

## European Citizenship: The IGC and Beyond

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### Abstract


This paper examines two aspects of the 'citizenship dimension' of the IGC agenda, in the light of a broader argument about the role of citizenship of the Union in feeding the construction and development of a 'European polity'. It is argued that citizenship was always likely to become a salient issue of debate in the 1990s EU, but that the concept which exists so far in Treaty form is extremely weak in nature. Against this background, the paper develops the arguments in favour of amendments to the EU Treaties to incorporate a 'non-discrimination' clause and enhanced individual access to EU institutional documents, concluding that such changes represent a fundamental aspect of polity-formation within the EU, so far as concerns the vital role of citizens.

### Kurzfassung

Dieses Paper untersucht zwei Aspekte der Dimension "Bürgerschaft" auf der Tagesordnung der IGK im Lichte der breiteren Diskussion um die Rolle der Unionsbürgerschaft als Mittel zur Bildung und Entwicklung einer europäischen "Polity". Es wird argumentiert, daß das Thema Bürgerschaft zwar prädestiniert dafür war, ein zentrales Thema der 90er Jahre zu werden, daß jedoch das zur Zeit in Vertragsform festgelegte Konzept sehr schwach ausgestaltet ist. Vor diesem Hintergrund schlägt das Paper als Novellierungen der EU-Verträge vor, eine Nicht-Diskriminierungs-Klausel einzufügen und die Möglichkeiten für den Zugang zu EU-Dokumenten zu verbessern. Diese Änderungen werden abschließend als grundlegender Aspekt innerhalb der Herausbildung einer EU-"Polity" bezeichnet, soweit die essentielle Rolle der BürgerInnen betroffen ist.

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## I. Introduction

The dominant rhetoric of European integration since the difficulties over the ratification of the Treaty of Maastricht has mandated that 'citizenship' would be an agenda item at the Intergovernmental Conference which that Treaty itself determined should begin in 1996, and which is due to conclude during 1997. As is well known, a notion of 'Union Citizenship' was introduced into the EC Treaty by the amendments wrought by the Treaty on European Union, and it has since been the subject of intensive discussion at a number of different political and academic levels, although little of that discussion has revealed any extensive degree of satisfaction with the concept and its subsequent evolution. The rather abstract idea of 'closeness to the citizen' (drawing on Article A TEU) has slipped into political discourse as a sort of badge of political credibility when discussing the further evolution of the Union. However, apart from the introduction of some new and rather controversial and not necessarily very effective rules on public access to documents emanating from the institutions, it is difficult to point to any really significant changes which have resulted from this general rhetoric.

One way of discussing the topic of citizenship in relation to the agenda of the 1996-97 IGC, and prospects for deepened political union, would be essentially descriptive, drawing on concrete (or more often not so concrete) proposals emanating from the various institutions, Member State governments, non-governmental organisations or policy/research institutions, and even individuals, especially academics, who have intervened in the debate, such as Joseph Weiler.<sup>(1)</sup> One such exercise has already been undertaken by Gráinne de Búrca,<sup>(2)</sup> albeit with a specific focus upon the reports issued by the institutions and by the Reflection Group, and with a particular mission in mind, namely to interrogate the so-called 'quest for legitimacy' in the European Union. By legitimacy in this context is meant the dual notion that the EU should both capture popular support, in the sense of acquiring social legitimacy, and also that it should instantiate a certain body of values and standards conventionally associated with liberal democracies subject to the rule of law (in the sense of having a normative legitimacy).

It is useful to draw upon de Búrca's conclusions, which highlight a consistent gap between rhetoric and concrete proposals. She concludes that 'citizenship is at least nominally given a central place in most of the current proposals for enhancing the legitimacy of the European Union', but that 'only the European Parliament makes any concrete proposals in relation to citizenship and in relation to the rights of 'third country' nationals within the Union'. De Búrca then goes on to warn that citizenship is not necessarily an integrative force within the EU, but may in fact be exclusionary and divisive, in particular because as it stands at present it draws directly and solely upon the notions of Member State nationality and citizenship in order to define the scope of membership, and excludes all third country nationals, even those lawfully established and contributing to the economic health and wealth of the Union, *a priori* from the benefit of that membership.

