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Stefan Kadelbach

Union Citizenship

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New York University School of Law and
Max Planck Institute for Comparative Public Law and International Law

Abstract

Union citizenship is the product of a political process which aimed at enhancing the status of the individual. Parallel to the deepening of European integration, a new role was sought for citizens that goes beyond participating in the Common Market. To achieve this goal, a strategy is followed which tries to sketch out a legal frame what has to be filled with political life. This article tries to take legal analysis and sociological aspects into account. Starting from the assumption that citizen status implies civil, social and political rights, it suggests that the existing Treaty provisions on Union citizenship are of a more symbolic nature, and that its legal potential lies in the sphere of social rights. If the ideal is creating a reflection of a full citizen status on the Union level, disappointment will be inevitable as long as the Member States remain reluctant in offering genuine political participation on both stages of the European multi-level system.

UNION CITIZENSHIP*

Prof. Dr. Stefan Kadelbach

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I. INTRODUCTION

European Community law is the product of a process of transformation. It has emerged as an autonomous legal order from a series of international treaties. The role of the European Court of Justice was crucial in this respect. Long-term treaty objectives have been attributed direct applicability and supremacy over municipal law,¹ individual rights have arisen from Member State duties,² and the EEC Treaty, the central document of European integration, has been re-interpreted as a constitution.³ According to the Court, the law of the European Community - today the Union - has become a legal system whose subjects are not only the Member States but also their citizens.⁴ The Treaty of Maastricht, by inserting a new part two on union citizenship into the EC Treaty (now Arts. 17-22 EC), suggested that this path would be further followed. The individual appears to have been placed in the centre of Union law.⁵

Investigations into the legal substance of Union citizenship have resulted in very heterogeneous assessments which differ with the chosen reference point.⁶ Restricting analysis to the existing rules of the EC Treaty will ensure a conservative conclusion,⁷ and particularly so if such assessments are based on a comparison with rights available to national citizens. Such comparison, which is suggested by the wording of the Union treaties, almost inevitably

* The author thanks Mr. Christopher Dallimore for his assistance in bringing about an English version of a very German text.

¹ Case 6/64, *Costa*, [1964] ECR 585, 593.

² Case 26/62, *van Gend*, [1963] ECR 1, 12.

³ Case 294/83, *Les Verts - Parti Ecologiste v. European Parliament*, [1986] ECR 1339, para. 23; BVerfGE 22, 293 (296).

⁴ Op. 1/91, *First EEA Case*, [1991] ECR I-6079, para. 21.

⁵ Cf. N. Reich, *Bürgerrechte in der Europäischen Union*, 1999, 5, 450 et seq.

⁶ J. Shaw, *The Interpretation of European Union Citizenship*, *MLR* 61 (1998), 293 et seq.

⁷ H.U. Jessurun d'Oliveira, *European citizenship: its meaning, its potential*, in: R. Dehousse (ed.), *Europe after Maastricht: An ever closer Union?* 1994, 126 (135 et seq.); S. O'Leary, *European Union Citizenship*, 1996, 44 et seq.; J.-D. Mouton, *La citoyenneté de l'Union: passé, présent et avenir*, 1996, 18 et seq.; J. Weiler, *European Citizenship and Human Rights*, in: J.A. Winter et al (ed.), *Reforming the Treaty on European Union*, 1996, 57 (65 et seq.); others make a distinction according to individual rights, e.g. V. Constantinesco, *La citoyenneté de l'Union*, in: J. Schwarze (ed.), *Vom Binnenmarkt zur Europäischen Union*, 1993, 25 et seq.; J. Verhoeven, *Les citoyens de l'Europe*, *Annales de droit de Louvain* 1993, 165 (172 et seq.).

leads to disappointment.⁸

Others assess Union citizenship in light of its future potential. Here too, the national citizen stands in the background and encourages diverse projections. Many of these assessments reflect the debate concerning the endurance and prospects of a European people and a European constitution.⁹ One line of enquiry seeks the foundations of citizenship in pre-legal identities. The appreciation of Union citizenship then depends on what is deemed indispensable for a constituency with respect to pre-existent factors of a social nature that create identity.¹⁰ Other contributions express the view that Union citizenship can be structured by law; it may thus constitute the prerequisite of an active European citizenship, the continuing development of which will be influenced by a gradual enhancement in legal status.¹¹

It is tempting to juxtapose perspectives of citizenship relating to positive law and political theory for two reasons. The first reason is methodical in nature. Strictly speaking, both views concern two different and unrelated discourses. The question arises whether this must be necessarily the case or whether there are links which should provide more mutual interest. The second reason lies in the pioneer role which Union citizenship plays in the discussion concerning a European constitution. Both initiatives share the idea of creating integration and identification by law. The overriding question is: What value can concepts employed by theories which have a connotation with the state as a reference point have at European level?

⁸ A. Wiener, *Zur Verfassungspolitik jenseits des Staates*, *ZfV* 8 (2001), 73 et seq.; critical of the reception of national symbolism N.W. Barber, *Citizenship, nationalism and the European Union*, *ELR* 27 (2002), 241 (256 et seq.).

⁹ A. Augustin, *Das Volk der Europäischen Union*, 2000, 41 et seq.

¹⁰ Cf. D. Grimm, *Braucht Europa eine Verfassung?*, *JZ* 1995, 581 (587 et seq.).

¹¹ C. Tomuschat/S. Kadelbach, *Staatsbürgerschaft - Unionsbürgerschaft - Weltbürgerschaft*, in: J. Drexler et al

This essay will first consider the aim which rules governing Union citizenship seek to achieve (II.). Thereupon, the positive law governing Union citizenship will be investigated in order to learn the reasons for its bad press to date (III.). The final section will consider the horizon of constitutional-political expectations opened up by the introduction of Union citizenship using the social-science debate as a basis (IV.). Comparing the state of both discussions can prove rewarding in relation to the future structure of Union citizen rights.

II. THE NOTION OF UNION CITIZENSHIP

1. History

The story of the metamorphosis of the individual in the Community legal order has often been told.¹² It begins with the artificial birth of the “market citizen”,¹³ a “reduced functionalist concept of an individual”.¹⁴ This concept describes the individual as a holder of economic freedoms, the judicial enforcement of which serves to realise the Common market. The establishment of Union citizen rights in the EC Treaty represents the final chapter of this tale; for the time being, it must remain unfinished, since Union citizenship was introduced as open to development (Art. 22 EC). Accordingly, the citizen’s status in the new body politic of the European Union has yet to be defined. Confronting the market with the Union citizen may have an heuristic value. However, it is doubtful whether such comparison charts the development with sufficient clarity.

(ed.), *Europäische Demokratie*, 1999, 73 (84 et seq.) and 89 (104 et seq.), respectively.

¹² E. Grabitz, *Europäisches Bürgerrecht zwischen Marktbürgerschaft und Staatsbürgerschaft*, 1970, 65 et seq.; T. Oppermann, Vom Marktbürger zum EG-Bürger?, in: G. Nicolaysen/H. Quaritsch (ed.), *Lüneburger Symposium für Ipsen*, 1988, 87; E. Marias, From Market Citizen to Union Citizen, in: idem. (ed.), *European Citizenship*, 1994, 1; A. Randelzhofer, Marktbürgerschaft - Unionsbürgerschaft - Staatsbürgerschaft, in: A. Randelzhofer (ed.) *Gedächtnisschrift für E. Grabitz*, 1995, 580 et seq.

¹³ H.P. Ipsen/G. Nicolaysen, Haager Kongreß für Europarecht und Bericht über die aktuelle Entwicklung des Gemeinschaftsrechts, *NJW* 1964, 339 (340 at note 2); H.P. Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, 187, 250 et seq., 742.

On the one hand, individuals under the Community legal order were never mere market citizens. The original EEC Treaty already provided for elections to European Parliament (Art. 138 (3), now Art. 190 EC). In 1962, even before the Court of Justice had acknowledged the direct effect of fundamental freedoms, the Commission took the view that individuals in the Community legal order did not simply exercise their fundamental rights as mere factors of production but as holders of civil rights.¹⁵ The case law relating to fundamental Community rights began in 1969 with the Stauder case which dealt with the personality right of a welfare recipient who wished to purchase products subsidized from EC funds at a reduced price without having to reveal his identity.¹⁶ Notwithstanding his capacity as a beneficiary of a programme to dismantle agricultural surpluses, it was impossible to regard him as an actual holder of economic freedoms of the EC Treaty. At the same time, legislation on co-ordinating European welfare law was established which also granted pensioners as well as relatives of employees and the self-employed outside their country of origin equal access to national systems of social welfare at their place of residence.¹⁷ The first Council initiatives with the aim of a “Europe of citizens” date from as early as 1969,¹⁸ at a time when the customs union had been prematurely realised, but direct effect of some fundamental rights had not yet been finally recognised by the Court.¹⁹

On the other hand, fundamental freedoms are not constitutive for Union citizenship and

¹⁴ J. Habermas, *Die postnationale Konstellation*, 1998, 91 (142) (translation by the author).

¹⁵ OJ 1962, 2118.

¹⁶ Case 29/69, *Stauder*, [1969] ECR 419.

¹⁷ A.C. Evans, *European Citizenship*, *MLR* 45 (1982), 496; U. Everling, *Von der Freizügigkeit der Arbeitnehmer zum Europäischen Bürgerrecht?*, *EuR* Suppl. 1/1990, 81; S. O’Leary, *The Evolving Concept of Community Citizenship*, 1996, 65 et seq.; B. Laubach, *Bürgerrechte für Ausländer und Ausländerinnen in der Europäischen Union*, 1998, 21 et seq.; U. Becker, *Freizügigkeit in der EU - auf dem Weg vom Begleitrecht zur Bürgerfreiheit*, *EuR* 1999, 522.

¹⁸ Third General Report on the Activities of the European Union, 1969, 527 et seq.

¹⁹ Cf. Case 41/74, *van Duyn*, [1974] ECR 1337, para. 5/7 (free movement of employees); Case 2/74, *Reyners*, [1974] ECR 631, para. 29/31 (freedom of establishment); Case 33/74, *van Binsbergen*, [1974] ECR 1299, para.

therefore do not necessarily entail the latter. A Union citizen is a person who has the nationality of a Union state (Art. 17 (1) sentence 2 EC). By contrast, holders of fundamental freedoms are all those upon whom the Community legal order has conferred such rights. The free movement of goods does not depend on the nationality of the trading partners. The right to free movement can also be extended by treaty to nationals of non-EU states, despite the fact that it is reserved to Union citizens according to the wording of the EC Treaty. Such treaties have been concluded with EFTA Member States and accession countries, including Turkey.²⁰

Comparing the status between market and Union citizens makes clear that in Community legislation and political initiatives, personal rights have become increasingly independent of fundamental freedoms. The most important impulses emanated from European labour law and social legislation, the subjective guarantees of which initially served the freedom of employees but gradually became independent of the existence of an employment contract.²¹ At the same time, the demand for a political status of migrants within the EC arose. In 1974, the Council of Paris asked the Commission to review the special rights which citizens of Member States could be granted as members of the Community.²² The notion of the right to vote and stand as a candidate at municipal elections in the place of residence dates from this time.²³ The Tindemans Report, submitted in 1975, recommended more citizens' rights, *inter alia* equal access to public offices, dismantling of border controls, promotion of school and student exchange programmes, mutual recognition of diplomas and improved consumer

24/26 (freedom to provide services).

²⁰ Cf. esp. Arts. 28, 31 and 36 of the EEA Treaty, OJ 1994 No L 1/3; with respect to Turkey, see *inter alia* Case C-262/96, *Sürül*, [1999] ECR I-2685; concerning the right of establishment of Polish, Bulgarian and Czech nationals, see three judgments from 27th September 2001, Case C-63/99, *Głoszczuk*, Case C-235/99, *Kondova*, and Case C-257/99, *Barkoci and Malik*, not yet reported.

²¹ See references in note 17.

²² Eighth General Report on the Activities of the European Union, 1974, 337 et seq.; the starting-point for the description which differentiates between four phases in Wiener, see note 8, 79 et seq.

²³ Commission of the European Communities, *Towards a Europe for Citizens*, Bull. EC 7-75, 5 (23 et seq.).

protection.²⁴ For the time being, however, the universal suffrage for the European Parliament and a uniform passport were the only obvious signs of a “Europe for citizens”.²⁵

The Draft Treaty Establishing the European Union produced under Altiero Spinelli was passed by the Parliament in 1984 and employed the term “Union citizenship” for the first time.²⁶ The European Council of Fontainebleau convened the Adonnino Committee – named after its chairman – which had the task of adopting Community measures “to strengthen and promote its identity and its image both for its citizens and for the rest of the world”.²⁷ The subsequent reports of the group already contained most of the rights which Union citizens now have under the EC Treaty.²⁸ In the same year, the ECJ granted tourists the right to rely on (passive) freedom of services and, by widening the scope of the fundamental freedoms in this way, made an important step towards defunctionalising the freedom of persons.²⁹ The 1987 ‘Erasmus’ Decision of the Council concerning student exchange was the first legal act to refer to a “Europe for citizens”.³⁰ In the following year, the Commission submitted its proposal for the right to vote at municipal elections.³¹ A little later, in 1990, the Council issued three directives on the right of persons with no occupation to reside outside their home state.³²

²⁴ Bull. EC Suppl. 1-76, 29 ff

²⁵ Council Decision 76/787, and the annexed act concerning direct universal suffrage, OJ No L 278, 1; Resolutions concerning the adoption of a passport of uniform pattern, OJ 1981 No C 141, 1 and OJ 1982 No C 179, 1 with most recent amendments in OJ 1995 No C 200, 1.

²⁶ Resolution of the Draft Treaty Establishing the European Union, OJ 1984 No C 77, at 53; Art. 3 DTEU: “The citizens of the Member States shall *ipso facto* be citizens of the Union. Citizenship of the Union shall be dependent upon citizenship of a Member State; it may not be independently acquired or forfeited. Citizens of the Union shall take part in the political life of the Union in the forms laid down by the Treaty, enjoy the rights granted to them by the legal system of the Union and be subject to its laws.”

²⁷ Bull. EC 6-1984, 11: “A People’s Europe”.

