Chapter 14: Citizenship of the European Union

Constitutional importance of Citizenship

14-1 From a constitutional point of view, citizenship is an important indication of the nature of the political entity of which the people who are subject to the laws of that entity are citizens. It is hard to conceive a unitary or federated state without common citizenship, carrying well defined rights and duties. Essentially, citizenship includes at least five elements:

- a clear definition of who qualifies for citizenship;
- legal rights, privileges and immunities;
- the right to vote;
- duties and responsibilities under the criminal law; and
- specific rights and duties created by legislation which, though not primarily concerned with citizenship, affects citizens as such.

14-2 A clear definition of citizenship is essential.[1] The definition in the Treaty is clear enough, as far as it goes; but, in relating citizenship of the European Union to citizenship of the individual Member States, it is derivative.[2] What this means in practice is that the qualifications for citizenship of the European Union vary according to the different citizenship laws of each of the Member States. Moreover, since there is nothing in the Treaty to cause European citizenship to oust or supersede national citizenship, it has to be assumed that the two forms of citizenship exist side by side. The Treaty did not give the citizens of Member States the right to choose whether they wished to become citizens of the European Union.

14-2 Legal rights, privileges and immunities are enjoyed in a unitary state throughout the territory of the state and, in a federated state, in all the constituent states[3]; and no state, provincial or local authority should have power to abridge these rights, privileges and immunities.[4] Citizenship of the European Union falls some way short of conferring similar rights: citizens enjoy only the rights conferred by the Treaty[5], so that rights in matters which fall outside the scope of the Treaty may not be the same as the rights of nationals of other Member States.[6]

14-3 Although the right to vote is a distinguishing feature of state citizenship, the citizens of the European Union have only limited voting powers in states other than those of which they are nationals.[7]

14-4 As a general rule, citizenship carries with it duties and responsibilities under the criminal law. Within a unitary state or a federation there must be equal treatment of citizens for offences and no special treatment in any given state or province. As a corollary, no citizen of the unitary state or federation should be denied the protection of the law in any part of the jurisdiction.[8] Since the European Union has no substantive powers in the field of criminal law, other than limited powers of harmonisation[9], this is not a matter in which the citizen of the European Union, as such, has any duties or rights. Criminal law and constitutional law intersect in at least two ways: first, in the general rights and duties conferred or imposed by the constitution itself; and, secondly, in the existence of constitutional crimes, such as treason or sedition. As to the first of these, no substantive

matters are covered by the Treaty; and, as to the second, *a fortiori*, no constitutional crimes exist at the European Union level. A breach of certain duties imposed by the Treaty may result in the imposition of a penalty; but this would not be in the nature of a criminal punishment.[10]

14-5 As to specific rights created by legislation which, though not primarily concerned with citizenship, affects citizens as such, the principal matters concerned are likely to be those arising from Bills of Rights[11] or, in Europe, from the European Convention for the protection of Human Rights and Fundamental Freedoms.[12] However, although the European Union is committed to respecting "fundamental rights"[13], it is not part of the European Union's task to guarantee them to its citizens, except in the context of the objectives of the Union and, more specifically, of the European Community. Under the Treaty establishing the European Community, the main context in which citizens' rights are an issue is that of free movement of persons and freedom to provide services[14]; and this is reflected in the provisions of the Treaty on citizenship.[15]

14-6 In the constitutional field it is harder to identify the specific duties created by legislation which, though not primarily concerned with citizenship, affects citizens as such. Probably the obligation in some countries to carry out military service is the best example.[16] It is, however, one which is not germane to the European Union.

Citizenship: Provisions of the Treaty

14-7 Under the Treaty, there are provisions covering the following aspects of citizenship of the European Union:

- establishment of citizenship of the European Union[17];
- definition of citizenship of the European Union[18];
- rights and duties attaching to citizenship of the European Union[19];
- freedom of movement and residence[20];
- voting in municipal elections[21] and in elections for the European Parliament[22];
- protection by diplomatic and consular authorities[23];
- petitioning the European Parliament[24];
- applying to the "Ombudsman"[25]; and
- monitoring the operation of the provisions on citizenship of the European Union.[26]

14-8 Every person holding the nationality of a Member State is a citizen of the Union.[27] The national law of each Member States governs the determination of persons holding the nationality of the Member State in question. Citizenship of the European Union complements and does not replace national citizenship.[28]

14-9 Citizens of the European Union enjoy the rights conferred by the Treaty and are subject to the duties imposed by it.[29] For the most part these rights are contained in the remaining provisions on citizenship of the European Union. Despite the specific reference to freedom of movement and residence, the rights contained in the Treaty are largely those which already existed, or exist independently of the provisions on citizenship.[30] Identification of the specific duties imposed by the Treaty on citizens - as distinct from traders, owners of copyright, operators of service stations,

company executives, and so on, - is less clear. Inclusion of the reference to duties may simply have been *ex abundanti cautela* or may possibly have anticipated the addition, in amendments to the Treaty, of other duties.