A different way of enquiring about the future significance of citizenship, within the framework of the agenda for the IGC, and also beyond, requires us to go back and discover more about the roots and foundations of Union Citizenship. Citizenship is a widely used, but still very contested concept. Just as with the introduction of the principle of subsidiarity into the EU constitutional framework, accomplished most clearly and explicitly likewise by the Treaty on European Union, the Union is borrowing an established concept with a political and legal heritage which it struggles to incorporate into its own conceptual system. Above all, citizenship is not just a formal legal concept, which the EU can buy into when it has reached a particular stage of maturity or development. The 'currency' of citizenship also carries with it a huge intellectual baggage regarding content, meaning and symbolism which cannot be ignored and indeed can be used positively in the understanding and development of the rather bare provisions of the EC Treaty. Consequently, it is on this heritage that this paper will focus, following a brief review of the *status quo* of citizenship rights in the EC Treaty after the Treaty of Maastricht. There will then be a summary discussion of just two aspects of the concrete evolution of citizenship rights: first, the proposal to introduce a general non-discrimination clause going beyond the range of factors covered by EC law at present (sex/gender and [EU] nationality), and extending also to race, religion, other nationalities, sexuality, age, and other relevant factors; and, second, the suggestion that citizens should be given some form of 'right to open government' which goes beyond the rather vague notions of transparency and 'closeness'. These two aspects, in my view, well illustrate the tensions inherent in citizenship itself.

## II. Citizenship After the Treaty of Maastricht

The 1993 amendments to the EC Treaty introduced by the Treaty of Maastricht put in place a new and rather novel section on citizenship (Part Two: Articles 8-8 EEC):

'Every person holding the nationality of a Member State shall be a citizen of the Union' (Article 8(1)).

The reference to the nationalities of the Member States is important. It states clearly the limited nature of EU citizenship. It links back directly to one of the framework 'constitutional' provisions of the Treaty of Maastricht itself, Article F(1) TEU:

'The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy'.

The rights and duties of EU citizens as defined in Article 8 are first and foremost those conferred or imposed by the EC Treaty (Article 8(2)) (i.e. including rights and duties to be found elsewhere in the Treaty). The following provisions go on to confer some specific rights including:

- the 'right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect' (Article 8A);
- the right to vote or stand in municipal elections for those citizens residing in Member States of which they are not nationals (Article 8B(1));<sup>(3)</sup>
- the right to vote or stand in European parliamentary elections for the same group of citizens (Article 8B(2));<sup>(4)</sup>
- EU citizens finding themselves in the territory of a third country where their own country is not represented have the right to diplomatic or consular protection by any Member State which is represented there (Article 8C);
- the right to petition the European Parliament and to apply to the Ombudsman established under Article 138E.

It will quickly be seen that this catalogue of citizenship rights is exceedingly limited and hardly comparable with domestic conceptions of citizenship. In fact, one of the key concessions made to Danish sensibilities after the first referendum which narrowly rejected the Treaty of Maastricht, was a declaratory confirmation by the European Council that nothing in the provisions of the Treaty of Maastricht in any way displaces national citizenship. Furthermore, it is not an 'independent' status of membership:<sup>(5)</sup> EU citizenship attaches to those with the nationality of the Member States, and it is *prima facie* the Member States who determine - as sovereign states under international law - who are their nationals.

Perhaps the most notable feature of citizenship of the Union is that it is founded on the concept of free movement<sup>(6)</sup> - a right which EU nationals hold and exercise *vis-à-vis* the Member States -, and not on rights which citizens exercise first and foremost *vis-à-vis* the European Union or the European Community. Moreover, it is a right which they already have had - in many cases for many years - either by virtue of the various provisions of the EC Treaty which uphold the principles of the internal market (Articles 7A, 48, 52 and 59), or pursuant to a series of Directives enacted in 1990 to confer rights of residence on a number of residual categories of persons who are not economically active (or are not the members of the families of those who are), such as pensioners, students, and those of independent economic means.<sup>(7)</sup> Article 8A seems to add nothing new, in particular since it also allows the EU legislature to continue to require of those who exercise the right to intra-EU migration that they are economically active, or capable of supporting themselves during their period of residence in the host state.<sup>(8)</sup>

A strong impetus for the inclusion of a conception of citizenship in the EC Treaty came from a Memorandum from the Spanish Government presented to the Intergovernmental Conference on Political Union in 1990.<sup>(9)</sup> It suggested that rights for European citizens would constitute an important and indeed essential core of such a conception. That suggestion was not wholly adopted. For example, the protection of the fundamental rights of EU citizens is to be found elsewhere in the Treaty system, in Article F(2) TEU:

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'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

This is an example of how citizenship rights can be scattered across the Treaty. However, unlike

Articles 8-8E EC, this provision stands outside the jurisdiction of the Court of Justice. In any event, it is essential to look beyond the formal provisions on citizenship to see how and to what extent these 'citizens' are constituted as 'members' having a stake in the European Union as a political entity. For example, the vitally important non-discrimination provision (Article 6 EC) falls outwith these provisions. 'Citizenship' rights are likewise to be found in the case law of the Court of Justice.<sup>(10)</sup> It should be added that the provisions appear an even more inadequate statement of EU citizenship if the attempt is to be made - as here - to provide a broader, contextually grounded view of citizenship issues rather than a formal legal elaboration of a bounded group of citizenship rights attaching to a particular category of persons.

