

The Invention of the European Citizen

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It is in the European Court of Justice that community citizenship is being constructed. Ruling after ruling, decision after decision, the Court confers rights upon European nationals and a little more substance to political Europe.

It bears a huge symbolic burden and has been the object of an impressive number of studies. Yet despite all of the attention it has received, European citizenship still lacks precise legal content. Formally established by the 1992 Maastricht Treaty, it has been the object of very few legal texts. At first glance, moreover, the texts that do address it seem to delineate a somewhat vague program of action rather than a specific legal regime. Let's look at the facts.

The principle innovation of the Maastricht Treaty consisted in the adoption of a new treaty on the European Union [1]. By leaving behind the single method of gradual economic harmonization and venture out into the much more political terrains of defense, foreign affairs, justice and the promotion of fundamental rights, the Treaty undeniably crossed a new threshold in the process of community integration.

Community citizenship is an important aspect of this evolution. Starting with the preamble to the EU treaty, the governments of Europe declared themselves “resolved to

establish a citizenship common to nationals of their countries”. In doing so, their aim, according to Article 2, was to “strengthen the protection of the rights and interests of the nationals of [the Union’s] Member States”. A grandiose, to be sure, though the realities of the situation required them to lower their sites somewhat.

Indeed, the sections of the EC treaty devoted to Union citizenship are extremely cautious. Above all, the relationship between community citizenship and nationality remained indestructible: “Any national of a Member State is a citizen of the Union”. The national framework therefore loomed large, all the more so given that, in the absence of community competence, each Member State remained totally free to determine the conditions of access to its own nationality [2]. Community citizenship is therefore not granted in an autonomous manner; the population of community citizens is strictly the sum of the nationals of the twenty-seven Member States.

These narrow conditions for granting community citizenship are accompanied by a correspondingly modest legal content. In concrete terms, four specific rights have been extended to community citizens: free movement within Europe (Article 18); the right to vote and eligibility in municipal elections in the Member State of residence (article 19); the right to benefit from the diplomatic protection of all Member States (Article 20); and the right to petition the European Parliament (Article 21). The first of these rights, however, had already been broadly established: the free movement of persons within the Union is one of the fundamental accomplishments of the European construction. Though not unimportant, the modest scope of the three other rights nevertheless gives reason to doubt that community citizenship will be accompanied by the elaboration of a particular political status. One might thus see the contribution of community citizenship as above all symbolic. An important and even essential symbol, to be sure, but still just a symbol and, as such, capable of justifying a certain lack of interest on the part of jurists [3]. The claim that a new form of citizenship had been created merited a program for the future and political argument in its own right. It did not, by contrast, entail precise legal content. An empty shell looking for something to fill it, the notion of European citizenship seemed to be waiting for new political agreements to supply it with more significant legal

import. These agreements were never reached. While Member States have on several occasions modified the treaties, dispositions relating to citizenship have remained unchanged. The Lisbon Treaty, which one hopes will soon come into force, will not modify this state of affairs.

As is often the case in the community legal order, the revolution – that is indeed the word for it – began in the Court of Justice [4]. The Court gradually seized hold of the notion of citizenship, broadening it in ways that were all the more surprising given the improbability of the forum. Up till then, the Court had refused to intervene in state nationality law. The terms of Article 17 EC are clear on this point and the issue was politically explosive. It is thus hardly surprising that the Court should have taken a gingerly approach in this area, systematically deferring to national law in order to determine who is and who is not a community citizen [5]. It showed the same prudence in regards to the political rights accruing to citizenship. While certain questions were sometimes submitted to it, particularly concerning election to the European Parliament, the Court had up till then largely confined itself to small-scale technical modifications [6]. The audacity of the Court was essentially brought to bear on what nevertheless seemed the least important question: the freedom of movement.

Indeed, free movement for community citizens had already been largely realized with the adoption of the Maastricht Treaty. Although it was originally reserved for workers, in keeping with the economic underpinnings of the community construction, subsequent developments had considerably expanded this limited conception. In particular, three 1990 directives extended freedom of movement to the non-working population. It thus very much seemed as if the construction of free movement for individuals within the European Union had already been realized and hardly required anything more than minor interventions on the part of the Court.