²⁸ Bull. EC Suppl. 7-85, 9 et seq., 19 et seq.

²⁹ Cases 286/82 & 26/83, *Luisi and Carbone*, [1985] ECR 377.

³⁰ Council Decision 87/327 EEC, OJ 1987 No L 166, 20; on the legislative power of the EC Case 242/87, *Commission v. Council*, [1989] ECR 1425. Tourists and students thus qualify as first true Union citizens.

³¹ OJ 1988 No C 246, 3; the directive was deferred owing to preparatory work on the Union Treaty.

³² Directive 90/364/EEC on the right of residence, OJ No L 180, 26; Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ No L 180, 28; Directive 90/366/EEC on the right of residence for students, OJ No 180, 30 was annulled by the ECJ for

These initiatives show that the freedom of movement and granting of political rights were seen as the most important elements in creating Union citizenship. Something of more recent provenance is a third component which has arisen from the efforts of the Union institutions to increase the identification with Europe, to make the Union more citizen-oriented and to create a sense of accountability vis-à-vis the individual. This attitude is reflected in Art. 1 (2) EU, which declares its aim to be “an ever closer union among the peoples of Europe”; decisions should be taken “as closely as possible to the citizen”. According to Article 2 (3) EU, one aim of the Union is “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”.

All three elements mentioned so far are reunited in the form of individual rights in the EC Treaty: Freedom of movement (Art. 18 EC), the right to vote (Art. 19 EC) and freedom of information rights in relation to Union institutions (Arts. 21, 255 EC). In its section on citizens’ rights, the Charter of Fundamental Rights of the European Union also grants the right to “good administration” which is closely connected to the third group (Art. 41 ChFR). The right to protection abroad by diplomatic and consular authorities of other Member States additionally appears as a fourth component (Art. 20 EC).

Union citizenship is not limited to these rights. It extends to all rights and duties of Union law (Art. 17 (2) EC). It therefore includes fundamental freedoms resulting from constitutional traditions common to Member States (Art. 6 EU) and social rights which have hitherto mainly existed on the basis of secondary legislation³³ to which the Charter of Fundamental Rights refers (Arts. 27-38 ChFR). The rights guaranteed in Arts. 18-21 EC nevertheless have a special symbolic value. As a rule, only nationals enjoy complete freedom of movement within

incorrect basis of jurisdiction (Case C-295/90, *Parliament v. Council*, [1992] ECR I-4193) and newly enacted as Directive 93/96/EEC, OJ No L 317, 59.

the state borders.³⁴ Likewise, the right to vote and stand for election is usually reserved to them alone. Diplomatic and consular protection, the expression of the state's sovereignty over persons, forms an important component of the reciprocal relationship of protection and obedience which exists between citizens and the state according to classical political theory.³⁵

Since the creation of the rights of market citizens, European citizens have thus been granted many attributes which resemble political rights. Therefore, an investigation as to how far the parallels between state citizenship and Union citizenship extend and how each relates to nationality appears to be unavoidable.³⁶

2. The Legal Concept of European Citizenship

a) Nationality

Nationality and citizenship are dependent on each other but are not congruent.³⁷ Depending on the view taken in constitutional theory, nationality describes either a status or legal relationship owing to which the individual is subject to a state's jurisdiction.³⁸ It has

³³ Conclusions of the Council of Rome Bull. EC Suppl. 2-91.

³⁴ Cf. Art. 11 (1) GG; Art. 5 (4) Greek, Art. 16 Italian, Art. 44 Portuguese and Art. 19 Spanish constitutions; proviso in relation to the acquisition of real estate in § 44 (2) of the Danish Constitution, which is allowed in terms of primary law by a Protocol. Belgium, Ireland, Luxembourg, the Netherlands and Sweden do not anchor national freedom of movement in constitutional law. Only § 7 of the Finnish constitution places nationals and foreigners legally resident in Finland on an equal footing, providing, however, for further legislation with respect to aliens.

³⁵ Th. Hobbes, *Leviathan*, 1651, edition by M. Oakshott, Oxford 1960, 467 et seq.

³⁶ The Commission does not appreciate such comparisons, see Third Commission Report on Citizenship of the Union, COM (2001) 506 final, 9: "When considering the scope of citizenship of the Union, attempts to draw parallels with national citizenship should be avoided. Because of its origins and the rights and duties associated with it, citizenship of the Union is *sui generis* and cannot be compared to national citizenship of a Member State."

³⁷ In German, the terms "Staatsangehörigkeit" and "Staatsbürgerschaft" have to be distinguished, see R. Grawert, Staatsangehörigkeit und Staatsbürgerschaft, *Der Staat* 23 (1984), 179 (182); cf. also T. Wobbe, Soziologie der Staatsbürgerschaft, *StW&StP* 1997, 205 (207 et seq.); the English/French pairing of the terms "citizenship"/"nationality" or "citoyenneté"/"nationalité" do not wholly correspond, see B. Guiguet, Citizenship and Nationality: Tracing the French Roots of the Distinction, in: M. La Torre (ed.), *European Citizenship*, 1998, 95; D. Gosewinkel, Untertanschaft, Staatsbürgerschaft, Nationalität, in: *Berl. J. Soziol.* 1998, 507.

³⁸ A. Makarov, *Allgemeine Regeln des Staatsangehörigkeitsrechts*, 2nd ed. 1962, 21 et seq.; K. Hailbronner/K.

consequences in international and constitutional law.

In terms of international law, nationality forms a basis of a state's jurisdiction and a crucial requirement for the exercise of diplomatic protection in relation to other states.³⁹ Essentially, states are free to establish the requirements governing acquisition of nationality. However, a merely formal attribution of nationality is not sufficient to create a legal relationship which third states are bound to recognise. In its famous *Nottebohm* judgment concerning the exercise of diplomatic protection on behalf of a naturalised citizen, the International Court of Justice held that the legal bond of nationality had to correspond to social reality. Nationality had to be supported by a genuine, existential and emotionally rooted commitment to the state; otherwise, it would be ineffective and not give rise to any obligations vis-à-vis the claimant state.⁴⁰ This restriction is primarily significant for individuals who possess more than one nationality. It accords with the conflict of laws statutes of many states to choose the effective nationality as a reference point in such cases.⁴¹ Under international law, nationality therefore serves to resolve collisions of jurisdiction.

According to most constitutions, nationality alone does not establish any rights or duties of an individual. However, it does represent a necessary condition for some of them such as the right to vote in elections, access to public offices or compulsory military service. To this extent, nationality is a framework legal relationship, to be filled out by law.⁴²

Renner, *Staatsangehörigkeitsrecht*, 2nd ed. 1998, Intro. paras. C 1 et seq.

³⁹ A. Randelzhofer, Nationality, in: R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. III, 1997, 501 (502); C. Gloria, in: K. Ipsen (ed.), *Völkerrecht*, 4th ed. 1999, § 24 paras. 2 and 34.

⁴⁰ Developed by the ICJ in the *Nottebohm Case*, *Liechtenstein v. Guatemala*, ICJ Reports 1955, 4 (23).

⁴¹ So also Art. 5 (1) of the introductory law to the German civil code (EGBGB).

⁴² Cf. Grawert, see note 37, 183; with respect to the term "stand-by status" ("Bereitschaftsstatus") A.

b) Citizenship

Citizenship, on the other hand, describes the adherence to a body politic in a way which identifies a person as a full member thereof.⁴³ “*Citoyens*”, creatures of the enlightenment, are united by freedom, equality and brotherliness.⁴⁴ Expressed in terms of rights, they necessarily include protective citizens’ rights of the *bourgeois* which aim to protect the individual against arbitrary interference by state authority. Historically, however, such rights were only limited to the states’ own nationals for relatively short periods of time.⁴⁵ What is constitutive for a citizen’s status are political rights, i.e. primarily the right to vote and stand for election. In historical comparison and in political theory they constitute the criterion of exclusion which distinguishes the fully effective status of a citizen from other forms of membership, especially from that of mere subjects.⁴⁶ Having regard to the consequences of industrialisation, English sociology first recognised that the status of a citizen also incorporates social rights.⁴⁷

“Citizenship” may have its origin in political philosophy but this does not mean that it is not a legal concept. The German Basic Law employs it twice. Article 33 (3) GG draws a distinction between civil (*bürgerlich*) and citizen’s (*staatsbürgerlich*) rights and makes clear that both are independent of religious or other affiliation. Article 33 (1) GG guarantees all Germans equal political rights. According to the prevailing opinion, the people from whom all state authority

Randelzhofer, in: T. Maunz/G. Dürig (eds.), *Grundgesetz*, Art. 16 para. 9 (rev. ed. 1985).

⁴³ Grawert, see note 37, 182 et seq.

⁴⁴ M. Stolleis, Untertan - Bürger - Staatsbürger, in: R. Vierhaus (ed.), *Bürger und Bürgerlichkeit im Zeitalter der Aufklärung*, 1980, 65 et seq.

⁴⁵ On the limitation of libertarian rights to nationals in the 19th century, see G. Oestreich, *Geschichte der Menschenrechte und Grundfreiheiten im Umriß*, 1978, 81 et seq.

⁴⁶ Aristotele, *Politics*, 1275 a: “[A] ... citizen in the strictest sense ... shares in the administration of justice and in offices”, quoted here according to: Aristotle, *The Politics*, St. Everson (ed.), Cambridge 1989; on the individual epochs W. Eder, Who Rules? Power and Participation in Athens and Rome, in: A. Molho et al (ed.), *City-States in Classical Antiquity and Medieval Italy*, 1991, 169; E. Isenmann, *Die deutsche Stadt im Spätmittelalter 1250-1500*, 1988, 93 et seq.; R. Brubaker, *Citizenship and Nationhood in France and Germany*, 1992, 21 et seq.; M. Troper, The Concept of Citizenship in the Period of the French Revolution, in: La Torre, see note 37, 27 et seq.

⁴⁷ T.H. Marshall, *Citizenship and Social Class*, 1949, here according to: T.H. Marshall/T. Bottomore, *Citizenship and Social Class*, 1992, 3 et seq.; R. Dahrendorf, The Changing Quality of Citizenship, in: B. van Steenbergen (ed.), *The Condition of Citizenship*, 1994, 10 (13).

derives according to Art. 20 (2) GG, are German citizens eligible to vote.⁴⁸ This is equally so in other Union states.⁴⁹

Empirically and legally, therefore, only nationals can be in full possession of all political rights. Those who stress that nationality serves as a criterion of exclusion point at this connection between nationality and citizenship.⁵⁰ Whereas political philosophy sometimes refers to citizens being those who wish to live in the same system,⁵¹ in terms of constitutional law, full citizenship requires naturalisation.⁵²

c) Union citizenship

(1) Nationality as a Condition for Union Citizenship

Taking account of the guarantees contained in Arts. 17-21 EC, it becomes clear that parallels to *nationality* are neither possible nor intended.⁵³ Article 17 (1) sentence 2 EC requires nationality by granting Union citizenship to those who are the nationals of a Member State. The two are inseparable: Union citizenship cannot be acquired alone,⁵⁴ nor can it be forfeited

⁴⁸ BVerfGE 83, 37 (59).

⁴⁹ Concerning Art. 88-3 sentence. 2 in connection with Arts. 24 and 3 French constitution see Conseil constitutionnel, CC No. 92-308 DC, Rec. 55 (Maastricht I); see also, for example, Art. 48 Italian Constitution; Arts. 23, 13 Spanish Constitution.

⁵⁰ See e.g. D.M. Smith/E. Wistrich, *Citizenship and Social Exclusion in the European Union*, in: M. Roche/R. van Berkel (eds.), *Citizenship and Social Exclusion*, 1997, 227.

⁵¹ E. Meehan, *Citizenship and the European Community*, 1993, 123 et seq.; J. Habermas, *Citizenship and National Identity*, in: van Steenbergen, see note 47, 20 (23); C. Closa, *Citizenship of the Union and Nationality of Member States*, *CML Rev.* 32 (1995), 487 (488 et seq., 507 et seq.).

⁵² BVerfGE 83, 60 (72 et seq.).

⁵³ Closa, see note 51, 488 et seq., 515 et seq.; see also S. Magiera, *Die neuen Entwicklungen der Freizügigkeit für Personen: Auf dem Wege zu einem europäischen Bürgerstatut*, *EuR* 1992, 433 (446), with parallels to the *lex patriae* ("Indigenat") of the national introduced by the Federal States in Germany of the 19th Century; similarly S. Hobe, *Die Unionsbürgerschaft nach dem Vertrag von Maastricht*, *Der Staat* 32 (1993), 245 (258 et seq.); Hailbronner/Renner, see note 38, Intro. para. 50; G.-R. de Groot, *The Relationship between the Nationality Legislation of the Member States of the European Union and European Citizenship*, in: La Torre, see note 37, 115 (117); R. Hofmann, *German Citizenship Law and European Citizenship: Towards a Special Kind of Dual Nationality?*, *ibid.* 149 (163 et seq.); concerning the federal character of Union citizenship, see below at IV.1.

⁵⁴ Cf. Commission, Third Report, see note 36, 8 at fn. 4.

without giving up nationality.⁵⁵

As a Declaration to the Final Act of the Maastricht Treaty makes clear, the concept of nationality is determined by national law and not autonomously according to Community law.⁵⁶ Member States decide who is a Union citizen. A peculiarity in comparison with general international law lies in the fact that Member States must recognise mutually such decisions. In one case, an Italian – Argentine dual national wished to establish himself as a dentist in Spain following his studies in Argentina, his country of origin. The ECJ regarded the fact that Spanish law required effective nationality as incompatible with the prohibition of discrimination contained in the fundamental freedoms.⁵⁷ It might follow that nationals who possess another EU nationality may not be prejudiced in comparison with beneficiaries of personal fundamental freedoms from other Member States either. Therefore, *discrimination à rebours* – which is otherwise not ruled out in the case law of the ECJ – is impermissible in such cases.⁵⁸ These consequences represent a departure from the principles of the International Court of Justice referred to earlier. A further limit to the Member States' jurisdiction with respect to nationality law is set by the duty of loyalty to the Community (Art. 10 EC), which prohibits Member States from obstructing a common immigration policy (Art. 63 EC).⁵⁹

⁵⁵ Bavarian High Administrative Court, *NVwZ* 1999, 197; concerning possible limits in Community law to the deprivation of nationality see S. Hall, *Loss of Union Citizenship in Breach of Fundamental Rights*, *ELR* 21 (1996), 129.