Developments in the field of citizenship rights since ratification and coming into force of the Treaty of Maastricht, with the consequential amendments to the EC Treaty, have been few.<sup>(11)</sup> The provisions on voting and standing in European Parliament and local elections have been brought into force. After some delay a European Ombudsman has been appointed and started work. Little or no progress has been made in the field of free movement, at least in part because of difficulties in achieving the correct balance and parallelism between controls on internal and external borders. The Court of Justice has held that the free movement right in Article 8 is residual, and not the starting point for an analysis of the constitutional nature of free movement.<sup>(12)</sup> To the disappointment of some commentators, the Court has also declined to use the citizenship provisions as an aid to the interpretation of the rest of the Treaty, so as, for example, to form the foundation for holding that directives can have *horizontal* direct effect.<sup>(13)</sup> Citizenship has been raised as an important theme within debates leading into the 1996 Intergovernmental Conference to consider amendments and modifications to the Treaty of Maastricht,<sup>(14)</sup> but and this paper will consider below some of very few concrete proposals which have come out of the consultation process and emerged into specific publicly available texts. The ultimate outcome of these processes of reform is uncertain, as the Reflection Group Report revealed a notable lack of consensus in this area.

### III. Citizenship: The Problematic Heritage

One means of demonstrating the contested nature of citizenship is to show how, at every turn, its usage and meaning is riddled with dualisms. This point relates not only to the language of citizenship in general, but also to explanations as to how it has come to play such an important role within the EU in recent years.

For example, there are twin rationales for the current importance of the citizenship debate, relating to internal and external developments. The first (internal) reason emerges if an evolutionary view of the EC/EU is taken. Whatever theoretical explanation for its development ultimately finds favour, and irrespective of whether its impact upon contemporary Europe or upon the global geo-political stage is given a positive or negative evaluation, empirically there can be no doubting that it has enjoyed a degree of success which would probably surprise all but the most optimistic of its early promoters. It has lasted more than forty years and has survived periods of great crisis and apparently interminable political and economic stagnation. The range of activities covered by the 'Community' method which has involved not only the representatives of the states, but also, increasingly the representatives of the 'people' in the form of the European Parliament, has dramatically extended. Looser forms of intergovernmental co-operation in other fields have also fostered closer links between the countries involved. [State] membership of the EC/EU has grown from six to fifteen, with a number of outstanding 'applicant' countries clustering around the periphery. A supranational legal order has been developed out of extremely unpromising material, creating a system in which individuals have been constructed as 'subjects' of EC law with a range of rights, mainly of a socio-economic nature. The practice of politics has substantially changed as 'Community' questions have been transformed from matters of foreign or diplomatic policy into issues of domestic policy-making. Perhaps most significantly of all, something approximating to a 'single internal market' has been constructed out of a fortunate coalescence of factors. These include the presence of a group of treaty provisions which

grant individual economic freedoms in relation to trade, Court of Justice case law which has frequently maximised the scope of these individual economic freedoms at the expense of national regulatory autonomy, (since 1985) strategic legislative interventions on the part of the Council (increasingly involving the European Parliament) driven forwards by the astute policy entrepreneurship of the Commission, and last, but not least, the impact of global economic changes which have increasingly raised the stakes involved in enhancing 'European' competitiveness.

Inevitably, within such a matrix - where political and economic instabilities have often appeared endemic - larger 'constitutional' questions about the nature of the polity within which these world-historic developments have been occurring have been raised by many observers, both in the field of 'practical' politics and within the academic sphere. One question which keeps recurring is the question of the role of 'the people': if the EU now represents a form of 'polity' (if not a state), then it must have a membership and a relationship to the 'people' who are its 'members'. It also needs a means of exclusion - the inevitable flipside of a concept of membership. Finally, the question arises as to the role of these members in the process of polity-formation: do the members have a constitutive status, either conferred upon them 'from above' by political institutions, or claimed 'from below' through a process of citizen empowerment. All of those points beg the question, however, of the definition of membership and even the putative existence of a 'people' of the European Union - a suggestion which raises a mixture of incredulity and horror in many academic, political and broader popular circles. And so, not all of the impetus for the citizenship debate comes from a positive balance sheet of 'European' achievements. One reaction to the post-Maastricht Treaty ratification crisis has involved the suggestion that the EU governance structures need to offer something with which individuals can identify, and some means of inspiring their loyalty and a sense of identity with the fate of the EU which, while not replacing established national or regional identities, nonetheless helps to give the EU a *raison d'être* which is not purely economic. Laffan puts it in the following terms in the context of an analysis of the politics of identity in Europe:(15)

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'the affective dimension of the European project is critical to the Union at this juncture because the Monnet method of integration has reached its limits...'