This, however, was to fail to take into account the Court's use of the possibilities contained in the expression "community citizenship", which it was to draw on over the course of a long series of decisions. These do not give themselves to easy summary given

the difficulty of following all of the Court's twists and turns. Yet despite the singularity that necessarily affects a right constructed in fits and starts and over the course of many rulings, an overarching theme can nevertheless be found: the Court's fierce desire to give meaning to its oft-repeated formula, "Union citizenship is destined to be the fundamental status of nationals of the Member States" [7]. This formula must be read as expressing the determination of the Court to give precise content to community citizenship to the extent permitted by the texts.

Entry and Legal Residence

The Court's determination in this area was first brought to bear on the right of entry and legal residence. While the freedom of movement was at first reserved for workers – that is, the economic agents expected to construct the internal market on a day to day basis – it has since been liberated from its initial foundations and generalized. Simply by virtue of being community citizens, Member State nationals now enjoy an extremely broad right to legal residence.

Moreover, this right to legal residence today presents fewer difficulties than any other. Ever since the adoption of a major 2004 directive – the aim of which is perfectly clear in its title, *Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states* – the jurisprudential construction has been partly taken up by community leaders. The Directive established an extremely liberal regime that, broadly put, provided for an absolute right to free movement, a similarly absolute right to a three month period of residence, a right to permanent residence after five years of temporary residence and a right to legal residence between three months and five years on very minimal conditions. It therefore represented a prerogative directly granted to community citizens independently of any and all economic considerations. Indeed, as the Court stated, "the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two of the EC treaty on citizenship of the Union" [8].

In this respect, community citizenship has powerfully contributed to decoupling freedom of movement from economic activity. The community citizen's freedom to come and go across the entire territory of the community is now guaranteed. Although it has not completely disappeared, the initial economic purpose of this freedom is now of secondary importance.

Of course, this liberal solution only concerns Member State nationals. For all that, non-EU nationals will for their part also benefit from it one of these days. Here, too, the movement is longstanding but has been profoundly transformed by the advent of European citizenship. Indeed, it has long been agreed that the family members of community nationals should be allowed to move with them, even if they are not nationals of one of the Union's Member States.

The Court has thus for many years required that the movement of workers respect certain demands of liberty and dignity. In concrete terms, the solution implies that the rights guaranteed a community national's family be interpreted in light of the right to pursue a normal family life as proclaimed by Article 8 of the European Convention on Human Rights and recognized by community law [9]. This solution, for its part, is now enshrined in the 2004 directive.

What doesn't figure there, by contrast, is the very close oversight of the Court, which has been renewed on the basis of community citizenship. No doubt the *Chen* affair was the most emblematic in this regard [10]. This particular case concerned a young Chinese woman who travelled to the United Kingdom, where her husband, himself a Chinese national, frequently came for professional reasons. She then remained illegally in England. After becoming pregnant, this woman left for Belfast – i.e., still British territory but on the island of Ireland. Yet, under Irish nationality law, all persons born on the soil of the island of Ireland can acquire Irish nationality. For this reason, the young Catherine is Irish. Citing her status as mother of a community citizen, Mrs. Chen requested a long-term residency permit from the British authorities. Invoking various arguments concerning the fraudulent character of the interested party's maneuver, the British

authorities refused. This refusal was challenged and the Court of Justice was asked to determine whether it was in conformity with international law.

Basing its decision on community citizenship, the Court entirely found in the petitioner's favor. Indeed, it underscored the fact that young Catherine is an Irish national and therefore a community citizen. As such, and even if she does not enjoy a right of residence drawn from the applicable derived law, the child directly enjoys the prerogatives accruing to this status, particularly that of being able to reside on the territory of another Member State. The fact that Irish nationality had been obtained thanks to an opportunistic voyage to Northern Ireland is, from the point of view of community law, irrelevant. Particular Member States are alone competent to determine who is and who is not their national; once this nationality has been attributed to a person, the other Member States are incapable of limiting its effects. The petitioner thus may not be reproached for any abuse of law. Once the case of the child had been resolved, there remained that of the mother. For the latter, the Court underscored that the residency right guaranteed by Article 18 would be deprived of all useful effect if the child could not travel with the person responsible for looking after her. A side effect of the decision, therefore, was that the mother was to be granted residency rights on British soil.

