to Parliament by natural or legal persons who are neither citizens of the European Union nor reside in a Member State nor have their registered office in a Member State"[15].

[14] See, Europa Rapid Press Release, Integration of third-country nationals, 01/09/2005. http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/290&format=HTML&aged=0&language=EN&guiLanguage=en#fn4

[15] Rules of Procedure of the European Parliament, july 2006, 16th Edition, http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//NONSGML+RULES-EP+20060703+0+DOC+PDF+V0//EN

There is then an apparently contradiction to rise this right at the level of a right of European citizenship whereas it is opened to non-citizens. Why then to define European citizens in relation to nationality of Member States, if some rights can be opened to non-nationals? Then, what would the "differentiator element" of the European Citizenship be if some of theses rights are opened to non-nationals? Actually, historically, citizenship has been considered as the "*status civitatis*" of persons that fulfill certain requirement, normally related to nationality. In the case of European citizenship, not only of the right to petition and the right to complain to the European Ombudsman are open to non European citizens but also some of the "political" rights, that were presented as the core of the new European Citizenship.

Indeed, in a very recent case, the European Court of Justice has recognized the right to vote and to stand in European elections to non European citizens, even against the opinion of the General Advocate Tizzano. The case opposed the Kingdom of Spain against the United Kingdom about the problem of the European political participation of citizens of Gibraltar[16]. The case arose after a judgement of the European Court of Human Rights that declared that, by failing to organise European Parliament Elections in Gibraltar, the UK has infringed Article 3 of the ECHR Protocol 1. In order to comply with the judgement, in 2003 the UK enacted the European Parliament Representation Act that enable the inhabitants of Gibraltar to participate in the European Parliament Elections. Section 16 provides that persons who meet all the following conditions are entitled to be entered on the register : being resident in Gibraltar ; not being subject to a legal incapacity to vote ; being at least 18 years of age; being a citizen of the European Union or a Qualifying Commonwealth Citizen or a citizen satisfying certain conditions (QCC). It shall be noticed that QCC are not citizens of the United Kingdom.

The Court was then requested by Spain, among other things, to determine whether the United Kingdom was legitimately entitled to grant the right to vote in European elections to persons residing in Gibraltar (a European territory in which Community law is applicable) but not possessing the nationality of a Member State or, therefore, citizenship of the Union., as it is the case of the QCC. Indeeed, the Kingdom of Spain claims that, by conferring the right to vote on QCCs who are not Community nationals, the United Kingdom is in breach of Articles 189 EC, 190 EC, 17 EC and 19 EC, which, "interpreted historically and systematically, recognise the right to vote and to stand as candidates of citizens of the European Union alone".

It is worth explaining that the QCC have already the right to vote in in United Kingdom Parliamentary elections. The law provided, likewise, that QCCs residing in the United Kingdom have the right to vote in elections of the European Parliament. Thus, more than a million of them have taken part in each of those elections since 1978. According to the UK, "that grant of the right to vote to QCCs is regarded as one of the constitutional traditions of the United Kingdom".

The European Court decided to distinguish between the right to vote and to stand in European Parliament elections according to article 190 ECT[17] and to the Act of 1976[18]

[16] Case C-145/04 Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland, 12th September 2006. It is worth noting that the case opposes for the second time of the European history, two Member States according to article 227 ECT.

[17] Article 190 ECT provides that "The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage".

and article 17 and 19 of the Second Part of the ECT. Clearly, one thing is to determine the persons entitled to vote and to stand as a candidate in elections to the European Parliament that falls within the competence of each Member State in compliance with Community law and another thing is to grant the right to vote and to stand in European Elections to every European citizen who lives in a Member State different from the Member State of his nationality that falls within the Community Law and that obliges every Member State according to article 19 ECT and the Directive 93. Then, following this reasoning, the UK was perfectly free to recognize the right to vote to European Parliament Elections to non European citizens.

Obviously, the European Court did not say that the QCC, who are entitled to vote in Gibraltar, could claim this right in another Member State because they are not European citizens. In that case, Gibraltar is considered as full part of the UK. The QCC are able to vote only on the UK territory.