All of these issues throw up the dilemma of 'citizenship', or, to put it another way, the question whether there is more to belonging to a class of persons who are the primary subjects of the legal order of the EU in terms of legal, political and socio-economic status than simply being a citizen of one of the Member States who enjoys - by way of 'add-on' - certain legal rights granted by virtue of EC law.(16)

The second (external) reason for a contemporary focus on citizenship in the EU comes from the resurgence - since the late 1980s - of writing about citizenship as a prism of analysis for the human condition. Aside from its use in the analysis of contemporary problems of political and social philosophy such as the nature and scope of rights, concepts of democracy and participation, and notions of identity, the issue of citizenship has been thrown most dramatically into the melting point by the tensions between the upsurge in parallel of new and old regionalisms, nationalisms and even supranationalisms. Yet despite the frequency with which the theme of citizenship is raised, it remains a highly contested concept, and a number of different strands within the literature can be identified. For example, in virtually every work the writer suggests at least two separate usages of the term 'citizenship', but each of his or her usages are likely to be subtly different to every other. In particular, there remains uncertainty as to whether it is sufficient to be a 'passive' citizen - i.e. to receive the rights and duties of citizenship - or whether 'active' citizenship is a necessary component. Do we need to be 'good' citizens, and if so, what is a 'good' citizen? This suggests that citizenship might be an

ideal worked out on the basis of a given political philosophy (e.g. liberalism, radical socialism, communitarianism, etc.) against which actual citizenship rights and duties can be measured. An alternative approach is to put forward a strongly historical analysis of citizenship, as a dynamic patchwork displayed in the constantly negotiated and re-negotiated tension between identity and rights. In view of that observation, another question which needs to be addressed is whether a universal concept of citizenship is possible in multi-ethnic and multi-cultural societies, in view of the plurality of 'identities'.

Taking this resurgence of interest into account, it would have been remarkable if the new types of political and legal issues raised by the EU had not been analysed in terms of the various strands of thinking about the meaning and significance - past, present and future - of citizenship. Nor has it been only those whose primary focus of interest is the EU itself who have considered these questions, but also writers with a broader range of interests in citizenship and the development and articulation of concepts of political community. Thus, for example, Mouffe has argued that

'If Europe is not to be defined exclusively in terms of economic agreements and reduced to a common market, the definition of a common political identity must be at the head of the agenda and this requires addressing the question of citizenship. European citizenship cannot be understood solely in terms of a legal status and set of rights, important as these are. It must mean identifying with a set of political values and principles which are constitutive of modern democracy.'(17)

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Citizenship as a challenge to the EU, and especially to the constitution-makers concerned with the EU, epitomises the possibilities of a new model of 'post-national membership' outlined by writers such as Soysal, which highlights the different levels at which notions of identity and rights are being constituted and suggests a separation of identity and rights. With this shift, it may be that there will no longer need to be a search for the elusive 'European identity':

'While nation-states and their boundaries are reified through assertions of border controls and appeals to nationhood, a new model of membership, anchored in the universalistic rights of personhood, transgresses the national order of things. The duality embedded in the principles of the global system is further reflected in the incongruence between the two elements of modern citizenship: identity and rights. In the postwar era, these two elements of citizenship are decoupled. Rights increasingly assume universality, legal uniformity, and abstractness, and are defined at the global level. Identities, in contrast, still express particularity, and are conceived of as being territorially bounded. As an identity, national citizenship - as it is promoted, reinvented, and reified by states and other societal actors - still prevails. But in terms of its translation into rights and privileges, it is no longer a significant construction. Thus the universalistic status of personhood and postnational elements of membership coexist with assertive national identities and intense ethnic struggles.'(18)

Of course, not all would agree with Soysal's characterisation of a universalist notion of rights. Bellamy, for example, argues for a preliminary focus on problems of democracy in the EU and in EU constitution-building, rather than a preoccupation with rights which, he maintains will always

'prove too indeterminate and subject to conflicting interpretations to provide a constitutional basis for a European polity.'(19)

More specifically he argues that

'since rights are subject to utilitarian considerations and reflect the traditions and understandings of

the community, then our freedom will be best guaranteed, and our rights rendered legitimate, through democracy.'(20)

De Búrca likewise provides a mildly sceptical view of the impact of the language of rights on processes of European integration, reminding the reader not to lionise the work of the Court of Justice in the field of individual rights, but concluding nonetheless that the language of rights can have an integrative function within the structure of the EU legal order, and the wider EU polity.(21) A variant upon the rights/identity dualism which would not fall foul of the inherent limitations of rights discourse involves using a triad of rights, 'access' and belonging (including both questions of identity and legal ascription such as nationality).(22) The perspective of access is added 'as a means of testing the meaningfulness and hence the integrative power of formal rights'.(23) For all of these reasons, in this paper a sceptical eye is turned upon the utility of rights discourse, while acknowledging that in circumstances where the political institutions of European integration continue to lack transparency and general popular legitimacy it seems pointless to throw the rights baby out with the democracy bathwater, simply on the grounds of an underlying scepticism about whether 'rights make a difference.'