⁵⁶ Final Act to the Maastricht Treaty, Pt. III, 2nd Declaration (on nationality of a Member State); see also Conclusions of the European Council in Edinburgh, Bull. EC 12/92, 26 et seq.

⁵⁷ Case 369/90, *Micheletti*, [1992] ECR, I-4239.

⁵⁸ Cf. Case 235/87, *Matteucci*, [1988] ECR 5589; concerning a case with French/German nationality Case 292/86, *Gullung*, [1988] ECR 11; see generally U. Wölker, in: H. v.d. Groeben/J. Thiesing/C.-D. Ehlermann (eds.), *Kommentar zum EUV/EGV*, Vol. I, 5th ed. 1997, Prel. Remarks Arts. 48-50 ECT, para. 24.

⁵⁹ This is the consequence of the reference of the ECJ in *Micheletti* (note 57, para. 10), that the Member States must make use of their powers “having due regard to Community law”; see A. Hatje, in: J. Schwarze (ed.),

(2) Union citizenship as a Complement to State Citizenship

Union citizenship is therefore based on a familiar foundation if it makes the creation of citizens' rights dependent on nationality. Article 17 (1) sentence 3 EC makes clear that the guaranteed rights lean to those of citizens: "Citizenship of the Union shall complement and not replace national citizenship." This complementary element constitutes one of its crucial features.⁶⁰

Union citizenship certainly aims to create political rights of participation with regard to the Union's sovereign powers which correspond to political rights in the state. This certainly applies to the basic right to participate in European elections (Art. 190 (4) EC) as well as the rights of petition, information and access to documents (Arts. 21, 255 EC). However, Union citizenship extends beyond this for the rights of Union citizens are not solely levelled against the Union and its institutions. Addressees of the freedom of movement (Art. 18 EC) and the right to participate in European and municipal elections at the place of residence (Art. 19 (1) EC) are the Member States. To this extent, Union citizenship aims to ensure equal rights between nationals and members of other Union states throughout the Union. The provision on diplomatic-consular protection (Art. 20 EC), also addressed to Member States, extends this status to the intergovernmental field of foreign affairs.

According to these Treaty provisions therefore, the Union represents not only a supranational organisation but also a compound unit consisting of Member States, the European Communities and an overarching superstructure, i.e. a multi-level system.⁶¹ Parallel

Europäische Union, 2000, Art. 17 EC para. 4.

⁶⁰ C. Closa, The Concept of Citizenship in the Treaty on European Union, *CML Rev.* 29 (1992), 1137; D. O'Keefe, Union Citizenship, in: idem/P.M. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, 1994, 87 (102 et seq.).

⁶¹ The German Federal Constitutional Court uses the term "Staatenverbund", which may probably be translated

considerations between national and Union citizenship only make sense against this background.

III. ELEMENTS OF UNION CITIZENSHIP

1. Individual Rights Based on EC Law

According to Art. 17 (2) EC, citizens of the Union enjoy the rights conferred by the Treaty and are subject to the duties imposed thereby. Therefore, the rights of Union citizens are not limited to Arts. 18-20 EC. References made in the EC Treaty to “this Treaty” also include the secondary law issued on its basis.⁶²

a) Fundamental Freedoms

Since the free movement of goods does not only relate to persons but also to products, it is available to anyone whose economic activity falls within the scope of the EC Treaty. It does not depend on Union citizenship. The same applies in relation to the free movement of payment and capital, certain restrictions notwithstanding. By contrast, personal fundamental freedoms are based on the nationality of Member States (Arts. 39 (2), 43, 49 EC). However, they may be extended to nationals of third states by international agreement.

It is important for understanding the relationship between fundamental freedoms and Union

as compound association of states *Cf.* BVerfGE 89, 155 (184, 190) and which has a connotation to types of international organisations as founded under international law; the reciprocal relationships between intertwined levels of states and supranational structure are better expressed by the notion of “multi-level constitutionalism” as suggested by I. Pernice, *Europäisches und nationales Verfassungsrecht, VVDStRL* 60 (2001), 148 (163 et seq.).

citizenship that the former require a cross-border reference, at least according to the case law of the ECJ. European citizens can only claim fundamental freedoms as against their own state if the latter intends to prevent them from exercising such rights.⁶³ Otherwise, domestic discrimination remains permissible.⁶⁴ This case law has remained unaffected by the introduction of Union citizenship.⁶⁵ Hence it appears that freedoms are still understood as serving the creation of the Common market. This does not comply with the concept of all citizens being equal before the law. The question as to whether provisions constituting Union citizenship also benefit state nationals and will eventually lead to the removal of domestic discrimination can only be answered by investigating any single guarantee separately. In any event, there is no reason to believe that fundamental freedoms represent a constitutive dimension of European citizens' rights. They amount to nothing more than their historical beginning, one of several components but have not lost their original functionalist purpose.⁶⁶

b) Secondary law: Union Citizens as Taxpayers, Welfare Recipients and Consumers
Broad concepts of European citizenship also include secondary law.⁶⁷ Like citizens within the national legal order, European citizens also possess rights for which nationality and thereby Union citizenship are not required. European citizens are therefore beneficiaries of rights guaranteed by Community law not only as national citizens of Member States, but because of further roles and identities. In their capacity as employees they enjoy protective rules under labour law and, as do self-employed individuals, possess the right of equal access to national welfare systems. They are affected by rules of other Europeanised legal areas in their capacity as taxpayers, consumers, students, victims of adverse environmental effects, addressees of

⁶² Cf. Art. 220 EC.

⁶³ Case 175/78, *Saunders*, [1979] ECR 1129, para. 11; Case C-112/91, *Werner*, [1993] ECR I-429, para. 17.

⁶⁴ Overview and further references in S. Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluß*, 1999, 263 et seq.

⁶⁵ Case C-64/96, *Uecker*, [1997] ECR I-3171, para. 23.

⁶⁶ See above under II.1.

⁶⁷ Reich, see note 5, 76 et seq.

legal measures concerning foreign nationals, members of minorities or simply as persons who have, need or spend money in the form of the new common currency. Why should the status of European citizenship not result from the sum of these rights?

Behind all of this there is no settled idea concerning the rights a person has by nature or should have by law. This is because there are different reasons for guaranteeing rights. On the European level, the harmonisation of indirect taxation as well as the establishment of employment and environmental standards were designed to create similar conditions of competition. In addition, provisions concerning consumer transactions improve transparency of cross-border competition between prices and terms. European co-ordinating social law facilitates the free movement of employees, the mobility of trainees and students being one of its pre-effects. Accordingly, some rights are granted to all those who reside, trade or buy products within the Community. Other rights concern the treatment of nationals and therefore can only be claimed by foreigners with EU nationality.

All this only affects the status of citizen insofar as that status must include the enjoyment of relevant rights on the basis of a general prohibition on discrimination (Art. 12 EC). In this respect such rights are no different from personal rights granted by statute in national legal systems. The connection to the rights of Union citizens produced by Art. 17 (2) EC is therefore misleading. One can hardly claim that citizens have a system of rights to which this Treaty clause appears to refer.

2. Rights of Union Citizens

Therefore, the provisions of Arts. 18-22 EC primarily determine the substance of Union

citizenship.⁶⁸ It is difficult to assess their significance since the provisions have formed the subject of scientific discourse in very different areas. As the following will show, the question of their implementation involves – besides European law – aspects of constitutional law, local government law, administrative procedural law, international law and social law.

a) Freedom of Movement

Union citizenship attributes central significance to the right to move and reside freely within the territory of Member States (Art. 18 EC), since this forms the pre-condition for exercising most fundamental freedoms and basic rights.⁶⁹ It aims at a general freedom of movement, independent from economic freedoms. A more detailed consideration proves that this aim has by no means been achieved.

The dispute which erupted upon the introduction of this provision, i.e. whether Art.18 EC was directly applicable or not, does appear to have been decided. Case law, which had deliberately avoided this question at first, is now clearly pointing into this direction.⁷⁰ In literature, too, the majority opinion assumes that Art. 18 EC has direct effect.⁷¹ The aim of expanding citizens' rights and a systematic comparison with the provisos in Arts. 19 and 20 EC support this

⁶⁸ For a comprehensive analysis, see J.-M. Acker *et al.*, *Citoyenneté européenne*, in: Ecole nationale d'administration (ed.), *Mise en oeuvre du traité de Maastricht et construction européenne*, Vol. 1, 1994, 323 et seq.

⁶⁹ Cf. Commission, Third Report, see note 36, 15.

⁷⁰ Left undecided in Case C-85/96, *Martinez Sala*, [1998] ECR I-2691, para. 60; Case C-274/96, *Bickel*, [1998] ECR I-7637, para. 15; however, moving towards direct effect Case C- 466/00, *Kaba*, [2000] ECR I-2623, para. 30; Case C-357/98, *Yiadom*, [2000] ECR I-9265 para. 23.

⁷¹ J. Wouters, *European Citizenship and the Case Law of the Court of Justice of the Court of the European Communities on the Free Movement of Persons*, in: Marias, see note 12, 25 (48 et seq.); E. Klein/A. Haratsch, *Das Aufenthaltsrecht der Studenten, die Unionsbürgerschaft und intertemporales Gemeinschaftsrecht*, *JuS* 1995, 7 (11 et seq.); M. Haag, in: v.d. Groeben et al., see note 58, Art. 8 a EC para. 4; G. Schulz, *Freizügigkeit für Unionsbürger*, 1997, 86 et seq.; Becker, see note 17, 528 et seq.; W. Kluth, in: Ch. Calliess/M. Ruffert, *Kommentar EUV/EGV*, 1999, Art. 18 EC para. 9; Tomuschat, see note 11, 77 et seq.; Ch. Koenig/A. Haratsch, *Europarecht*, 3rd ed. 2000, para. 455; Hatje, see note 59, Art. 18 EC para. 5; M. Hilf, in: E. Grabitz/M. Hilf (eds.), *Das Recht der Europäischen Union*, Art. 18 EC para. 1 (rev. ed. 2001); contra M. Degen, *Die Unionsbürgerschaft nach dem Vertrag über die europäische Union unter besonderer Berücksichtigung des Wahlrechts*, *DöV* 1993, 749 (752); M. Pechstein/A. Bunk, *Das Aufenthaltsrecht als Auffangrecht*, *EuGRZ* 1997,

conclusion. On the one hand, the Council “may” adopt provisions further facilitating freedom of movement in accordance with Art. 18 II EC whilst Art. 19 I and II EC clearly require it to adopt secondary legislation; granting discretion would invalidate the guarantee if it were not directly effective. On the other hand, the Maastricht version of Arts. 19 and 20 EC (formerly Arts. 8 b and 8 c ECT) laid down transposition periods for the Council and Member States. By contrast, Art. 18 EC, formerly Art. 8 a ECT, did not.

This finding does not lead far, however, since Art. 18 EC does not go beyond the *acquis communautaire* in terms of content. It does not help to solve the problem of domestic discrimination⁷² and existing “limitations and conditions” continue to apply. Conditions limiting the area of protection are, for example, the evidence of adequate basic provisions and health insurance required by secondary law.⁷³ The continuing validity of public policy exceptions in Arts. 39 (3), 46, 55 EC Treaty establish limitations which a fortiori apply to all those who cannot rely on one of the fundamental freedoms and which are filled out by the Member States.

Accordingly, it seems as if one hand takes away what the other has just granted. However, there are three differences found in comparison to the former legal situation. The first is that the freedom of movement is being placed on a constitutional basis. Now, even persons who do not exercise any fundamental freedoms such as those seeking employment, students and pensioners whose rights of residence have hitherto been based on secondary law can claim a guarantee anchored in the Treaty which thus can be described as a fundamental right.⁷⁴ Secondary law is to be interpreted in light of this. Second, Art. 18 (2) EC now provides a

547; W. Kaufmann-Bühler, in: C.O. Lenz, *EG-Vertrag*, 2nd ed. 1999, Art. 18 EC para. 1.

⁷² See notes 64, 65.

⁷³ Art. 1 of Directive 90/364/EEC, Directive 90/365/EEC and Directive 93/96/EEC, respectively (see note 32).

⁷⁴ Art. 44 of the Charter of Fundamental Rights.

uniform legal basis for the adoption of secondary law on the freedom of movement thereby removing existing uncertainty concerning the proper bases of competencies.⁷⁵ For this purpose, Art. 18 (2) EC allows measures facilitating the freedom of movement but no new restrictions.⁷⁶ Third, Art. 18 EC offers the ECJ a reference point to extend social and cultural rights to all those legally residing in the territory of the Member State concerned by means of judge-made law and on the basis of the general prohibition of discrimination contained in Art. 12 EC.⁷⁷

Therefore, Art. 18 EC certainly heralds an enhancement and extension of the freedom of movement but has not changed its *acquis communautaire* in terms of substance. As of today, there is still no unrestricted freedom of movement within the Union.

b) Political Rights

Article 19 EC grants Union citizens resident in Member States, whose nationality they do not possess, the right to vote and to stand as candidates at municipal (Art. 19 (1) EC) and European elections (Art. 19 (2) EC). The bearings on Union law are different in each case. Whilst Art. 19 (1) EC is closely connected to the right of free movement (Art. 18 EC), Art. 19 (2) EC is also important in relation to the legitimacy of the Union's exercise of powers – even if this is not immediately obvious.

(1) The Right to Vote and to be Elected on the Local Level

⁷⁵ On the repeal of Directive 90/366/EEC see note 32; there currently exist two Regulations and nine Directives on the right to entry and residence; the Commission is proposing a consolidation, see COM (2001) 257 of 23 May 2001.

⁷⁶ Haag, see note 71, Art. 8 a ECT para. 10; Hatje, see note 59, Art. 18 EC para. 13.

⁷⁷ Case C-85/96, *Martinez Sala*, [1998] ECR I-2691, para. 60; see also below at III 3 c).