14-10 In some respects the most tangible of the rights enjoyed by citizens of the European Union is that of moving and residing freely within the territory of the Member States, even though this is subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.[31] The rights are inseparable from the concept of discrimination on grounds of nationality, which is prohibited under the Treaty.[32]

> Article [17] of the Treaty attaches to the status of citizen of the [European] Union the rights and duties laid down by the Treaty, including the right, laid down in Article [12] of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty. It follows that a citizen of the European Union, lawfully resident in the territory of the host Member State, can rely on Article [12] of the Treaty in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State.[33]

The Council has power to adopt provisions with a view to facilitating the exercise of these rights.[34] Except where the Treaty provides otherwise[35], the Council must act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament. The right of citizens of the European Union to enjoy freedom of movement is slightly complicated by the fact that some of the provisions are contained in the Treaty on European Union. "Without prejudice to the powers of the European Community", the European Union's objective is "to provide citizens with a high level of safety within an area of freedom, security and justice".[36] It is further complicated by the existence of a set of provisions on visas, asylum, immigration and other policies related to free movement of persons[37]: these are separate from the original provisions on free movement.[38] Finally, there is a limited right of freedom of movement - limited, that is, to nationals of certain Member States, - under the so-called Schengen arrangements.[39]

14-11 Where a citizen of the European Union resides in a Member State of which he is not a national, he or she has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides, under the same conditions as nationals of that state.[40] The exercise of this right is subject to detailed arrangements adopted by the Council.[41] These arrangements may provide for derogations where warranted by problems specific to a Member State.[42]

14-12 Similarly, where a citizen of the European Union residing in a Member State of which he or she is not a national, he or she has the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.[43] The exercise of this right is subject to detailed arrangements adopted by the Council.[44] These arrangements may provide for derogations where warranted by problems specific

to a Member State.[45]

14-13 No provision of the Treaty on citizenship of the European Union provides for a citizen residing in a Member State of which he or she is not a national, to vote or stand as a candidate in elections to the national parliament or assembly of the Member State in which he or she resides, nor in elections to national public offices.

14-14 Citizens of the European Union have the right, in the territory of a country outside the Union in which the Member State of which they are nationals is not represented, to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State. To secure this protection, Member States have been required to establish the necessary rules among themselves and to start the requisite international negotiations.[46]

14-15 Every citizen of the European Union has the right to petition the European Parliament.[47] This right is defined in more detail in the provisions applying to the European Parliament and its powers and duties.[48] Under these provisions, the right is not restricted to citizens of the European Union, but extends to any natural or legal person residing or having its registered office in a Member State.[49]

14-16 Every citizen of the European Union may apply to the Ombudsman.[50] This is a person appointed by the European Parliament to receive complaints from any citizen of the European Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, other than the Court of Justice and the Court of First Instance acting in their judicial role.[51]

14-17 Every citizen of the European Union may write to the European Parliament, the Ombudsman, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee or the Committee on the Regions in any of the authentic Treaty languages of the Community and have an answer in the same language.[52] The authentic Treaty languages are: Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish.[53]

Monitoring the provisions on Citizenship

14-18 Monitoring of the manner in which the provisions on citizenship of the European Union operate is entrusted to the Commission, which has to report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions in question.[54] This report has to take account of the development of the Union. On the basis of the report, and without prejudice to the other provisions of this Treaty, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, has power to adopt provisions to strengthen or to add to the rights laid down in this Part of the Treaty; the Council must then recommend these provisions to the Member States for adoption in accordance with their respective constitutional requirements. This is an odd procedure. The wording suggests that there is some difference between adopting "provisions" and adopting "measures" and that the

difference lies in the need for certain types of right to call for special adoption by the Member States going beyond (for example) the implementation of a directive. The reason may be the possibility that the Treaty foresees the addition of new rights lying outside the present scope of the Treaty itself.[55]

1. Cf. The Fourteenth Amendment to the Constitution of the United States.

2. Article 17(1) (formerly 8(1)),second sentence, EC Treaty. See paragraph 14-8 below.

3. Cf. Article IV, section 2, first sentence, of the Constitution of the United States.

4. Cf. The Fourteenth Amendment, section 2, second sentence, of the Constitution of the United States.

5. Article 17(2) (formerly 8(2)), EC Treaty. See paragraph 14-9 below.

6. See, however, the discussion of the general provision on discrimination on grounds of nationality between nationals of Member States in Chapter 13.