Returning to the point about the construction of 'identity' in the cultural or political senses at the European level, a number of writers have suggested mechanisms whereby there might be a reciprocal reinforcement of what elements of 'community' do exist between individuals at an EU level, and the actual practice of citizenship. This represents a different form of 'post-nationalism' to that suggested by Soysal, in that its focus is not upon the transfer of 'rights-giving' or 'rights-enjoyment' away from a (nation)statist norm, but rather focuses upon political and institutional innovation in the construction of a new (political and civic) citizenship at Union level. One might take the work of Weiler as an example of this.

The starting point for his analysis is the attempt to review what he calls *fin-de-siècle* (i.e. post-Maastricht) Europe. Public support for what the politicians 'achieved' at the intergovernmental conferences ending in 1991 has been extremely suspect, and belief in what he calls the European Community's foundational ideals from the immediate postwar era of peace, prosperity and supranationality, which were cast as a counter to (destructive, statist) nationalism, have lost their way in the rhetoric and text of the Treaty of Maastricht.(24) The *crisis* in the sense of the *telos* of European integration worsened considerably, in his view, as a result of the trenchant decision of the German Federal Constitutional Court on the compatibility of the Treaty of Maastricht with the German constitution.(25) Although ultimately setting no barrier to German ratification of the Treaty and to German involvement in 'Europe' as presently constituted, the conceptualisation of state, nation and people given by the Court in that case does represent a serious challenge to what could be termed 'European constitutionalism'. The thesis presented by the Court - greatly simplified - was that there is no European people or *demos* and, therefore, because citizenship and nationality are conflated in the German (national) model with a notion of people/*Volk* and lineage, there can be no democracy at the European level. Legitimacy is lent to the European Union only through democratic institutions at national level. The European Parliament is irrelevant to these considerations, because the electorate do not vote at that level *as a people*. Since Weiler would share the view that there can be no *demos* in the ethno-cultural sense at the European level,(26) the search is on for a foundation for European Union or a 'coming together' in

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'shared values, a shared understanding of rights and societal duties and shared rational, intellectual culture which transcend organic-national differences.'(27)



He suggests, as one possible solution, a notion of supranationalism, summarised as follows:

'We see .... that in the curtailment of the totalistic claim of the Nation-State and the reduction of nationality as the principle (sic) referent for human intercourse, the Community ideal of supranationalism is evocative of, and resonates with, Enlightenment ideas, with the privileging of the individual, with a different aspect of liberalism which has as its progeny today in liberal notions of human rights. In this respect the Community ideal is heir to Enlightenment liberalism. Supranationalism assumes a new, additional meaning which refers not to the relations among nations but to the ability of the individual to rise above his or her national closet.'(28)

On that analysis, therefore, EU citizenship must have a vital role to play. This form of citizenship would not be a 'statal' concept bringing the baggage of nationality and forms of organic, cultural nationalism, but a civic, rational construct, offering a sense of 'belonging' or being 'at home' through the

'the rationality of civic and political commitment [which] can have at least as much normative legitimation and at least to some a high degree of psychological attachment.'(29)

This sense of *demos* would not, however, make a claim to exclusivity over the individual, but perhaps operate in a structure of concentric circles encompassing other (national, regional, religious) identities.(30) In concluding his argument, Weiler also recognises that one of the greatest challenges to such a construct is that of double (or conflicting loyalties), a point on which, it should be noted, the current conception of EU citizenship - with its emphasis on rights and not *duties* - offers so far little if any helpful guidance.

A very similar view of EU citizenship as a progressive vehicle for development of the EU is expressed by Preuß:(31)

'European citizenship does not mean membership in a European nation, nor does it convey any kind of national identity of 'Europeanness'. Much less, of course, does it signify the legal status of nationality in a European state. Rather, by creating the opportunity for the citizens of the Member States of the European Union to engage in manifold economic, social, cultural, scholarly, and even political activities irrespective of the traditional territorial boundaries of the European nation-states, European citizenship helps to abolish the hierarchy between the different loyalties .... and to allow the individuals a multiplicity of associative relations without binding them to a specific nationality. In this sense, European citizenship is more an amplified bundle of options within a physically broadened and functionally more differentiated space than a definitive legal status.'