The right to vote at municipal elections is regarded as facilitating the freedom of movement. It aims to compensate for the loss of political involvement at local level caused by leaving the country of origin and to make integration easier by ensuring equal rights with nationals of the host state.⁷⁸ The opportunity to participate in decisions at local level, which has the most obvious consequences for citizens at all levels of state organisation, can make it easier to accommodate in another environment.

The right to vote at municipal elections has an important constitutional aspect. As in France, Spain and Portugal, implementing that right in Germany required an amendment to the constitution.⁷⁹ According to the leading interpretation of the relevant provisions of the Basic Law, only German nationals may exercise the right to vote at elections.⁸⁰ The sovereignty of the people (Arts. 20 (2), 28 (1) GG), which refers to the German people, is indeed entrenched according to the eternity clause of Art. 79 (3) GG, defining the core elements of the constitution as unchangeable, but the dependency between nationality and the right to vote at municipal elections does not belong to this reserve.⁸¹ This is basically because the representative bodies of municipalities are believed to form part of the executive and not the legislature.⁸² The right of Union citizens to vote at municipal elections was therefore facilitated by introducing a new Art. 28 (1) sentence 3 GG. The transposition of the Directive on municipal elections⁸³ comes within the jurisdiction of the states and has now been accomplished. For now, the German states have resolved the dispute in literature as to

⁷⁸ Cf. Degen, see note 71, 749.

⁷⁹ For France see R. Kovar/D. Simon, *La citoyenneté européenne*, CDE 1993, 285 (304 et seq.); for Spain see A. Lopez Castillo/J. Polakiewicz, *Verfassung und Gemeinschaftsrecht in Spanien*, EuGRZ 1993, 277; for Portugal see Lopes Marinho, in: F. Laursen/S. Vanhoonacker (eds.), *The Ratification of the Maastricht Treaty*, 1994, 231; with respect to transposition in the other Union states see K. Hasselbach, *Europäisches Kommunalwahlrecht*, ZG 1997, 49 (64 et seq.).

⁸⁰ BVerfGE 83, 37 (right of non-nationals to vote in Schleswig-Holstein); BVerfGE 83, 60 (right of non-nationals to vote in Hamburg).

⁸¹ BVerfGE 83, 37 (59); BVerfG, *NVwZ* 1998, 52.

⁸² Cf. BVerfGE 65, 283 (289).

⁸³ Directive 94/80/EC, OJ No L 368, 38.

whether the right to vote at municipal elections may also extend to local referenda,⁸⁴ pursuant to a right of participation.⁸⁵

The introduction of the right to vote at municipal elections had been planned for a long time.⁸⁶ From a legal point of view it influenced the organisation of the state and represented a clear break with the constitutional traditions of some Member States. Regardless of the practical importance which the right to vote at municipal elections has for the approximately five million citizens resident outside their country of origin, it indicates that the Union has become a constitutive factor in the organisation of sovereign power in the European multi-level system.

(2) Right to Vote and to Stand for Elections to the European Parliament

The right to vote at European elections is only related to the right to vote at municipal elections insofar as it guarantees certain rights of political participation in the place of residence. Article 19 (2) EC enables, for example, a Portuguese to participate in the election of the 99 delegates allotted to the Federal Republic (Art. 190 (2) EC). Thereby, the right to vote at European elections only differentiates with respect to nationals of third party states

⁸⁴ The opposite view was taken by the Federal Minister of the Interior in a circular addressed to the *Länder* of 30th January 1995, unpubl., quoted in K. Engelken, Einbeziehung der Unionsbürger in kommunale Abstimmungen (Bürgerentscheide, Bürgerbegehren)?, *NVwZ* 1995, 432 (433 at fn. 6); furthermore, B. Burkholz, Teilnahme von Unionsbürgern an kommunalen Bürgerentscheiden?, *DöV* 1995, 816; K.-G. Meyer-Teschendorf/H. Hofmann, Teilnahme von Unionsbürgern nicht nur an Kommunalwahlen, sondern auch an kommunalen Plebisziten?, *ZRP* 1995, 290; M. Kaufmann, Kommunales Unionsbürgerwahlrecht und kommunaler Staatsaufbau, *ZG* 1998, 25 (31 et seq., 39); R. Scholz, in: Maunz/Dürig, see note 42, Art. 28 paras. 41 et seq. (rev. ed. 1997); as in the present text Engelken, *ibid.* 432 et seq.; H.-U. Erichsen, Kommunalrecht Nordrhein-Westfalen, 2nd ed. 1997, 84; Hailbronner/Renner, see note 38, Intro. para. 62; K. Barley, *Das Wahlrecht der Ausländer nach der Neuordnung des Art. 28 Abs. 1 S. 3 GG*, 1999, 73 et seq.; Kluth, see note 71, Art. 19 EC para. 11.

⁸⁵ Cf. the Local Communities Acts (“Gemeindeordnung”) of Baden-Wuerttemberg Art. 72; of Hesse, § 30; of Rhineland Palatine §§ 17 a, 13; of Saxony, §§ 24, 16; of North-Rhine Westphalia §§ 26, 21, here in connection with § 7 Municipal Elections Act.

⁸⁶ See note 23; concerning the pre-history until 1972, R. Bieber, “Besondere Rechte” für die Bürger der Europäischen Gemeinschaften, *EuGRZ* 1978, 203 (204); Haag, see note 71, Art. 8 b EC paras. 2 et seq.

according to nationality, but within the Union exclusively according to the place of residence. The electorate is constituted by the citizens of the Union and not by the peoples of European states. This exclusive link to Union citizenship is a natural consequence of establishing direct elections to the European Parliament. However, reservations are expressed in this regard i.e. that the success threshold - distributed unequally between Member States anyway - will be further reduced to the detriment of under-represented states.⁸⁷ The Federal Constitutional Court has nevertheless not pursued such objections.⁸⁸ They are also untenable, even more so in light of the insignificant participation at elections.⁸⁹

Like the right to vote at municipal elections, the right to vote at European elections, according to the wording of Art. 19 (2) EC, only extends to Union citizens who reside outside their state of origin. However, that provision cannot intend to place citizens residing abroad in a privileged position so that it must also confer a right to vote on nationals as well. The case law of the European Court of Human Rights concerning Art. 3 of the 3rd Protocol to the ECHR also suggests such a conclusion. It deems the European Parliament to be entrusted with genuine legislative functions so that contracting states must ensure its election.⁹⁰

The procedures are set forth in the Directive on European elections.⁹¹ It stresses the intention behind Art. 19 EC viz. to expand the rights of Union citizens by allowing citizens to exercise the right to vote at elections in the country of origin instead of the place of residence. However, it did not aim to establish the planned uniform election procedure (Art. 190 (4) EC). The Directive is limited to questions concerning the personal right to vote at elections such as

⁸⁷ Cf. for example R. Streinz, *Europarecht*, 5th ed. 2001, paras. 54, 306, 654; similarly M. Dürig, Das neue Wahlrecht für Unionsbürger bei den Wahlen zum Europäischen Parlament, *NVwZ* 1994, 1180 (1181 et seq.).

⁸⁸ Cf. BVerfG, *EuGRZ* 1995, 566.

⁸⁹ See figures in Commission, Third Report (note 36), 18.

⁹⁰ ECHR, *Matthews v. United Kingdom*, Rep. 1999-I, 251, para. 52.

⁹¹ Directive 93/109/EC, OJ No L 329, 34.

the application principle and to excluding multiple elections and candidates.

Article 19 (2) EC is significant because it grants a personal component to the right to vote at European elections which to date has been conceived in purely institutional terms at European level (*c.f.* Art. 190 (1) and (3) EC: “representatives [. . .] shall be elected”).⁹² Nationality is no longer a crucial factor in that respect. Thus, the EC Treaty is moving towards the notion of a European demos.⁹³ More than any other component of Union citizenship, this provision triggers off considerations concerning the role Union citizens could play in organising the expression of will in Europe. This will be investigated in detail under IV below.

c) Petition, Information, Access to Documents

Union citizens – like all residents within Union territory – are granted a series of rights which can and should be attributed an auxiliary function in connection with active citizens’ rights. This is true of the right of petition and the right to appeal to an ombudsman (Art. 21 (1) and (2) in conjunction with Arts. 194 and 195 EC), the right to information (Art. 21 (3) EC), introduced by the Treaty of Amsterdam, and access to documents (Art. 255 EC), adopted by the EC Treaty at the same time. These rights are listed together in the European Charter of Fundamental Rights (Arts. 42-44).

The right to file a petition contains a guarantee which performs a multiple function in a national context. On the one hand, it is regarded as a link between the citizens and their Parliament which opens up a certain possibility of political influence.⁹⁴ On the other hand, it

⁹² *Cf.* Kovar/Simon, see note 79, 307.

⁹³ *Cf.* A. Rosas, Union Citizenship and National Elections, in: idem./E. Antola (eds.), *A Citizen’s Europe*, 1995, 135; Weiler, see note 7, 74; R. Rubio Marín, Equal Citizenship and the Difference Residence Makes, in: La Torre, see note 37, 201 et seq.; M.-J. Garot, A New Basis for European Citizenship: Residence?, *ibid.* 229 et seq.

⁹⁴ H. Bauer, in: H. Dreier (ed.), *Grundgesetz Kommentar*, Vol. I, 1996, Art. 17 para. 12.

severs legal protection since it offers the opportunity to pursue individual matters outside formal legal remedies. At the European level, it expressly refers to all matters for which the Community is responsible but it is the practice of the Parliament to extend it to the whole Union.⁹⁵ Therefore, the substance of the guarantee is widely drawn. Nevertheless, more than half of the petitions do not pass the threshold of permissibility.⁹⁶ Most cases will lack the required personal impact.

The right to appeal to an ombudsman stresses the protective aspect of the right to complain. On this procedural path, wrongs committed by Union institutions in the course of their activities can be investigated. It therefore serves to control the administration which is expected to be more transparent. In addition, it possibly increases discipline in the performance of official tasks.⁹⁷ The responsibilities of the ombudsman also extend beyond those of the Community to the so-called third pillar, i.e. co-operation with police and the courts in criminal cases.

At first glance, the right to information contained in Art. 21 (3) EC offers nothing more than the right to use one's own language before the Community institutions or the ombudsman and to receive an answer in that language, provided it is one of the Community languages (Art. 314 EC). Whether the right is limited to this depends on the conditions which the answer requested must satisfy. The Union has expressly committed itself to more citizens' rights and greater transparency (para. 12 of the Preamble, Arts. 1 (2) EU and 255 EC), which suggests an interpretation extending beyond the right to use one's own language. It represents a claim

⁹⁵ Rule 174 of the Rules of Procedure of the European Parliament.

⁹⁶ Commission, Third Report (note 36), 20 et seq.; the numerical importance is also low (958 in the 1999/2000 session), with a continuing downward tendency.

⁹⁷ S. Kadelbach, *Verwaltungskontrollen im Mehrebenen-System der Europäischen Gemeinschaft*, in: E. Schmidt-Aßmann/W. Hoffmann-Riem (eds.), *Verwaltungskontrolle*, 2001, 205 (220).

to information,⁹⁸ the content of which will depend not only on the matter in question but also on legitimate interests in confidentiality (*c.f.* Art. 287 EC).

The claim to information overlaps with the right of access to documents in the possession of the institutions referred to in Art. 255, i.e. the Council, Commission and Parliament. The personal right of citizens contained in Art. 255 EC forms a relatively new instrument of monitoring administrative practice.⁹⁹ It stems from self-commitments of the institutions and has been further defined in a Transparency Regulation based on Art. 255 (2) EC.¹⁰⁰ Individuals must be granted access without having to prove a special interest. The Transparency Regulation sets out individual interests in confidentiality which can be raised against this law. Such exceptions include public security, defence, foreign relations and financial, currency and economic policy, as well as the protection of privacy, in particular data protection.¹⁰¹ In addition, access can be refused in order to protect economic interests of a judicial or investigative procedure. Finally, there is no right to access documents of a preparatory character or such information which may only be distributed with the consent of a Member State. Existing case law on legitimate self-commitments of the institutions interprets exceptions narrowly and is unlikely to change in the future.¹⁰²

Such rights to control and information are indispensable for an administration which is close to the citizens. Some of them can also breathe new life into the administrative traditions of

⁹⁸ Kaufmann-Bühler, see note 71, Art. 21 EC para. 2; Hatje, see note 59, Art. 21 EC para. 4; Hilf, see note 71, Art. 21 EC para. 1.

⁹⁹ Concerning the context with Union citizenship J. Shaw, *European Citizenship: The IGC and Beyond*, *EPL* 3 (1996), 413 (430 et seq.).

¹⁰⁰ Regulation (EC) 1049/2001/EC regarding public access to European Parliament, Council and Commission documents, OJ No L 145, 43.

¹⁰¹ *Ibid.* Art. 4 (1) in connection with Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ No L 281, 31; concerning data protection in Europe A. Hatje, *Datenaustausch und Datenschutz in der EU*, in: S. Magiera/K.P. Sommermann (eds.), *Verwaltung in der Europäischen Union*, 2001, 193 (205 et seq.).

¹⁰² Kadelbach, Case Note, *CML Rev.* 38 (2001), 179 et seq.

many Member States which only recognise a restricted access of the public to information. As with the participation of Union citizens in elections, however, such rights are relatively little used.¹⁰³ This particularly applies in relation to the right of access to information. The Commission is conscious of this problem and attempts to confront it by making citizens aware of their rights to participation.¹⁰⁴ Ultimately, the rapprochement of the Union to its citizens encounters non-legal limits.

d) Protection by Diplomatic and Consular Authorities

Article 20 EC aims to open up a completely different dimension of personal rights. Union States diplomatic and consular authorities must grant all Union citizens protection in states outside the Union in which their home state is not represented. Co-operation between diplomatic and consular representatives forms part of the common foreign and security policy (Art. 20 EU). Art. 20 EC therefore expresses the joint responsibility of Union states. In order to understand this provision it is useful to remind oneself that when the Maastricht Treaty entered into force there were only five states in which all Union states were represented.¹⁰⁵ The concern to improve the position of tourists and business people abroad appears citizen-friendly. However, the extent and applicability of this guarantee are fraught with uncertainties which mitigate its effectiveness.