The story of Madame Chen is instructive because it shows the extent to which the Court of Justice seeks to fully draw out the consequences of its own jurisprudence concerning community citizenship. Beyond a shadow of a doubt, these consequences are understood in a very broad way: Madame Chen's sophisticated maneuver was not condemned by the Court, which instead contented itself with underscoring that the rights resulting from access to community citizenship can not be limited by another Member State. In this respect, access to the nationality of a Member State, by whatever means, is the front door for a general, indisputable status that can be extended to a significant portion of the beneficiary's family.

With community citizenship, we have arrived at a right to entry and residence similar to the freedom to come and go of internal law – that is, a public freedom disconnected from

all economic considerations. What is on its way to being realized here is no longer a labor market but rather a single territory within which the borders between states will be gradually stripped of all legitimacy.

Equal Treatment

An examination of the decisions relating to equal treatment leads to a similar conclusion. The equal treatment of the nationals of the various Member States was consecrated by the treaties. In particular, the ban on all forms of national-origin discrimination is as old as the initial Treaty of Rome and today features in both Article 12 and, more specifically, Article 39 regarding the free movement of workers. As in the area of the right to reside, it was therefore not at all certain that community citizenship would significantly contribute to the long-standing and solid edifice constructed by the Court and the law derived from it in the area of national non-discrimination.

Yet the Court went much further and, now that the evolution is nearly complete in the area of residency rights, it appears to be drawing very innovative solutions from community citizenship in the area of equal treatment. Indeed, some have begun to speak of “European social citizenship” [11]. More specifically, European citizenship has allowed equal treatment’s field of application to be expanded in both its personal and material dimensions.

The personal dimension is perhaps the most immediately identifiable. It consisted in granting the community citizen rights that had up till then been reserved for workers. Indeed, a particular social advantage, such as the educational allocation for children, is today no longer reserved to workers alone nor even to those who enjoy a right to residence on the basis of community law. This is the lesson of the very first ruling founded on community citizenship [12] and it has since been repeated time and again by the Court – for students [13], unemployed people [14] and the destitute [15]. The solution figures in Article 24 of the 2004 directive, according to which “all Union citizens residing on the basis of this directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.”

The material dimension of this extension is in some ways a corollary of the personal extension. By increasing the number of people concerned by equal treatment, the Court was strongly encouraged to consider the specific social advantages accruing to these new beneficiaries as part of the Treaty's field of application. Community citizenship thus gradually introduced into the heart of community law a number of issues that did not in any obvious way belong there.

The point is particularly striking in the case of a number of social advantages that were not directly related to work or the status of workers and so had up till then fallen outside of the field of application of the principle of non-discrimination among workers. This was the case, for example, for living expenses allocations paid to students [16] and job search allocations [17]: initially excluded from the Treaty's field of application, they now fell under it due to European citizenship. As a result, it was henceforth considered discriminatory to refuse these allocations to nationals from another Member State when they would have been accorded to host country nationals who found themselves in the same situation.

This is all the more striking when the Court uses community citizenship and non-discrimination to much more openly depart from its original field of action and supervise the type of data that is gathered on individuals within the territory of a Member State [18]. From the point of view of data-gathering efforts that have been conceived with public security in mind, the community national must be treated like a national.

Located at the heart of the community construction from the outset, equal treatment thus seems to be enjoying a second wind when combined with citizenship. While certain differences of treatment can still be explained or justified where only economic agents were concerned, these differences are no longer acceptable when the same individual is described as a community citizen. It is no longer the frontiers between countries that are condemned but rather those between individuals. To the degree that both are European

citizens, two nationals of different Member States can not be treated differently, no matter the circumstances.

Creating a Status for the Family?