However, there is only so far such an analysis can be taken, because of the absence of a defined and accepted concept of democracy within the framework outlined above. Without that 'the concept of European citizenship is hardly more than a challenging idea.'(32)

## IV. Beyond a Challenging Idea: Rights, Identity and Access for EU Citizens

In the final part of this paper, I shall address two areas in which additional concrete citizenship rights may be conferred on citizens by the current IGC, and assess the circumstances which this would give rise to. I have chosen two contrasting areas: the idea of a general non-discrimination clause would

significantly extend the 'civil' rights of EU citizens, whereas the creation of a right to 'open government' would address the considerable *lacunae* currently existing with regard to the 'political' rights of EU citizens.(33)

#### IV.A. Towards a general non-discrimination clause

In a decision which may turn out to be of some constitutional significance,(34) the Court of Justice recently decided in *P v. S and Cornwall County Council*(35) that the dismissal from employment of a transsexual on the grounds that she had undergone or was undergoing gender reassignment was discrimination on grounds of sex, contrary to the Equal Treatment Directive.(36) The Court held that the dismissal of a transsexual on the grounds of gender reassignment from male to female was discrimination 'based, essentially if not exclusively, on the sex of the person concerned' and was contrary to the Equal Treatment Directive (para. 21). The Court added that 'to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard' (para. 22) which appears to postulate an absolute minimum standard of treatment for all persons. On the other hand, there is some uncertainty in the way in which the judgment is phrased, as the Court also appeared to employ a more traditional form of comparative reasoning when it stated that P was treated unfavourably in comparison with a person of the sex that P was deemed to belong to (the male sex) prior to gender reassignment.

For our purposes, however, whatever the conception of equality employed in the judgment, what is significant is that the Court is stepping into the hitherto uncharted territory in relation to 'grounds' for claiming the right to non-discrimination. Beyond the relatively limited possibilities opened up by outlawing discrimination based on gender reassignment, the judgment steps close to acknowledging that discrimination on grounds of *sexuality* may be brought within the remit of the EU's sex equality law.(37) On the other hand, the Court is remaining within the Treaty-based and legislative framework of discrimination by drawing any inspiration from the Equal Treatment Directive, and is *not* making free with some form of judicially-created general clause prohibiting discrimination.

The suggestion to incorporate a general non-discrimination clause into the Treaty has, of course, been put before the agenda of the IGC and, as we shall see, has been taken up in draft amendments to the Treaties presented to the negotiating parties. It is worth considering whether it is an appropriate direction for the development of EU citizenship rights to take.(38) The proposal received considerable support from the Commission and the European Parliament, as well as an indication from the Court of Justice that it would wish to be involved in considering the implications for judicial review if there were to be a large scale revision of the existing approach to the protection of fundamental rights in general.(39) Support for the general clause has also come from a wide range of non-governmental organisations which have sought to intervene in the process of constitution-building - although the extent to which their voices will be or have been heard has to be doubted to a considerable degree. The strongest level of support has been for the adoption of, at the very least, an EU-level prohibition on discrimination on grounds of race, but should that narrow proposal receive support it would, coupled with the other 'grounds' already accepted, raise the question why a generalised rather than itemised approach to the issues of discrimination and equality should not be adopted.

If the Member States were to adopt a general clause prohibiting discrimination, and leaving a wide discretion in the interpretation and enforcement of that clause to the courts, they would be following the lead taken at *state* level in terms of the process of constitution-building by, amongst other countries in recent years, Canada and South Africa. Canada adopted a Charter of Fundamental Rights and Freedoms in 1982 as part of a process of adopting an autonomous constitution and separating itself from the constitutional heritage of the United Kingdom.(40) The interpretation of the clause by the judiciary has been broad, both in the sense of the groups not specifically mentioned which have

been brought within the ambit of the clause (non-citizens; gay men and lesbians, public housing tenants), and also in the 'test' of equality which has been applied. Because the test has focused on concepts of disadvantage rather than differential treatment *per se* it has been easier for the courts to fit a variety of circumstances of socio-economic inequality into a process of ever-increasing enfranchisement of all citizens.(41) Even more recent is the acceptance of a new Constitution for South Africa by a special sitting of the South African Constitutional Assembly in May 1996, which contained not only provisions addressing the general problem of equality, but also, after an effective campaign spearheaded by a number of groups including the National Coalition for Gay and Lesbian Equality, a provision explicitly giving protection against sexual orientation discrimination.(42) In the light of South African history the careful crafting of equality provisions guaranteeing respect for human dignity was to be expected; less to be anticipated was the successful lobbying of groups representing interests such as those of gays and lesbians for a form of inclusionary equality policy, since the history of the legal treatment of gays and lesbians in South Africa has been one of considerable repression reflecting a society in which to be openly homosexual has not until recently been a realistic life choice.

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It should not be thought, for example, that the process of constitution-making in South Africa has been hijacked by monied and influential groups perverting a directionless process to their own ends. Both constitutional documents were only adopted after widespread democratic consultation, of a type which is not going to occur at least *before* some form of Treaty is adopted at the conclusion of the IGC and submitted for 'popular' ratification. The sense of popular involvement with the text ultimately adopted is simply not going to occur; on the contrary, the Treaty when concluded will be a tablet of stone handed down as a result of a highly impervious process of compromise and negotiation based largely on single-stranded perceptions of *the* national interest represented by those present at the negotiating table. In circumstances involving an element of popular involvement or even *struggle*, the inclusion of new rights becomes more than pure symbolism(43) and becomes itself part of the process of constitution-building *from below*. This lies within the tradition of 'new constitutionalism', which is more than just the process of engineering a new constitutional settlement based on the charismatic perceptions of worthy political leaders, but involves incorporating what Tully has called the 'politics of cultural recognition' into constitution building itself.(44) The politics of new constitutionalism explicitly recognise that the process of constitution-making is also part of the process of shaping new communities - a point which feeds neatly back into the earlier discussion of relationship between EU citizenship and 'European identity'.