To begin with, is not wholly clear what kind of protection is to be provided. The German text version refers to “diplomatic and consular protection” (*diplomatischer und konsularischer Schutz*). According to practice in international law, consular protection primarily embraces administrative activity such as the issue of passports, support in matters relating to family and

¹⁰³ See the figures in Third Report of the Commission (note 36), 20 and 22 where, however, they are evaluated more optimistically.

¹⁰⁴ Discussion paper on public access to Commission documents of 23rd April 1999, SG.C.2/VJ/CD D (99) 83.

inheritance law, providing representation before a court, legal aid etc.¹⁰⁶ These tasks can be directly performed by other states acting in a representative capacity.¹⁰⁷

By contrast, diplomatic protection, as a technical term, refers to the situation where a state supports its own nationals in relation to breaches of international law by another state.¹⁰⁸ This activity focuses on taking up compensation claims of individuals arising from a shortfall in the minimum established by legal practice with regard to the protection of life, personal integrity and property. If the home state assumes its national's demand for reparation against the responsible state then, at least according to the traditional understanding of international law, it effectively pursues its own claim.¹⁰⁹ If a third party state wishes to pursue this claim, the consent of the claimant and the defendant states is required.¹¹⁰

It thereby becomes clear that Art. 20 EC cannot guarantee a right to diplomatic protection *strictu sensu* to individuals. However, the substance of that guarantee does not extend to diplomatic protection in the classical sense either – contrary to its German wording which is apparently clear but actually misleading.¹¹¹ This is borne out by the versions in other authentic languages which refer to “protection by the diplomatic or consular authorities” (“protection

¹⁰⁵ Second Commission Report Citizenship of the Union, COM/97/230 final, 11.

¹⁰⁶ See Art. 5 Vienna Convention on Consular Relations of 24th April 1963 (VCCR), United Nations Treaty Series 596, 261; further §§ 1 - 17 of the Act on consular officials, their tasks and powers – Consular Act, BGBl. 1974 I, 2317.

¹⁰⁷ Art. 8 VCCR.

¹⁰⁸ Gloria, see note 39, § 24 paras. 32 et seq.

¹⁰⁹ PCIJ, *Greece v. United Kingdom (Mavrommatis Palestine Concessions)*, PCIJ Ser. A, No 2 (1924), 12; ICJ, *Liechtenstein v. Guatemala (Nottebohm)*, ICJ Reports 1955, 4 (24).

¹¹⁰ ICJ, *Belgium v. Spain (Barcelona Traction Light and Power Co.)*, ICJ Reports 1970, 2 (47).

¹¹¹ On the intention C. Jiménez Piernas, La protección diplomática y consular del ciudadano de la Unión Europea, in: *Revista de las Instituciones Europeas* 20 (1993), 9 (17 et seq.); J. Weyland, La protection diplomatique et consulaire des citoyens de l'Union européenne, in: Marias, see note 12, 63 (64); cf. also M. Ruffert, Diplomatischer und konsularischer Schutz zwischen Völker- und Europarecht, *AVR* 35 (1997), 459 (465, 472, 476); Kluth, see note 71, Art. 20 EC para. 7, 11; for a view following the international law concept of diplomatic protection Haag, see note 71, Art. 8 c ECT paras. 4 et seq., 9; Koenig/Haratsch, see note 71, para. 467; Hatje, see note 59, Art. 20 EC para. 9; Hilf, see note 71, Art. 20 EC para. 15; see also T. Stein, Die Regelung des diplomatischen Schutzes im Vertrag über die Europäische Union, in: G. Ress/T. Stein (eds.), *Der diplomatische Schutz im Völker- und Europarecht*, 1996, 97 et seq.

par la part des autorités diplomatiques et consulaires” etc.). The context in which the term “diplomatic protection” is used in international law also opposes such an interpretation. Diplomatic protection does not require the victim’s state of origin to maintain an embassy in the defendant state nor must the claim be brought on that state’s territory. By contrast, protection by diplomatic authorities can also be consular protection,¹¹² to which existing transposition law has been limited.¹¹³

Article 20 EC is limited not only in substance but also in effect. Sentence 2 of the provision obliges Member States to agree the “necessary rules” and to start “international negotiations”. A view which attributes Art. 20 EC direct effect is hardly tenable in the light of this proviso.¹¹⁴ The first steps to implement the claim to protection were three decisions by the Member States which, for their part, require adoption by national law.¹¹⁵ This has not yet happened. More than a decade after what is now Art. 20 EC entered into force, Member States have still not been able to grant it effective force.

Accordingly, Art. 20 EC – like Art. 18 EC – seems to promise more than it can deliver for the time being. Consular protection and auxiliary services of diplomatic protection can already be provided by third party states according to applicable international law. Art. 20 EC may have potential insofar as it could serve as an incentive for the Member States to cut on expenditures

¹¹² Art. 3 sentence 2 VCCR, see note 106; Art. 3 (2) of the Vienna Convention on Diplomatic Relations of 18th April 1961, United Nations Treaty Series 500, 95.

¹¹³ Art. 5 (1) of the Decision 95/553 regarding protection for citizens of the European Union by diplomatic and consular representations, OJ No L 314, 73; Decision on the practical arrangements to be made by consular officials, unpubl.; Decision 96/409 on the establishment of an emergency travel document, OJ No L 168, 4; see also “Guidelines for the Protection of Unrepresented EC Nationals by EC Missions in Third Countries”, publ. as Doc. 7142/94, PESC 161, COCON 2 of the General Secretary of the Council of 24th May 1994.

¹¹⁴ Similarly Closa, see note 51, 502 et seq.; Kaufmann-Bühler, see note 71, Art. 20 EC para. 3; contra U. Everling, in: R. Hrbek (ed.), *Bürger und Europa*, 1994, 49 (62); Ruffert, see note 111, 471 et seq.; P. Szczekalla, Die Pflicht der Gemeinschaft und der Mitgliedstaaten zum diplomatischen und konsularischen Schutz, *EuR* 1999, 325 (327 et seq.); Hatje, see note 59, Art. 20 EC para. 11.

¹¹⁵ See note 113.

for diplomatic missions and personnel.¹¹⁶ However, this would not have much to do with the motive of strengthening citizens' rights.

3. Rights of Union Citizens and Prohibition of Discrimination

a) **The Link between Union Citizenship and the General Prohibition of Discrimination**
The Commission regards the prohibition of discrimination on grounds of nationality (Art. 12 EC) as belonging to the catalogue of Union citizen's rights. In its report on Union citizenship the Commission also refers to Union initiatives against discrimination on other grounds.¹¹⁷

For an analysis of the impact Art. 12 EC has on Union citizenship, it is useful to recall its wording. Accordingly, "without prejudice to any special provisions contained [in this Treaty], any discrimination on grounds of nationality shall be prohibited". Most rights of Union citizens aim at national treatment, either expressly (Arts. 19 and 20 EC) or implicitly (Art. 18 EC). Therefore, they in effect prohibit Member States from discriminating on grounds of nationality just like Art. 12 EC. Technically, requirements of equal treatment contained in Arts. 18-21 EC therefore take precedence as "special provisions" over the general principle of equality under Art. 12 EC. On the other hand, they also belong to the "scope of application of this Treaty", and Art. 17 (2) EC refers to the "rights conferred by this Treaty", which include Art. 12 EC.

The ECJ has derived far-reaching consequences from that reciprocal linking. The leading notion of its case law is that Union citizens who reside in the territory of a Union state on a regular basis can rely on Art. 12 EC in all cases within the objective scope of the EC

¹¹⁶ Hilf, see note 71, Art. 20 para. 3.

¹¹⁷ Third Report, see note 36, 4, 26 et seq.

Treaty.¹¹⁸ The consequences are hard to predict. For now, they mainly concern social and cultural rights.

b) Derivative Social Rights

Although Community law does not grant any original claims under social welfare law it does establish the inclusion of certain groups of persons into the national systems of welfare benefits, subject to requirements which vary according to legal basis. Up to now, access to national social security schemes was open to beneficiaries of free movement of persons rights and their relatives. The same can apply in relation to those seeking employment, trainees or retired persons. However, it was always necessary to display a connection to one of the personal fundamental freedoms.

In its case law following the *Sala* decision, the ECJ has uncoupled such benefits from the requirement of a right of residence which is connected to the fundamental freedoms and attached them to the status of Union citizen. Regardless of whether Art. 18 EC directly confers a right of residence or not, the Court supports a claim to share social welfare rights by this provision in conjunction with Art. 12 EC in relation to all Union citizens who legally reside in the relevant Member State.¹¹⁹

Since residence - as in the *Sala* case - can also be based on national law Member States are free to take measures terminating it. The flipside of this case law could therefore be a more restrictive practice than that employed by immigration authorities in the Member States.¹²⁰

¹¹⁸ Case C-85/96, *Martínez Sala*, [1998] ECR I-2691, para. 62; critical C. Tomuschat, *CML Rev.* 37 (2000), 449.

¹¹⁹ *Ibid* at para. 63.

¹²⁰ S. Fries/J. Shaw, *Citizenship of the Union: First Steps in the European Court of Justice*, *EPL* 4 (1998), 533 (553); S. O'Leary, *European Communities and EEA*, *ELR* 24 (1999), 68 (78); H. Toner, *Judicial Interpretation of European Union Citizenship - Transformation or Consolidation?*, *MJ* 7 (2000), 158 (179 et seq.).

However, it must be observed that Community law similarly governs domestic law regulating foreign nationals. Here, account is taken of the “limitations and conditions”, referred to in Art. 18 EC. However, the need for social aid is not by itself sufficient.¹²¹ In one case, a French student had become dependent on social welfare in the fourth year of study after having financed himself for three years. The ECJ held that this could not lead to automatic expulsion because the receipt of benefit was only temporary in nature.¹²²

The Sala decision might have considerable consequences for social law. The prohibition of discrimination contained in Art. 12 together with Art. 18 EC constitutes a comprehensive general clause which covers all areas where application of national law concerns the lawful presence of individuals in a Member State. Nationality could lose its significance as a criterion of social welfare law and gradually give way to the residence principle in relation to Union citizens.¹²³ However, analysis in legal writings is only at its initial stages¹²⁴ and further cases are pending before the Court.¹²⁵

c) Derivative Cultural Rights

The right to use one’s own language provides a further example of the almost boundless potential of this case law. The ECJ granted German and Austrian defendants – against whom

¹²¹ According to K.-D. Borchardt, *Der sozialrechtliche Gehalt der Unionsbürgerschaft*, *NJW* 2000, 2057 (2059 et seq.) only if the right of residence is used in order to receive higher welfare benefits; narrower A. Randelzhofer/A. Forsthoff, in: Grabitz/Hilf, see note 71, Art. 39 EC para. 193 (rev. ed. 2001).

¹²² For an inadequate application of the residence principle see Case C-184/99, judgment of 20th September 2001, *Grzelczyk*, paras. 34 et seq., not yet reported, abandoning Case 197/86, *Brown*, [1988] ECR 3205, according to which the guarantee of subsistence for students did not fall within the scope of what is now Art. 12 EC according to the state of Community law at the time; see commentary by C. Jacqueson, *Union citizenship and the Court of Justice*, *ELR* 27 (2002), 260 (268 et seq.).

¹²³ Case C-224/98, *D’Hoop*, [2002] ECR I-6191 paras 27 et seq.; see also *Cf.* M. Stolleis/G. Schlamelcher, *Zur Verfassungsmäßigkeit des § 120 BSHG*, *Nachrichtendienst des Deutschen Vereins für Öffentliche und Private Fürsorge* 1985, 309; K. Hailbronner, *Der Ausländer in der deutschen Sozialordnung*, *VSSR* 1992, 77; J. Kokott, *Die Staatsangehörigkeit als Unterscheidungsmerkmal für soziale Rechte von Ausländern*, in: K. Hailbronner (ed.), *Die allgemeinen Regeln des völkerrechtlichen Fremdenrechts*, 1999, 25.

¹²⁴ Extensive consequences are drawn by Borchardt, see note 121, 2057 et seq.; more reserved Randelzhofer/Forsthoff, see note 121, paras. 189 et seq.

criminal proceedings had been commenced in the Trentino-South Tyrol region – a claim to have proceedings held in their mother tongue.¹²⁶ The basis for the prohibition on discrimination according to Art. 12 in conjunction with Art. 18 EC was provided by Italian law which granted such a claim to members of the German-speaking community resident in the province of Bolzano. The case was distinguishable from the existing decisions on social security law because criminal law does not come within the scope of the EC Treaty. Apparently, this legal development is borne by the status of Union citizen alone.

Speculation abounds as to the consequences which such an extension of minority rights might have. However, they should not be over-estimated. In particular, there are no reference points whatsoever for assuming that there is a general claim to the use of one's mother tongue before national courts of other Member States.¹²⁷ It must be emphasised that Union citizenship has not created any original rights to social welfare benefit. In addition, it does not contribute anything new to the problem of domestic discrimination already discussed since the precise question concerns whether its prohibition can be derived from Art. 12 EC.

4. Duties of Union Citizens?

Article 17 (2) EC implies that Union citizens have rights as well as duties. The significance attributed to constitutional obligations in the texts of national constitutions varies according to the constitutional tradition in question but, in most cases, they play second role to fundamental rights. They usually serve as an implied basis for constitutions expressing

¹²⁵ Case C-256/99, *Hung*, still pending.

¹²⁶ Case C-274/96, *Bickel*, [1998] ECR I-7637, paras. 16, 23 et seq.; Commentary by A. Gattini, *Rivista di Diritto Internazionale* 82 (1999), 106.

¹²⁷ In this direction P. Hilpold, *Unionsbürgerschaft und Sprachenrechte in der EU*, *JBl.* 2000, 93 (99); N. Reich, *Union Citizenship - Metaphor or Source of Rights?*, *ELJ* 7 (2001), 4 (13 et seq.); critical F. Palermo, *The Use of Minority Languages: Recent Developments in EC Laws and Judgments of the ECJ*, *MJ* 8 (2001), 299 (312 et seq.). The right to obtain the free assistance of a translator still forms the minimum standard according to Art. 6

republican constitutional duties expected of national citizens in the sense of a contribution. Examples include the duty to obey the constitution and law (Arts. 9 (2), 18, 21 (2) and (4) GG), to work (Art. 58 Port. const., Art. 35 Span. const.), to pay taxes (Art. 31 Span. const.) and to perform compulsory military service (Art. 12 a GG, Art. 30 Span. const.).¹²⁸ If Art. 17 (2) EC is determined by this understanding, then it awakens associations with the image of the state. It is doubtful whether it can plausibly be given substance.