The argument might be pushed a notch further to cover family law. It is true that, in the absence of community rules in this area, it is in principle up to each Member State to see to the coordination of the various rules of family law. For a long time, community law and family law thus only intersected at a few points. Family ties were examined by the Court of Justice only when specific competencies were to be implemented, particularly in the area of free movement and social services. Occasional interventions aside, however, the Court hardly ventured into the domain of defining family ties.

Guided by technical questions of civil law, the situation today has evolved. In the first stage of this evolution, the Court retained its traditional economic considerations. Extending its jurisprudence to the mutual recognition of diplomas, it held that the principle of mutual recognition should be extended to civil law certificates issued by other Member States. For this reason, the latter must benefit from a real presumption of regularity except in the event that their validity can be “seriously challenged by concrete evidence relating to the individual case in question” [19]. In the same way, the inscription of a family name on civil law registers may be contested before the Court since poor transliteration undermines the freedom of establishment of the individual under consideration [20]. Thus, while community law here impinged on the field of individual rights, the jurisprudence remained rather moderate. It above all concerned economic activity and was ultimately limited to an obligation to mutually recognize administrative documents.

The situation has today evolved. The *Garcia-Avello* [21] and, above all, *Grunkin-Paul* [22] affairs – both of which concern questions of family name – allow us to fully grasp how things have changed. In the latter ruling, what was at stake was a refusal by the German authorities to recognize the name given to the child of a German couple by the authorities in Denmark, where the child was born and resides. The name attributed to the

child by Danish civil law was that of the father and mother set side by side. Deeming that the question of the name should be governed by the national law of the interested party, the German authorities sought to apply the dispositions of German law, which forbids this solution. Judging that the compatibility of the Danish rule with community law could be called into question, the German authorities referred the case to the Court of Justice on the grounds of recourse against judgments.

Basing its decision on European citizenship, the Court found in favor of the parents. The rights accruing to the status of community citizen were indeed said to be challenged should the child have a different name in the two countries with which the child maintained close relations. The German authorities therefore found themselves obliged to recognize the name as it had been determined by Danish law.

This solution is of considerable importance. Uniquely based on community citizenship and independently of considerations of non-discrimination and the difficulties particular to dual nationality, it requires a Member State to recognize family situations that have been legally constituted in another Member State irrespective of the first state's particular rules of recognition. In addition to questions relating to family name, the solution may therefore be easily extended to many other questions of personal status – in particular, in the domains of marriage and descent. By drawing on citizenship to rule on a question outside of the field of application of community law and independently of all economic considerations, the Court here laid an important milestone for the possible emergence of community family law.

There is no question here of creating substantial family law out of whole cloth. Each State remains free to determine the rules that it wishes to see applied. What community law requires, by contrast, is that the citizen be governed by a single status when significant attachments exist with several Member States. When he exercises the freedom of movement guaranteed him by the Treaty, the community citizen must be assured of the permanence of his situation. Any challenge to prior arrangements potentially represents an obstacle to this.

Such a solution needs to be further developed and explored. In particular, it will have to meet the challenge presented by the significant differences of opinion that continue to oppose the various Member States in the area of family law, the most spectacular example of which is marriage between individuals of the same-sex. Yet, in principle and by gradually extending solutions that were originally reserved for workers, it brings to completion the construction of a particular status, a collection of rules governing all those who, for reasons of dual attachment, can call upon the legal systems of several Member States.

In addition to the many questions that it affects (the condition of foreigners, social protection, personal status, etc.), the status of European citizen has thus acquired a global coherence. Community jurisdiction is a real jurisdiction and entails a legal regime of its own, one that comes on top of (and sometimes transforms) the status acquired under the influence of particular Member States.

In this way, the Court is in the process of realizing a long legal and political evolution in which the abstract, economic and disembodied model of the agent of production is once and for all abandoned in favor of a concrete figure exposed to the ups and downs of existence and ordinary passions: the citizen.

Above all, the Court has along the way reinvented an old distinction that long ago contrasted the citizen and the national [23]: whereas the former is seen as an individual enjoying civil rights, the latter is seen as an individual enjoying political rights. The European citizen does not effectively exercise political rights in Europe: the nation rests the relevant level in this respect. That said, the European citizen can assert original rights. Because they flow directly from the rules of the Treaty, these rights are independent of national constructions.