Against this background it is useful to consider how the process of treaty amendment has proceeded in this field since the presentation of the draft proposals to the European Council meeting in Dublin, in December 1996.(45) The Dublin paper suggested the strengthening of provisions such as Article F TEU on fundamental rights protection, including an adjustment to ensure that fundamental rights are specifically recognised as justiciable before the Court of Justice. More directly on the topic of non-discrimination rights, it also proposed the introduction of a new Article 6A EC providing a specific legal basis for the adoption of a non-discrimination law. Notably that provision is not a guarantee of non-discrimination itself, but a competence-conferring device, and it lacks any assurance that the legislative powers conferred will in fact be used. Since they provide for unanimity in the Council, and allow only for consultation of the European Parliament (rather than cooperation or even co-decision) it will be apparent that they are modelled on a relatively intergovernmental vision of Union legislative action.

The new non-discrimination clause proposed by the Irish Presidency did at least, however, draw out a specific list of forms of discrimination which would be discriminated: sex, racial, ethnic or social

origin, religious belief, disability, age or sexual orientation. It is doubtful whether this 'list' will survive the negotiation process unscathed. Already in the 'Non-Papers' issued in February 1997 by the Dutch Presidency, a significant watering-down process seems to be at work. Mention of disability, age, social origin and sexual orientation is removed, with the Dutch Presidency commenting on opposition from certain delegations and asking whether the Conference could consider, instead of a non-discrimination clause for those social categories, addressing their concerns 'in the context of the existing substantive policy provisions (e.g. social policy, education, vocational training and youth (!), public health)'.<sup>(46)</sup> Moreover, amendments are suggested to reinforce the Treaty-makers' intention that such a clause should under no circumstances have direct effect, which will ensure that the clause is not capable of giving rise to rights which individuals could enforce in national courts.

On all these grounds any clause adopted is likely to be a disappointment to those who have lobbied for its inclusion,<sup>(47)</sup> and should be contrasted with the proposed amendments in the narrower field of sex equality, which reflect a concern to 'correct' the Court of Justice's judgment in the *Kalanke* case<sup>(48)</sup> where it significantly limited the ability of Member States to construct positive action programmes through national legislation, in order to offset the effects of historical and structural disadvantage in the labour market faced by women. Perhaps the most significant change suggested is that to include in Article 3 EC a paragraph specifically concerned with 'inequality':

'In all the activities referred to in this Article, the Community shall aim to eliminate inequalities and to promote equality between men and women.'

This concentration on the already well-developed field of sex equality, which contrasts with the failure to broaden the EU's concerns with rights and discrimination issues into other fields, probably reflects the strength of a coalition of interests in this area, including the Commission, the European Parliament, a number of Member States and sub-national governments within the Member States, and non-governmental organisations of a national and transnational nature. This coalition of interests appears to have the strength to shift the IGC agenda, but perhaps only in ways which are relatively uncontroversial given the widespread attempts to ensure 'mainstreaming' of equal (gender) opportunities as an economic as well as a rights issue in many political fora including the Commission's own decision-making processes.

#### **IV.B. Transparency and open government in the EU**

We shall now turn to the political rights of EU citizens; in that context, d'Oliveira sounds a strong note of caution, arguing that<sup>(49)</sup>

'the political dimension of [EU] citizenship is underdeveloped. The instruments for participation in the public life of the Union are lacking as this public life itself, as distinguished from the public life in the Member States, is virtually non-existent: a weak Parliament, next to no direct access to the European Courts, and so forth.'

Laffan echoes this point in very similar terms:<sup>(50)</sup>

'The European Union does not represent a shared public realm in any meaningful sense of the term. The novel idea of transforming diplomacy into democracy faces considerable barriers.'

The practice of democracy at the EU remains a pale shadow of the national 'versions' on which the

EU still, in truth, largely depends for a large degree of its legitimacy. It seems reasonable to suggest with Lenaerts and de Smijter,<sup>(51)</sup> however, that the forms of democratic representation of popular interests in the EU comprise not only the European Parliament itself, but also other bodies such as the Committee of the Regions and the Economic and Social Committee. As they put it,<sup>(52)</sup>

'the legitimacy of the exercise of public authority by the European Union requires a system of democratic representation of the citizens of the Union which takes into account the several kinds of loyalty of the citizens corresponding to the communities to which they belong.'