Notwithstanding the agreement underlying all legal systems to observe the legal rules from which it is constituted, EC law does not contain any duties comparable with political duties. The Community legal order does not recognise either direct or indirect taxes or compulsory military service. Even the prohibition of the abuse of law only constitutes an inevitable limit of law and not an autonomous duty.¹²⁹

As with the expectation of diplomatic protection abroad, political duties (as they are usually described) also arise in the conflict between protection and loyalty.¹³⁰ There is pressure within the Union for such a sphere of protection – visibly so in the proposal for an area of freedom, security and justice (Arts. 2 (4), 29 EU) and the proclamation of a European Social Charter.¹³¹ There is little to suggest that there are any duties relating to loyalty. Accordingly, Art. 10 EC can merely be interpreted as meaning loyalty to the federation within a federal system. The structural policy and other programmes of financial assistance might amount to a form of

(3) a) and e) of the European Convention of Human Rights.

¹²⁸ J. Shaw, *Citizenship of the Union: Towards Post-National Membership?*, in: The European University Institute (ed.), *Collected Courses of the Academy of European Law*, Vol. VI-1, 1998, 237 (343).

¹²⁹ Reich, see note 127, 21 et seq.

¹³⁰ On “residual republican duties” H. Hofmann, *Grundpflichten und Grundrechte*, in: J. Isensee/P. Kirchhof (eds.), *Handbuch des Staatsrechts*, Vol. V, 1992, § 114 para. 20; critical G. Frankenberg, *Die Verfassung der Republik*, 1997, 117 et seq.

¹³¹ Cf. J. Shaw, *The Many Pasts and Futures of Citizenship in the European Union*, *ELR* 22 (1997), 554 (565 et seq.).

financial compensation but certainly not a duty of solidarity among citizens.¹³² Moreover, despite surrounding itself with attributes of statehood such as flag, anthem etc., the Union does not expect personal duties of loyalty. The Union courts its citizens not because it expects them to perform duties but because it wishes to be accepted as a body politic, for which everyone feels a sort of ethical responsibility.

It is not necessary to establish duties of Union citizens in order to realise the aims by which Union citizenship is to be pursued, i.e. the strengthening of personal rights, the promotion of freedom of movement and, thereby, the integration of the peoples of Europe together with the increase in legitimacy of the Union. A constitutional style modelled on that of the state leads to misunderstandings here as well, the avoidance of which should be in the interests of the parties involved.

5. The Relationship Between Union Citizenship and Fundamental Rights

As has been pointed out in the foregoing, Arts. 18-21 EC do not define Union citizenship exhaustively. The general reference in Art. 17 (2) EC to all rights and duties of Community law has already been examined in connection with secondary law. Furthermore, it has been stressed that written primary and secondary law does not by itself enhance citizen status. This was only achieved by reference to Art. 12 EC made by the Court. Art. 12 EC, one of the few fundamental rights set forth in the EC Treaty, also contains the most important legal cross-connection between Union citizenship and fundamental Rights.¹³³ This provision raises the question as to how each relates to the other. In this respect, the aim cannot be to reserve all

¹³² See. L. Osterloh, Harmonization and Public Finance in Germany and Europe, *Columbia Journal of European Law* 2 (1996), 519 (529 et seq.).

¹³³ K. Lenaerts/E. de Smijter, A “Bill of Rights” for the European Union, *CML Rev.* 38 (2001), 273 (275).

fundamental rights - libertarian rights in particular - to Union citizens.¹³⁴ However, fundamental rights provide information as to how a body politic is constituted. In particular, the question arises as to whether the recognition of individuals as citizens corresponds to libertarian rights which fill the concept and aim of Union citizenship with substance.¹³⁵

Initially, there were no connections between the case law on fundamental rights and Union citizenship. Whereas Union citizenship is derived from the initiatives of the Council and the Commission, Community legal rights owe their creation to a correction of the EC law's claim to supremacy. That is to say that, on the one hand, uniformity, prevalence and effectiveness particularly of secondary law cannot be placed in question by national fundamental rights. On the other hand, however, the legitimacy of the Community legal order will suffer adverse effects if this loss is not compensated.¹³⁶ This may be why Union citizenship and fundamental rights do not refer to each other in the treaties either. The Treaty establishing the European Union, in Articles 6 and 7, recognises fundamental and human rights in a rather general way whereas Union citizenship is regulated in the EC Treaty – an almost paradoxical distribution considering the current significance of each subject.

Commentators have criticised the lack of a conception of citizens' rights which is becoming ever more obvious behind this hitherto rather loose connection. Despite a basic recognition of the merits of the ECJ and its decisions concerning fundamental rights, it is accused of enforcing personal rights not for their own sake but only where expedient for Community law, while otherwise subordinating them to Community interests.¹³⁷ Such objections hide the

¹³⁴ See I. Pernice, *Eine Grundrechte-Charta für die Europäische Union*, *DVBl.* 2000, 847 (856).

¹³⁵ See the interpretation of "civis europeus" by AG Jacobs in Case C-168/91, *Konstantinidis*, [1993] ECR I-1191, para. 46.

¹³⁶ Cf. BVerfGE 37, 271 ("*Solange I*" Case) and Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, para. 3.

¹³⁷ S. O'Leary, *The relationship between Community citizenship and the protection of fundamental rights in*

desire to intensify the protection of legal rights and to make them not a limitation to, but an end of the Community's activity so that they, just like other rules which implement objectives of the Treaty, would participate in the *effet utile*.¹³⁸ The corresponding attempts by the Parliament have not yet met with success.¹³⁹ Their realisation would mean reorganising the Union from a special-purpose association of economic integration into a genuine community of fundamental rights and values, as it were, a supranational version of the European Council. However, this is not on the agenda owing to the distribution of roles between Member States and Union.

Essentially, the Charter of fundamental rights¹⁴⁰ has not changed this in any way. It attempts to increase the value of human rights without affecting the functionality of the Union.¹⁴¹ Indeed, it brings fundamental rights into contact with citizens. In accordance with its Preamble, the Union “places the individual at the heart of its activities” and “strengthen[s] the protection of fundamental rights [...] by making those rights more visible in a Charter.” However, this was not achieved by amending the treaties but by creating a reference document which is not legally binding in itself. Critics of Union citizenship will note that it shares with the Charter of Fundamental Rights a comparable need for symbolic legislation, i.e. the desire to promote identification of citizens with the Union by the formulation of rights

Community law, *CML Rev.* 32 (1995), 519 (544 et seq.).

¹³⁸ Cf. Ph. Alston/J.H.H. Weiler, An “Ever Closer Union” in Need of a Human Rights Policy, in: Ph. Alston (ed.), *The EU and Human Rights*, 1999, 658 et seq.; critical A. v. Bogdandy, Grundrechtsgemeinschaft als Integrationsziel?, *JZ* 2001, 157 (158 et seq.).

¹³⁹ Bull. EC Suppl. 2/91; Bindi-Report on European Citizenship for the European Parliament, PE Doc. A3-0300/91, 4; cf. also U.K. Preuß, Grundrechte in der Europäischen Union, *KJ* 1998, 1 (4); H. Däubler-Gmelin, Vom Marktbürger zum Unionsbürger, *FAZ* of 10th January 2000, 11.

¹⁴⁰ OJ 2001 No C 364, 1; concerning the creation of the Charter see G. de Búrca, The drafting of the Union Charter of fundamental rights, *ELR* 26 (2001), 126.

¹⁴¹ Compare, with respect to the draft stage Ch. Tomuschat, Manche Rechte bedürfen der Konkretisierung, *FAZ* of 7th August 2000, 13, considering the Charter, by and large, as a good compromise, with K.A. Schachtschneider, Ein Oktroi, nicht die gemeinsame Erkenntnis freier Menschen von ihrem Recht, *FAZ* of 5 September 2000, 9 (10) who refers to it as a manifesto of global capitalism (“Kampfschrift für die Interessen des globalen Kapitals”); see also M. Wathelet, La charte des droits fondamentaux: un bon pas dans une course qui reste longue, *CDE* 2000, 585.

whilst at the same time keeping their practical effectiveness in check.¹⁴²

Chapter V of the Charter is dedicated to the further development of Union citizenship but fails to provide any new perspectives in this respect. It paraphrases the rights of citizens contained in the second part of the EC Treaty and complements them by the right to “good administration” (Art. 41) - already firmly established in case law - and the right to access documents (Art. 42), which has hitherto been regulated outside Union citizenship in the institutional part of the EC Treaty (Art. 255 EC).¹⁴³ Some provisions also cite Union citizens as beneficiaries of rights but do not go beyond the sands of positive law in this respect. Personal fundamental freedoms have been summarized into a quasi-right to exercise fundamental rights (Art. 15 (2)). In addition, one paragraph in the Article on the freedom of assembly and of association refers to expression of political will of Union citizens in European parties (Art. 12 (2), which corresponds to Art. 191 EC). The Charter therefore entrenches the status quo.

However, many connections between the status of citizen and fundamental rights could result over time. Insofar as Art. 19 EC grants a right to vote and to be elected, all rights must be enforced which are required to participate in elections. These are the rights to free speech, information, assembly, equal rights to media access and the free exercise of office and mandate. Article 12 EC provides the key granting access to rights which state constitutions often reserve to their nationals and, indeed, irrespective of the Charter’s status. Therefore,

¹⁴² Cf. S. Alber, Die Selbstbindung der europäischen Organe an die Europäische Charta der Grundrechte, *EuGRZ* 2001, 349; the European Court of First Instance referred to the Charter as a source of fundamental rights for the first time in Case T-54/99, *Maxmobil v. Commission*, judgment of 30th January 2002, paras. 48, 57, not yet reported.

¹⁴³ The right to freedom of movement (Art. 45) appears at first glance to be drawn wider than in Art. 18 EC because there is no reservation of conditions and limitations; however, this is contained in the general limitation of Art. 52 (2).

even if the courts did not continue their new trend of using the Charter as a source of law,¹⁴⁴ and any changes to its present status notwithstanding, Art. 12 EC has generally granted all Union citizens access to citizens' rights in state constitutions.

The European Convention on Human Rights provides further leverage for enhancing the value of fundamental rights for Union citizens. In this context, the impulses radiating from the European Court for Human Rights are too often overlooked. In one case, where the public were not involved as required by a Directive on environmental law, the Court expressly stated that this stage in the administrative procedure was connected to the substantive guarantees of the Convention.¹⁴⁵ Particular importance is attached to the publicity of administrative decisions as a requirement of transparency. The Strasbourg Court decided that nationals of the EC, within the Union, are not to be considered as foreigners so that their political rights could not be limited according to Art. 16 of the Convention.¹⁴⁶ In the more familiar 'Matthews' decision, the Court regarded the European Parliament as a legislative body pursuant to the third additional protocol of the Convention and granted inhabitants of Gibraltar the right, as against the UK government, to participate in EP elections.¹⁴⁷

6. Interim Evaluation

The investigation provides a split picture. It suggests that a uniform legal analysis of Union citizenship is not possible unless one is prepared, from the outset, to measure it against a pre-

¹⁴⁴ See note 142.

¹⁴⁵ On the connection between the participation of the public in industrial plant supervision according to the "Seveso-Directive", freedom to receive and impart information (Art. 10 HRC) and right to privacy (Art. 8 HRC) see ECHR, *Guerra v. Italy*, Rep. 1998-I, 210.

¹⁴⁶ Concerning Art. 10 HRC (freedom of expression) ECHR, *Piermont v. France*, Series A, No 314, para. 64; commentary by *J.-F. Flauss*, *RTDH* 1996, 364. The judgment is however based not only on the fact that the plaintiff possessed the nationality of a Member State of the EC but also on the latter's status as Member of the Parliament; it did not depend on the lawfulness of the residence (see paras. 44, 49).

¹⁴⁷ See note 90.

defined vision of the role of citizens in Europe. Each of the rather disparate guarantees must be assessed individually – despite their common orientation towards images of political rights.

The freedom of movement granted by Art. 18 EC not only incorporates the *acquis communautaire* into positive law but also helps it to achieve significance in terms of constitutional law, a uniform basis for enacting new secondary law and a view to further development (Art. 18 (2) EC).

The right to vote (Art. 19 EC) offers a starting point for further considerations concerning the legitimacy of sovereign power at local and European level. Active citizenship is no longer determined by nationality but by place of residence. However, it currently lacks significance in the real world.

The rights to petition, information and access to documents (Arts. 21, 255 EC) essentially refer to other provisions of the EC Treaty and confirm the vested rights which exist in any event. In this respect, the right to access documents introduced innovative accents since it was previously - and still is - unrecognised by many legal systems. At the same time, such rights help to implement the active rights of citizens which are not exercised to a significant degree.

On closer examination, the right to diplomatic and consular protection (Art. 20 EC) only has a symbolic significance, overall. The right adds practically nothing to that already possible under applicable international law and it appears that it will not be implemented in the foreseeable future.

The link between the prohibition of discrimination (Art. 12 EC) and the right of residence (Art. 18) made by the ECJ could have considerable potential which transfers Union

citizenship's own concept of national treatment to social and cultural rights. It shows most clearly the resolution to overcome the long-standing tendency to model individual rights on economic freedoms. Judicial development has served to counteract the relative inaction of the Union's political institutions in this respect and not for the first time in the history of European integration.¹⁴⁸

To date, links between Union citizenship and basic rights have only resulted from the case law of the European Court of Human Rights. However, civil liberties could complement citizens' active rights if the ECJ were to transfer the fundamental idea of the *Sala* decision based on Art. 12 EC to the latter.

If one takes the contents of the individual guarantees into account, then they all attempt to place Union citizens on an equal footing within their scope. This concept is indebted to the principle of equality before the law which constitutes a genuine attribute of any modern concept of citizenship. The next step to realise that ideal will have to be to abandon domestic discrimination, which is still beyond the reach of Union law.