The ECJ adopted this solution against the opinion of Advocate General, and confirmed that article 19 TCE is only a corollary of the right to free movement. Concretely, it means that every Member State is sovereign to determine which people is entitled to the right to vote according to the Act of 1976 and as long as it does not exist no uniform procedure in all Member States for elections by direct universal suffrage. In that sense, the ECJ adopted in part the reasoning presented by the United Kingdom about the interpretation of "peoples of Europe":

However, neither Article 190 EC nor the 1976 Act defines expressly and precisely who are to be entitled to the right to vote and to stand as a candidate in elections to the European Parliament. In themselves, those provisions do not exclude, therefore, a person who is not a citizen of the Union, such as a QCC resident in Gibraltar, from being entitled to the right to vote and stand for election. However, it must be ascertained whether there is, as the Kingdom of Spain submits, a clear link between citizenship of the Union and the right to vote and stand for election which requires that that right be always limited to citizens of the Union.

71 No clear conclusion can be drawn in that regard from Articles 189 EC and 190 EC, relating to the European Parliament, which state that it is to consist of representatives of the peoples of the Member States, since the term 'peoples', which is not defined, may have different meanings in the Member States and languages of the Union.

For all of these reasons, it could be then possible to interpret the solution of the ECJ as a recognition of the possibility (if not the right) for Member States to entitle non European citizens to the right to vote in European elections, but not obviously according to some European rule. By this solution, the ECJ opens clearly the possibility to extend European citizenship to non European citizens.

[18] Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976.

4. Some proposals as final remarks

4.1 A European citizenship based on residence

After 15 years, the European citizenship appears still to be neither European nor a real citizenship. It is true that some rights have evolved, specially the right to free movement, thanks to the European Court of Justice and its large application of the principle of non discrimination. But, the same problems remain to solve, related first to the entitlement of European citizenship and second to the political meaning of the concept.

Concerning the entitlement to European citizenship, two problems remain as we have seen: first, the dependence of the Union of the Member States (i.e. its exclusion from the process of determination of European citizens) and second, the inequality of conditions of access.

Then, in order to remedy these questions, two solutions are possible. The first would entail the unification of the procedures of access to European citizenship, finally rendering uniform the different laws of nationality. After the European Parliament in 1991, the European Commission made a communication in that sense recently[19], saying that "Naturalisation is a strategy, which can help to promote integration and which Member States should consider when granting residence to immigrants and refugees. The Commission welcomes the relaxation of the conditions to be fulfilled by applicants for nationality which has taken place in a number of Member States in recent years. Within the framework of the reinforced coordination process, the Commission will promote the exchange of information and of best practices concerning the implementation of nationality laws of Member States". Obviously, the European Commission does not yet claim for the harmonization of nationality laws of Member States but only encourages Member States to open them.

Asking for an harmonization of nationality laws presents some serious disadvantages: on the one hand, it calls into question a sacrosanct prerogative of the States, i.e. to determine their own nationals, and on the other hand, it still does not permit the Union to determine its own citizen. It would be wiser to move instead in a different direction. Thus, within the framework of European citizenship, one could envisage a distinction between nationality and citizenship. Accordingly, it would be necessary to base European citizenship no longer on the nationality of Member States, but rather on residence in one of those States. In this way, one could avoid interfering with a prerogative of the sovereignty of States, while at the same time rendering the conditions of access to European citizenship, more equal. In addition, this would permit the Union,

15. The European Parliament has already proposed this idea in 1991, in a report of the Institutional Commission on Union Citizenship, See doc A3 /0300/91, p 5 and ff. For the European Commission, see the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment. Com (2003) 336 final.

as a result of determining itself the criteria of access (definition of residence, length, etc…) to free itself from the Member States with respect to defining its own citizens[20]. Concretely, it means that not only citizens of Member States but also third countries nationals could be entitled to all the rights of European citizenship.

This solution is justified not only by the need to reinforce the role of the Union in the determination process of European citizens, but also by democratic arguments encapsulated in the maxim "no taxation without representation". Moreover, as the ECJ says, the limits of the "people" of Europe are not yet defined and could perfectly be designed in a broad way.

However, the solution proposed seems to dislike European institutions. Recently, one of the Member of the European Parliament, Giusto Catania, "calls on the Member States, where necessary, to consider establishing a closer link between permanent legal residence over a reasonable period of time and the acquisition of national- and hence European- citizenship"[21]. The proposal was not well received by the Members of the European Parliament and the report of Mr. Catania has been rejected by majority[22].