It should be emphasized here that this solution is also an admission of political impotence to the degree that the community citizen as such is still not at the center of the European

political construction [24]. Yet, by gradually giving a legal content to citizenship, the Court is in the process of giving birth to a new bearer of genuine (and not just symbolic) rights: the European citizen.

Translated from the French by **Ethan Rundell**

NOTES

[1] It is worth briefly noting that, since the Maastricht Agreement, community Europe is principally governed by two treaties, the “Treaty on the European Union” (EU Treaty) and the “Treaty Establishing the European Community” (EC Treaty). The recent agreement, generally referred to as the “Lisbon Treaty”, will lead to these two texts being replaced by two others, one entitled the “Treaty on the European Union” and, the other, the “Treaty on the Functioning of the European Union”.

[2] On the diversity of national law in Europe, see P. Weil, R. Hansen (ed.), *Nationalité et citoyenneté en Europe*, Paris, La Découverte, 1999.

[3] See, however, among others, P. Dollat, *Libre circulation des personnes et citoyenneté européenne: enjeux et perspectives*, Bruxelles, Bruylant, 1998 and M. Benlolo Carabot, *Les Fondements juridiques de la citoyenneté européenne*, Bruxelles, Bruylant, 2007.

[4] On the importance of the Court in the process of community construction, see R. Dehousse, *La Cour de justice des communautés européennes*, Paris, Montchrestien, 1994.

[5] See for example ECJ, 20 February 2001, *Kaur*, aff. C-192/99.

[6] See for example ECJ, 12 September 2006, *Eman and Sevinger*, aff. C-300/04, relating to the situation regarding the European election of Dutch citizens of Aruba.

[7] ECJ, *Grzelczyk*, 20 September 2001, aff. C184/99, point 31.

[8] ECJ, *Baumbast*, 17 September 2002, aff. C-413/99, point 83.

[9] See in particular, ECJ, 18 May 1989, *Commission c. Allemagne*, aff. 249/86; more recently, see, in the area of refusal of entry of foreign spouses of community nationals: ECJ, 25 July 2002, *MRAX*, aff. C-459/99.

[10] ECJ, *Zhu and Chen*, 19 October 2004, aff. C-200/02.

[11] S. Maillard, *L'Emergence de la citoyenneté sociale européenne*, PUAM, 2008.

[12] ECJ, 12 May 1998, *Martinez Sala* aff. C-85/96; the decision was for this reason described as a “big bang”: D. Martin, “De *Martinez sala* à *Bidar*, les paradoxes de la jurisprudence sur la libre circulation des citoyens”, in J.-Y. Carlier, E. Guild, *L'Avenir de la libre circulation des personnes dans l'UE*, Bruxelles, Bruylant, 2006, p.159, particularly p.160.

[13] ECJ, 20 September 2001, *Grzelczyk*, aff. C-184/99 ; cJCE, 15 March 2005, *Bidar*, aff. C-209/03.

[14] ECJ, 23 March 2004, *Collins*, aff. C-138/02.

[15] See for example ECJ, *Trojani*, 7 September 2004, aff. C-456/02.

[16] ECJ, *Grzelczyk*, 20 September 2001, quoted above.

[17] ECJ, *Collins*, 23 March 2004, aff. C-138/02, point 63.

[18] ECJ, *Heinz Huber*, 16 December 2008, aff. C-524/06.

[19] ECJ, 2 December 1997, *Dafeki*, aff. C-336/94: in this particular case, it was a matter of determining the age of a person who wished to benefit from a pre-retirement mechanism.

[20] ECJ, 30 March 1993, *Konstantinidis*, aff. C-168/91.

[21] ECJ, 2 October 2003, *Garcia-Avello*, aff. C-148/02.

[22] ECJ, 14 October 2008, *Grunkin-Paul*, aff. C-353/06.

[23] M. Troper, “La notion de citoyen sous la Révolution française”, *Mélanges Dupuis*, LGDJ, 1997, p.301.

[24] On this point, see M. Benlolo Carabot, *op.cit.*, p. 241 onwards.

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