IV. THE FUTURE OF UNION CITIZENSHIP

1. Union Citizens in the European Multi-Level System

Union citizenship has turned out to be fragmentary and, in its present state, needs further elaboration (Art. 22 EC). It is an open concept in every respect. For this reason, its true potential cannot be revealed by an analysis of positive law alone.

¹⁴⁸ On this distribution of roles and their reasons see the classical exposition in J.H.H. Weiler, The

The diverse projections based upon various evaluations are derived from different assumptions concerning the future of Europe. It is striking that this discussion is held exclusively in normative terms and scarcely takes empirical contributions into account. The following sections attempt to make some connections.

a) Citizen Status and Identity

Whether Union citizenship is a merely legal construction or whether it also exists in social reality is a question which different scientific disciplines answer differently, varying with methodology. Regardless of discipline, it is possible to distinguish two positions. The frontlines between the different camps in the disputes concerning democracy in Europe, Union citizenship and a European constitution are largely running in parallel. Essentially, a rough distinction can be drawn between “multi-national” and “universal” views.¹⁴⁹

(1) The Multi-National Tradition

A multinational picture of Europe – which is basically a traditional public international law perspective on the Union – presents Union Member States as the significant parties. In terms of legitimacy, the Union is a creation of the peoples of nation states. This view is sceptical of the social requirements and possible developments of an overarching European *pouvoir constituant* with its own constitution, a European democracy and an active citizenship. The

Transformation of Europe, *Yale LJ* 100 (1991), 403 et seq.

¹⁴⁹ Cf. the juxtaposition in each case in E. Balibar, Kann es ein europäisches Staatsbürgertum geben?, in: *Das Argument. Zeitschrift für Philosophie und Sozialwissenschaften* 36 (1994), 621 (623), French original in: B. Théret (ed.), *L'Etat, la finance et le social. Souveraineté nationale et construction européenne*, 1995; M. Kaufmann, *Europäische Integration und Demokratieprinzip*, 1997, 110; P.A. Kraus, Von Westfalen nach Kosmopolis?, *Berl. J. Soziol.* 2000, 203 (204 et seq.). In the following I will not go into the “functionalist paradigm” of the German special-purpose association doctrine (“Zweckverbandslehre”) and liberal economic starting points as considered in my contribution to Drexl et al., see note 11, 105 since it does not contribute anything to the debate concerning Union citizenship. According to this view, the stand taken by the citizens has no consequence for the continuance of integration (E. Haas, *The Uniting of Europe*, 1958, 17); this attitude has ultimately been one of the reasons for replacing the concept of market citizenship by the idea of Union citizenship; see Ph. Genschel, Markt und Staat in Europa, *PVS* 39 (1998), 55 et seq.

Union's subject of legitimacy, according to that view, requires a shared bond which does not exist.¹⁵⁰ The criterion regarded as crucial varies.

The German Federal Constitutional Court, in its famous Maastricht decision, points into this direction. With regard to the principle of democracy, the Court takes account of social and political homogeneity as a requirement of "people", the legitimising community.¹⁵¹ The body politic of the Basic Law must accordingly retain an adequate reserve of its own fields of responsibilities. In this respect, the Court does not rule out complementary strands of legitimacy concerning areas over which the Union exercises sovereign authority: on the contrary, it regards them as the necessary consequence of further steps towards integration. However, the time when this can or should occur is still some way off. Thus, the Union regarded as a "compound of States" (*Staatenverbund*) cannot currently possess a legitimising community of its own. The people of Europe legitimise the Union by their respective national parliaments: in this respect, the European Parliament plays a merely complementary role.

Legal writings also refer to the importance of socio-cultural requirements for a European citizenship.¹⁵² According to *Grimm* there is no European public with pan-European, cross-border discourse on "European" themes; cultural pluralism and linguistic variety are regarded as substantial obstacles.¹⁵³ Others believe evidence of European solidarity to be crucial: this alone made it possible to tolerate outvoting by majority decisions across borders. However,

¹⁵⁰ So-called "no demos thesis", see J.H.H. Weiler/U. Haltern/F. Mayer, *European Democracy and its Critique*, *West European Politics* 18 (1995), 4.

¹⁵¹ BVerfGE 89, 155 (186); cf. also P. Kirchhof, *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*, *EuR Suppl.* 1/1991, 11; criticism in B.-O. Bryde, *Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie*, *StW&StP* 1994, 305.

¹⁵² Cf. for example Grimm, see note 10, 587 et seq.; P. Kielmansegg, *Läßt sich die Europäische Gemeinschaft demokratisch verfassen?*, *Europäische Rundschau* 22 (1994), 23 (26 et seq.); W. Streeck, in: idem. (ed.), *Internationale Wirtschaft, Nationale Demokratie?*, 1998, 11 et seq.; F. Scharpf, *Regieren in Europa*, 1999, 167 et seq.; systematic consideration of different starting points in Augustin, see note 9.

¹⁵³ Grimm, see note 10; but see P. Häberle, *Gibt es eine europäische Öffentlichkeit?*, *ThürVBl.* 1998, 121 (124 et seq.).

such evidence is said to be hard to provide.¹⁵⁴

The present form of democratic accountability in the Union then appears the only plausible concept. The connection between Union citizens only exists in law – in their subjective rights, to be more precise.¹⁵⁵ According to this viewpoint, the citizens of Europe form a loose association of individuals wholly unconnected with the Union itself. Democracy in Europe would then be an arrangement organised by the Member States in their co-operation within the Union, legitimised by their people and which can be dispensed with at any time.

The basic assumptions of this model are empirically formulated but intended normatively. They are based on what is regarded as obvious and for this reason do not take results of empirical social research into account. Their weakness lies in the fact that they can be countered by contrary theses with the same justification. One objection is that it is almost impossible nowadays to satisfy the demand for social and political homogeneity derived from a pre-formulated picture of society even within the nation states.¹⁵⁶ However, a certain immunisation against such criticism is achieved by keeping crucial criteria vague. One exception is the contention that a common political discourse is impossible owing to the lack of a European public.¹⁵⁷ The counter-argument is that the required discourse could be produced and influenced by the occupation of certain political fields¹⁵⁸ and by the formation

¹⁵⁴ On this debate see F.J. Scharpf, *Europäisches Demokratiedefizit und deutscher Föderalismus*, *StW&StP* 1992, 293 (296 et seq.); cf. also U.K. Preuß, *Nationale, supranationale und internationale Solidarität*, and W. Kersting, *Internationale Solidarität*, each in: K. Bayertz (ed.), *Solidarität*, 1998, 399, 411, respectively; R. Bieber, *Solidarität als Verfassungsprinzip der Europäischen Union*, in: A. v. Bogdandy/S. Kadelbach (eds.), *Solidarität und Europäische Integration*, 2002, 38.

¹⁵⁵ P.M. Huber, *Demokratie ohne Volk oder Demokratie der Völker?*, in Drexl et al, see note 11, 27 (33 et seq.); M. Heintzen, *Die Legitimation des Europäischen Parlaments*, *ZEUS* 2000, 377 (384 et seq.).

¹⁵⁶ With respect to the example of Switzerland, repeatedly cited in this respect, see B. Schoch, *Eine mehrsprachige Nation, kein Nationalitätenstaat - Zum Sprachenfrieden in der Schweiz*, *Friedens-Warte* 2000, 349 et seq.

¹⁵⁷ Grimm, see note 10.

¹⁵⁸ Cf. W. Kluth, *Die demokratische Legitimation der Europäischen Union*, 1995, 49 et seq.

of procedures and institutions.¹⁵⁹

A further objection is levelled against the exclusiveness with which conditions of state democracy are referred to as a reference model. A comparative consideration of the state and Union tends to neglect the peculiarities of the Union as a supranational organisation. National sovereignty is regarded as indivisible. The notion is not entertained that the Union could be complementary and supplementary components of a system in which sovereignty is exercised at several levels of power¹⁶⁰ as often found in federal systems.¹⁶¹

(2) Universalist Visions

Advocates of the opposing line of thought believe the State has been defeated as a reference point of identification and direct their attention towards establishing a body politic by a special legitimising community of citizens beyond statehood.¹⁶² According to this “liberal” idea, the origin of a body politic lies in voluntary agreement on constitutive elements. In the “post-national constellation”, Union citizenship can form the nucleus of a federal system with

¹⁵⁹ J. Habermas, *Faktizität und Geltung*, 1992, 643 et seq.; M. Zuleeg, What Holds a Nation Together? Cohesion and Democracy in the United States of America and in the European Union, *AJCL* 45 (1997), 505 (524 et seq.); U.K. Preuss, The Relevance of the Concept of Citizenship for the Political and Constitutional Development of the EU, in: idem./F. Requejo (eds.), *European Citizenship, Multiculturalism, and the State*, 1998, 11 (22 et seq.); M. La Torre, European Identity and Citizenship - Between Law and Philosophy, *ibid.* 87 (96); similar from the view of positive law E. Pérez-Vera, Citoyenneté de l'Union Européenne, nationalité et condition des étrangers, *RdC* 261 (1996), 243 (391 et seq.).

¹⁶⁰ But see N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, 1999.

¹⁶¹ With respect to the USA see the judgment of the US Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985) per Blackmun, J.: “The States unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.” In *U.S. Term Limits, Inc. v. Thornton*, 115 S Ct. 1842 (1995) the Supreme Court did not agree whether the holder of sovereignty was an American people or the people of the States of the USA; the opinions of Judges Thomas, Rehnquist, O'Connor and Scalia decided in favour of the latter sense; see commentary by K.M. Sullivan, *Harv L Rev.* 109 (1995), 78.

¹⁶² Cf. J.-M. Ferry, Die Relevanz des Postnationalen, in: N. Dewandre/J. Lenoble (ed.), *Projekt Europa*, 1994, 30 et seq.; J. Linklater, Citizenship and sovereignty in the post-Westphalian state, *European Journal of International Relations* 2 (1996), 77; Habermas, see note 14, 91 et seq.; concerning further levels U. Beck, *Politik der Globalisierung*, 1998, 7 et seq.; D. Held, Rethinking Democracy: Globalization and Democratic Theory, in: Streeck, see note 152), 59 et seq.

a European constitution. However, seen from the conceptual basis of this theory, there is no justification for replacing the personal isolation of the State by that of the Union. Rather, their arguments are based on the notion of the universalism of subjective rights the granting of which does not depend on traditional memberships. Upon this basis, justification is required if Union state nationals alone are granted political rights at state level.¹⁶³ From that perspective, Union citizenship replaces one criterion of exclusion (i.e. membership of a state) by another (i.e. nationality of a Member State).

If the attribution of political rights is mainly a postulate of equality, the consequence is a “post-national citizenship” which allocates rights not according to the legally established nationality but the place of residence.¹⁶⁴ Consequently, also Union citizenship would have to be overcome. For the Union, Article 63 (4) EC offers a starting point according to which the Council can establish rights which nationals of third party states with a right of residence in a Member State also enjoy in other Union states.¹⁶⁵

This view can derive arguments from some tendencies to uncouple individual rights and duties from nationality. Human rights can be invoked by all who reside within the jurisdiction of a state which recognises them, as is spelled out in Art. 1 ECHR. Similarly, many conventions of the International Labour Organisation and other treaties of international law, which introduce social rights, attach to the characteristic of employee alone. The obligation to

¹⁶³ H. Lardy, The Political Rights of Union Citizenship, *ELR* 2 (1996), 611 (619 et seq.).

¹⁶⁴ Y.N. Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe*, 1994; M. Martiniello, European Citizenship, European identity and migrants: towards the post-national state?, in: R. Miles/D. Thranhardt (eds.), *Migration and European Integration*, 1995, 37 (49 et seq.); Th. Kostakopoulou, Towards a Theory of Constructive Citizenship in Europe, *Journal of Political Philosophy* 4 (1996), 337 (343 et seq.); idem., European Union Citizenship as a model of citizenship beyond the nation state, in: A. Weale/M. Nentwich (eds.), *Political Theory and the European Union*, 1998, 158; M.J. Garot, *La citoyenneté de l'Union européenne*, 1999, 304; H. Staples, *The Legal Status of Third Country Nationals Resident in the European Union*, 1999, 335 et seq.; R. Davis, Citizenship of the Union ... rights for all?, *ELR* 27 (2002), 121 (135 et seq.); concerning such models V. Ferrari, Citizenship: Problems, Concepts and Policies, in: La Torre, see note 37, 51 et seq.; J.D. Galloway, Citizenship: A Jurisprudential Paradox, *ibid.* 65 et seq.

pay tax, which is occasionally cited as an example of a civil duty, mainly depends on residence.

Even within a national context, rights or duties as the ones referred to were at most temporarily constitutive elements of the status of citizen, if at all.¹⁶⁶ But objections go deeper than that. At its core, the point radical universalism makes is that (Union) citizenship should not depend on nationality. Critics complain that a body politic cannot be established on the basis of civil rights and belief in abstract norms alone and that the effect of common integrative factors is underestimated.¹⁶⁷ They parade many arguments which have played a role in the debate on liberalism vs. communitarianism.¹⁶⁸

This contribution cannot investigate the contingencies of a cosmopolitan extension of the status of citizenship Taking Union citizenship as it is conceived in Art. 17 EC as its starting point, it will restrict itself to the consequences of the framework positive law here offers.

b) Identities of Citizenship in Multi-Level Systems

Objections that the republican basis of the state is over-emphasised or neglected might overlook promising attempts to classify Union citizenship within the framework of the vertical structure provided.¹⁶⁹ As with some of the approaches discussed, such criticisms also follow a federalist paradigm but avoid placing normative demands on Union citizenship in relation to its requirements. The point of departure is the hypothesis that citizen status is possible at Union and state level simultaneously. Evidence must then show that there are

¹⁶⁵ Reich, see note 127, 18 et seq.

¹⁶⁶ Supra II. 2 b).

¹⁶⁷ Kraus, see note 149, 206.

¹⁶⁸ See the contributions in A. Honneth (ed.), *Kommunitarismus*, 3rd ed. 1995.