4.2 Towards a "political" European citizenship

As I tried to explain too, European citizenship does not have the political content or the symbolic and conceptual scope that was wished for it during the debates of the Intergovernmental Conference that led to the Maastricht Treaty in 1992. It seems evident that article 18 ECT which recognizes the principle of free movement to every European citizen, is the central article of the second part of the ECT. Indeed, the so-called "political" rights associated to free movement of persons make sense only for European citizens that do not live in their own Member State. Theses rights clearly are not aiming at promoting the direct participation of citizens in the European decision-making process (and 15 years after the Maastricht Treaty, the question is still alive). They do not add anything to the participation of European citizens to the European decision making process, especially because they can choose their representatives at the European Parliament since 1976.

European citizenship, in its present state, seems to be like a catalogue of distinct rights without a clear coherence, a "box of Pandora" as called it Prof. Weiler in 1998. Clearly, none of the rights contained in the part II of the ECT is aimed to remedy the so well known "democratic deficit" of the European Union. With or without the citizenship of the Union, European citizens do not participate directly in the European decision making process.

[20] As I mentioned in 1998, it is juridical feasible at the Community level since a Community notion of residence exists. Of course, certain judicial problems of a constitutional nature persist at the level of the States. However these problems are not insurmountable. See, Marie-José Garot, A new basis for European citizenship : residence?, in Massimo La Torre (ed), European Citizenship, an institutional Challenge, Kluwer Law International, 1998, p 229.

[21] Report on the Commission's fourth report on citizenship of the Union. Committee on Civil liberties, Justice and Home Affairs. Rapporteur : Giusto Catania, 15.12. 2005, Final A6-0411/2005

At this respect, the Treaty establishing a European Constitution gave a new chance to European citizenship, not only because it reinforce the role of the European Parliament in the decision making process but also because it begins to operate a distinction between citizenship and nationality. The Constitution still recognizes the traditional rights linked to the current status of citizen of the Union but foresees at the same time, the possibility to recognize some of the main rights to third country nationals, like the central right to free movement (art II.105).

In any case, European citizens seem to be entitled only to rights, not to duties. It could be good, especially to strengthen the idea of an European political community, to introduce a reference to a "service to the European cause". The service could be military (but for that, it is needed a European army and first of all, an European foreign policy) or more simply "European" (like in some Member States exists a "national service"). This would contribute, without any kind of doubt, to enhance the European consciousness (the US history is a very good example at this respect) and then consequently to build up the foundation of a "European constitutional patriotism", a *sine qua non* condition of a real European citizenship.

Some references:

Bauböck Rainer (1997). Citizenship and national identities in the European Union. *The Jean Monnet Working Papers*, n. 4/97, NYU School of Law.

Cautrès B (2004). La citoyenneté européenne. *Problèmes Politiques et sociaux*, n.901, p 5-116.

Fischer Thomas C. (2002-2003). European citizenship : in its own right and in comparison with the United States. *Cambridge Yearbook of European legal studies*, V.5, p 357-394.

Follesdal Andreas (2001). Citizenship: European and Global. *Arena Working Papers*, WP 01/22.

Garot Marie-José (1999). *La citoyenneté de l'Union européenne*. Paris, L'Harmattan, 365 p.

Hilson Chris (2004). What's in a right? The citizenship between Community, fundamental and citizenship rights in EU Law. *European Law Review*, n. 5, p 636-651.

La Torre Massimo (ed). (1998). *European Citizenship : an Institutional Challenge*. The Hague, Kluwer Law International, 476 p.

Liñan Nogueras Diego L (1992). La ciudadanía de la Unión. *Gaceta Jurídica de la CE,* nº 114, p 63.

Shaw Josephine (1997). Citizenship of the Union : towards post-national membership? *The Jean Monnet Working Papers*, n. 06/97, NYU School of Law.

Weiler Joseph H.H.(1997). The selling of Europe, The discourse of European citizenship in the ICG 1996. *The Jean Monnet Working Papers*, n. 3/97, NYU School of Law.

Wihtol de Wenden, Catherine (1997). *La citoyenneté européenne*. Paris, Presses de Sciences Po, 108 p.

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