7. Article 19 (formerly 8b), EC Treaty. See paragraphs 14-11 and 14-12 below.

8. Cf. The Fourteenth Amendment, section 1, second sentence, of the Constitution of the United States.

9. Article 31(e) (formerly K.3(e), EU Treaty. Harmonisation is possible only on the basis of unanimity: Article 34(2) (formerly K.6(2)), EU Treaty.

10. Under Article 83(2)(a) (formerly 87(2)(a)), EC Treaty, provision may be made for regulations imposing fines on persons committing an infringement of the rules on competition; but, under Article 15(4) of Regulation 17/1962, decisions imposing fines are not "of a criminal law nature".

11. As in the United Kingdom (under the Act of 1689) and in the United States (the first ten Amendments, adopted in 1791).

12. Signed in Rome on 4 November 1950.

13. Article 6(2) (formerly F(2)), EU Treaty.

14. Under Articles 39 to 55 (formerly 48 to 66), EC Treaty.

15. In Article 18 (formerly 8a), EC Treaty.

16. In Switzerland, citizenship and the obligation to carry out military service are traditionally inseparable.

17. Article 17(1) (formerly 8(1)), first sentence, EC Treaty.

18. Article 17(1) (formerly 8(1)), second sentence, EC Treaty.

19. Article 17(2) (formerly 8(2)), EC Treaty.

20. Article 18 (formerly 8a), EC Treaty.

21. Article 19(1) (formerly 8b(1)), EC Treaty.

22. Article 19(2) (formerly 8b(2)), EC Treaty.

23. Article 20 (formerly 8c), EC Treaty.

24. Article 21(1) (formerly 8d(1)), EC Treaty.

25. Article 21(2) (formerly 8d(2)), EC Treaty.

26. Article 22 (formerly 8e), EC Treaty.

27. Article 17(1) (formerly 8(1)), second sentence, EC Treaty. "To determine whether a person is a national of the United Kingdom for the purposes of Community law", see Case C-129/99, *The Queen v Secretary of State for the Home Department, ex parte Manjit Kaur*,

28. Article 17(1) (formerly 8(1)), third sentence, EC Treaty.

29. Article 17(2) (formerly 8(2)), EC Treaty.

30. For example, the right of men and women to receive equal pay for equal work, under Article 141 (formerly 119), EC Treaty, and the right of residence under Council Directive EEC/364/90.

31. Article 18(1) (formerly 8a(1)), EC Treaty. An example of a limitation or condition laid down in secondary legislation is to be found in Article 1, Council Directive EEC/364/90, on the right of residence, which provides that persons claiming the right must "have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence".

32. Article 12 (formerly 6), EC Treaty.

33. Case C-85/96, *Maria Martinez Sala v Freistaat Bayern*.

34. Article 18(2) (formerly 8a(2)), EC Treaty.

35. For example, under Article 40 (formerly 49), EC Treaty, which provides for the co-decision procedure.

36. Article 29 (formerly K.1), EU Treaty.

37. Articles 61 to 69 (formerly 73i to 73q), EC Treaty.

38. Contained in Articles 39 to 48 (formerly 48 to 58), EC Treaty.

39. Protocol 2, EC Treaty, on the Schengen *acquis*.

40. Article 19(1) (formerly 8b(1)), EC Treaty.

41. The Council must act unanimously on a proposal from the Commission and after consulting the European Parliament; ibid. See Council Directive EC/80/94 and Case C-323/97, *Commission v Kingdom of Belgium*.

42. Article 19(1) (formerly 8b(1)), EC Treaty.

43. Article 19(2) (formerly 8b(2)), EC Treaty. This is without prejudice to Article 190(4) (formerly 138(4)), EC Treaty, and to the provisions adopted for its implementation.

44. The Council must act unanimously on a proposal from the Commission and after consulting the European Parliament; ibid. See Council Directive EC/109/93.

45. Article 19(2) (formerly 8b(2)), EC Treaty.

46. Article 20 (formerly 8c), EC Treaty.

47. Article 21 (formerly 8d), first paragraph, EC Treaty.

48. Article 194 (formerly 138d), EC Treaty. See Chapter 16.

49. Ibid. Thus if the British subsidiary of a Japanese corporation has a head office in London, it has a right equal to that of a citizen of the European Union to petition the European Parliament.

50. Article 21 (formerly 8d), second paragraph, EC Treaty.

51. Article 195(1) (formerly 138e(1)), EC Treaty. See Chapter 16.

52. Article 21 (formerly 8d), third paragraph, EC Treaty.

53. Article 314 (formerly 248), EC Treaty. Irish is an authentic Treaty language, but not an official language, of the Community.

54. Article 22 (formerly 8e), EC Treaty.

55. For example, under the provisions of the EU Treaty on police and judicial cooperation in criminal matters. See Chapter 8.