¹⁶⁹ Meehan, see 51, 150 et seq.; D. Heater, *What is Citizenship?*, 1999, 87 et seq.

sufficient common elements for a united expression of will with regard to the current responsibilities of the Union.

A common culture of Member States has always been accorded a crucial role.¹⁷⁰ Here, the attempt to track down pre-existent social foundations of a body politic repeats itself. However, it would be incorrect to view the leitmotiv of culture in the light of advancing homogenisation.¹⁷¹ The Union is based on the diversity of European culture and has accepted this as the most important justification for the principle of subsidiarity.¹⁷² Linguistic variety also forms part of the *acquis culturel* of the Union. Cultural diversity might be in constant conflict with nationality but it is constitutive for Union citizenship. This condition is necessary for enquiring as to its genuine identity.¹⁷³

An approach orientated towards the aim of citizen participation assume that awareness of identity entails that members of a group share its common fate and exercise dispositive rights granted to them for their influence. The relevant models would be those which connect cultural diversity to the recognition of equal and political rights together with the form of democratic expression of will.¹⁷⁴ In relation to the Union, they would have to be transferred to its own system of rule. Several disciplines describe this by the concept of multi-level system which is receptive to very different models.¹⁷⁵

¹⁷⁰ Cf. Art. 151 (1) EC (“common cultural heritage”). The familiar statement of Monnet also comes to mind: “If I had the chance to begin again, I would start with culture” see T. Oppermann, *Europarecht*, 2nd ed. 1999, para. 1967.

¹⁷¹ Cf. H. Lübke, Europas Identität und die europäische Einigung, in: M. Bahr (ed.), *Das geistige Erbe Europas*, 1994, 193; M. Nettesheim, Das Kulturverfassungsrecht der Europäischen Union, *JZ* 2002, 157 (158 et seq.).

¹⁷² R. Lepsius, Bildet sich eine kulturelle Identität in der Europäischen Union?, *Blätter für deutsche und internationale Politik* 1997, 948; for the influence of regional elements on a common “lifestyle culture” within the Internal Market see R. Münch, Between Nation-State, Regionalism and World Society, *JCMS* 34 (1996), 379 (394 et seq.).

¹⁷³ On identity as a concept in constitutional law see E.-W. Böckenförde, Die Nation - Identität in Differenz, in: K. Michalski (ed.), *Identität im Wandel*, 1995, 129 (134, 145 et seq.).

¹⁷⁴ See contributions in M. Walzer, *Civil Society and American Democracy*, 1992.

¹⁷⁵ See European governance – A White Paper, COM (2001) 428 final = O.J. 2001 C 287, 1 (29); in relation to political sciences M. Jachtenfuchs/B. Kohler-Koch, Regieren im dynamischen Mehrebenensystem, in: idem.

The search for empirical requirements for such a ruling model uncovers research relating to sociology and social psychology which investigates the European identity of Union citizens. ‘Identity’ means the self-perception and portrayal of a human being which results from the awareness of belonging to certain groups or having distinct characteristics. Identity is, to a large degree, based on contingent factors and for many is therefore based on contexts which are “non-homogenous” and graded according to different levels of identity. In this respect, several identities are cumulatively possible without one of them having to claim precedence.¹⁷⁶ Identity can also be distinguished in terms of culture and region (besides gender -, age-, religion-, biography-, profession-specific etc.): it can therefore display local, regional, national and European reference points. Transferring this assumption to the Union, it can be established by empirical methods that the existing system of several tiers is reflected in the consciousness of Europeans.¹⁷⁷ Regular rises in the “Eurobarometer” also show that most Union citizens see essential parts of their identity in both their states of origin and “Europe”.¹⁷⁸

(ed.), *Europäische Integration* (1996), 27; M. Zürn, Über den Staat und die Demokratie im europäischen Mehrebenensystem, *PVS* 37 (1996), 27; Scharpf, see note 152, 81 et seq.; in relation to legal science E. Schmidt-Aßmann, *Allgemeines Verwaltungsrecht als Ordnungsidee* (1999), 324; I. Pernice, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?, *CML Rev.* 36 (1999), 703.

¹⁷⁶ Such recognition is not new; see the references to Durkheim in W. Gephart, Zwischen „Gemeinsamkeitsglaube“ und „solidarité sociale“. Partikulare Identitäten und die Grenzen der Gemeinschaftsbildung in Europa, *Zeitschrift für Rechtssoziologie* 14 (1993), 190 (195 et seq.); to Burke, Laski and T.H. Marshall in J. Monar, Die Unionsbürgerschaft als konstitutives Element des Unionssystems, in: R. Hrbek (ed.), *Die Reform der Europäischen Union*, 1997, 203 (209).

¹⁷⁷ O. Angelucci, Die europäische Identität der Europäer: Eine sozialpsychologische Bestandsaufnahme, in: A. v. Bogdandy (ed.), *Die Europäische Option*, 1993, 303; J. Kerkhofs, Les valeurs des Européens, in R. Picht (ed.), *L'identité européenne*, 1994, 41; G.M. Breakwell/E. Lyons (eds.), *Changing European Identities*, 1996; St. Immerfall/A. Sobisch, Europäische Integration und europäische Identität, *APuZ* B 10/97, 25 (32); W. Loth, Die Mehrschichtigkeit der Identitätsbildung in Europa, R. Elm (ed.), *Europäische Identität: Paradigmen und Methodenfragen*, 2002, 93 et seq.; cf. also J.H.H. Weiler, To be a European Citizen, in: *The Constitution of Europe*, 1999, 324 (328: “differentity”).

¹⁷⁸ Recently, 53 per cent of all those questioned in the Union stated that they feel (exclusively or in addition to being a national) European, 44 per cent defined their identity solely by reference to nationality; the data varies considerably according region, from a relation of 75/22 per cent in Luxembourg, 56/40 per cent in Germany to 28/71 per cent in Great Britain. Source: Eurobarometer 56, 14, collected October/November 2001, publ. April 2002, http://europa.eu.int/comm/public_opinion. 60 per cent declared themselves proud of Europe, by contrast 28

Empirical findings cannot indicate normative postulates such as moral requirements of solidarity. However, to the present author's knowledge, it is not claimed that the constitutional role of citizenship in Europe can be developed from the reserve of multi-levelled identities alone. Three results deserve emphasis:

- The view of the necessarily exclusive nature of the position of the individual in terms of citizenship does not do justice to the empirical facts; normative conclusions based thereon are problematic.
- One cannot presume that Union citizenship is lacking any kind of social basis.
- Such studies have shown that identities are particularly influenced by political discourses expressed in the media.¹⁷⁹

Identity and discourse therefore exercise mutual influence over each other.¹⁸⁰ European public opinion does not have to be a pre-condition for active Union citizenship but can emerge in parallel. Therefore, Union citizenship can clearly be created by legal means as well. The decisive point is not whether active citizenship has already existed with adequate characteristics of identification in the social sense but whether chances of identification are opened up and accepted.

The question now concerns whether there are any models of accountability beyond the nation state which adequately reflect social reality and their possibilities of development.

per cent did not perceive any emotional affinity, *ibid.* 17.

¹⁷⁹ O. Angelucci, *Europäische Identitätsbildung aus sozialpsychologischer Sicht*, in: Elm, note 174, 111 et seq.

c) The Complementary Relationship between Citizen Status and Political Participation

This analysis would correspond with a multi-level model with different legitimising communities (demoi).¹⁸¹ Depending on the level concerned, the group of active citizens is constituted according to individual or several different criteria. Nationality decides on the allocation of political rights at national level; otherwise among Union citizens the matter only concerns the centre of their lives which is represented by the place of residence. However, citizenship outlined in Union law and expanded at European level can only promote its social reality by creating genuine opportunities to participate in European politics.¹⁸² Here lies the real problem with its legal construction.

2. Union citizenship and Democracy in Europe

If reference to the legal debate concerning democracy in Europe is sought, two options can be ruled out: (1) the present discussion is no longer concerned with the Utopia of a European Federal State, the democratic organisation of which would have to be proposed.¹⁸³ (2) The model of deliberative democracy sustained by universalist moral philosophy, the voters of which are constituted by those who have decided in favour of life in the Union and accept the rules of shared expression of will,¹⁸⁴ exceeds the concept of Union citizenship.

It has been presumed here that a European citizenship can co-exist with national

¹⁸⁰ Cf. also Shaw, note 131, 563; idem., note 6, 312 et seq.

¹⁸¹ See for example, R. Koslowski, Intra-EU Migration, Citizenship and Political Union, *JCMSt* 32 (1994), 369 (389 et seq.); D.N. Chryssochoou, Europe's Could-Be Demos: Recasting the Debate, *West European Politics* 19 (1996), 787 (793 et seq.).

¹⁸² On this connection U.K. Preuß, Problems of a Concept of European Citizenship, *ELJ* 1 (1995), 267 (276 et seq.).

¹⁸³ F. Mancini, Europe: the case for statehood, *ELJ* 4 (1998), 29.

¹⁸⁴ J. Habermas, *Die Einbeziehung des Anderen*, 1996, 277 et seq.; D. Curtin, Postnational Democracy: *The*

citizenship.¹⁸⁵ Citizens must participate in decision-making at both levels. Proposals for improving existing rules will pursue this aim and aim at strengthening elements of active citizenship by legal means in order to promote a common identity, responsibility and solidarity, such as European referenda,¹⁸⁶ but also a genuine procedural involvement in the constitutional process which would go beyond separate ratifications by the Member States.

To a smaller degree, this is the strategy of the European Commission which has made transparency, control and good administration the leading concepts of its administrative policy by different initiatives. A further point, rightly regarded as decisive, is the promotion of legal equality amongst Union citizens which must complement the recognition of diversity.¹⁸⁷

In addition, the value of citizen status can only be further enhanced if the institutional framework is transformed: in particular, if the European Parliament would assume the function of a genuine parliament within the jurisdiction of the Union. This demand is suggested by the Treaty's choice of wording which is orientated towards citizenship. For if political rights form the decisive criterion with regard to citizen status and, furthermore, if the identity of European citizen can only be constituted and further developed by the creation of European discourse, then it must be matched by substantial democratic procedure and institutions. At this point, political limits to further development of the status of Union citizen become visible. The divergence between the symbols chosen in the language of the Treaty and the institutional architecture of the Union leads to an aporia. This will continue to remain

European Union in Search of a Political Philosophy, 1997.

¹⁸⁵ Cf. also Weiler, see note 177, 324 et seq. Accordingly, the national level represents the sphere of the affinitive emotionally rooted identity, the European level the Empire of the rational, determined by the perception that tasks of common interest can only be solved peaceably and in a legally ordered procedure; *contra* Barber, see note 8, 250 et seq.

¹⁸⁶ See e.g. J.H.H. Weiler, The European Union Belongs to its Citizens: Three Immodest Proposals, *ELR* 22 (1997), 150 (152 et seq.), with elements of direct democracy; see also A. Héritier, Elements of democratic legitimation in Europe: an alternative perspective, *J. Eur. Public Policy* 6 (1999), 269.

¹⁸⁷ It forms a focus of the Third Report, see note 36, 2, 4, 26 et seq.; cf. also Shaw, see note 99, 424 et seq.

one reason why citizens in the Union remain at a distance despite attempts by the Commission and Parliament to overcome this.

3. Union citizenship and European Constitution

The experience from Union citizenship threatens to repeat itself in the debate concerning the European Constitution. The choice of term propagated triggers off associations to which the content ultimately agreed might not correspond. The convention procedure currently followed can be interpreted as an attempt to organise a step towards consolidating the Union, for a change, not in the intergovernmental procedure hitherto pursued and to lend it an improved basis of legitimacy. Looked at it from a public international law perspective, however, the members of the convention are not more than plenipotentiaries with the power to negotiate yet another treaty.

The role which the citizens are ultimately to play here is a question which has bearing on their European identity. The citizens themselves hardly ever adopted constitutions in a factual sense. Social contracts are philosophical fictions according to which constitutional practice can be subsequently interpreted.¹⁸⁸ However, to believe that citizens will accept a constitution over the course of time by practical experience risks making the basis of the Union a fiction. To offer a Europe-wide referendum or to link the next elections to European Parliament with a constitutional debate would mean to take citizens seriously.

¹⁸⁸ See Pernice, note 61, 167 et seq.; G. Frankenberg, Die Rückkehr des Vertrages. Überlegungen zur Verfassung der Europäischen Union, in: L. Wingert/K. Günther (eds.), *Die Öffentlichkeit der Vernunft und die Vernunft der*

V. CONCLUDING REMARKS

There are two discussions in European legal science concerning Union citizenship which are independent from each other. One concerns the positive law of the EC Treaty and the case law, the other concerns the future role of active citizenship in the Union.

Analyses of the legal substance of Union citizenship as it was set forth in the founding Treaties usually show its limitation. They bring together the lines of development relating to freedom of persons and the political rights of participation and control. However, even with the best will in the world it must be admitted that this has only resulted in an insignificant enhancement to the status of European individuals. The driving force is the ECJ true to its tradition of developing weakly conceived legal institutions into strong concepts of rights. The connection of Union citizenship with social and cultural participation rights for which the Court is responsible lends Union citizenship new substance, the appraisal of which is only just beginning.

The scholarly discussion concerning the future form of union citizenship can refer to the cross-border legitimising community of the Union, the creation of which Art. 19 (2) EG appears to anticipate. It has many conditions because it is influenced not only by views on the continuance of the integration process but also by the communitarian/liberal debate concerning the position of the individual and by the discourse concerning the make-up of body politics without socio-cultural unity. It verifies which projections the concept of citizen allows and contrasts sharply with stock-taking of positive law.

If one accepts that the status of citizen is defined by the granting of political rights, then cross-

connections to the normative question concerning social basis, democratic make-up and the multi-level architecture of the Union necessarily result. The empirical contributions, which play a subordinate role in the normative debate, certainly do not allow any compulsory conclusions for the views of European active citizenship but they do show that identities are changeable and can be moulded by institutions.

Sovereignty, people and the identity of individual citizens can refer both to European and national levels. Concerning further initiatives in the tradition of establishing a “European identity”, this means that the Union will only come closer to its citizens if it offers identification by real opportunities of participation. Otherwise, Union citizenship will remain a weak construction behind its ambitious facade.