In other words, there is an intimate link between giving effect to principles of democracy and the complex identities of EU citizens, who enjoy links also to national and subnational political entities. According to at least one version of the formation of transnational identity - that sketched by Breton<sup>(53)</sup> citizenship input into decisions constitutes a means of reducing the gap between individuals and organisations, and thus of enhancing citizenship. Furthermore, so long as the European Parliament is elected on the basis of 'national quotas' of members, it will not be a truly 'European' institution, although the extension of the franchise allowing all those EU nationals resident in a given Member State to vote for the members elected in that state, by virtue of Article 8B(2) EC, represents a significant change in the electoral basis of that institution.<sup>(54)</sup>

There is also widespread support for the notion that the symbiotic relationship between the European Parliament and the national parliaments needs further development to enhance 'parliamentary Europe' at the expense of a 'Europe of executives'.<sup>(55)</sup> Democracy will likewise remain weak so long as political parties remain organised almost entirely at the national level alone, and in the absence of a real EU-level media capable of acting as a conduit for a concept of the public interest at that level. In the post-Maastricht EU, however, perhaps the most discussed facet of political life has been the notion of 'transparency':<sup>(56)</sup> it is this concept which is identified as capable of suggesting an effective transition from the conventional secrecy of diplomacy to a notion of 'public' democracy in every sense.<sup>(57)</sup> Transparency in the EU comprises two main elements.<sup>(58)</sup> The first is access to information by the public, who can, if properly informed, participate more fully in political debate (in that sense, transparency and freedom of information are about *choice* in the political realm).<sup>(59)</sup> The second concerns the fact that the main decision-making body in the EU, the Council, continues to operate almost entirely *behind closed doors*.<sup>(60)</sup> It continues to *legislate* in secret, although it has introduced a very limited number of public sessions. Little information is put into the public domain about the legislative process, with mandatory publication even of voting records introduced only in 1993.<sup>(61)</sup> The position is eloquently summed up by Twomey:<sup>(62)</sup>

'At present the work of Council is carried out in a culture of secrecy, tempered by leaks, official and unofficial, and ministers putting inflections on Council proceedings for consumption by domestic electorates.'

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In that sense, transparency is about *accountability* in the political realm. Although the post-Maastricht 'transparency' debate has touched each of the institutions, with the Commission revising some of its policies on public access to information and, like the Council coming under legal challenge by aggrieved individuals,<sup>(63)</sup> closest attention has been paid to the manner in which the Council has reacted to the challenge of more open government.

Examining the approach taken by the Council yields disappointing results. There is no Treaty article enshrining a general principle of 'open government', or the citizen's right to information. That said, in *Netherlands v. Council* the Court held

'the domestic legislation of most Member States now enshrines in a general manner the public's right of access to documents held by public authorities as a constitutional or legislative principle.

In addition, at Community level, the importance of that right has been reaffirmed on various occasions, in particular in the declaration on the right of access to information annexed (as Declaration 17) to the Final Act of the Treaty on European Union, which links that right with the democratic nature of the institutions. Moreover, (...) the European Council has called on the Council and the Commission to implement that right.'(64)

The Court also refers to a 'trend, which discloses a progressive affirmation of individuals' right of access to documents held by public authorities', and a departure from the Council's previous working practices based on a principle of 'confidentiality' (not 'secrecy', in the language of the Court!).(65) The approach of the Court is somewhat less affirmatory of such democratic rights than that taken by Advocate General Tesauro, who refers approvingly in his Opinion to 'openness of decision-making processes' as

'an innate feature of any democratic system and the right to information, including information in the hands of the public authorities ... (as) a fundamental right of the individual.'(66)

He finds the basis for the right to information

'in the democratic principle, which constitutes one of the cornerstones of the Community edifice, as enshrined now in the Preamble to the Maastricht Treaty and Article F of the Common Provisions. In the light of the changes which have taken place in the legislation of the Member States,(67) the right of access to official documents now constitutes part of that principle. It is the essential precondition for effective supervision by public opinion of the operations of the public authorities.'(68)

The rather vague and diffuse nature of the so-called sources of the right to information within the EU system, as found by the Court and the Advocate General, emphasise the urgency of a clarification of these questions at the constitutional level in the context of the IGC which began in March 1996.(69) The implementation of the principles, particularly by the Council, is also a matter for concern. The immediate post-Maastricht period - building on Declaration 17 referred to by the Court - saw a proliferation of 'soft' measures in the field of transparency. In particular, the Commission adopted a Communication entitled 'Public access to the institutions' documents'(70) and the Commission and Council adopted an interinstitutional agreement in December 1993, taking the form of a Code of Conduct enumerating the principles governing public access to documents in their possession, and committing themselves to the implementation of the principles before the beginning of 1994.(71) For the Council, implementation took the form of a change to its Rules of Procedure, Article 22 of which now provides that

'The detailed arrangements for public access to Council documents disclosure of which is without serious of prejudicial consequences shall be adopted by the Council.'

Acting on the basis of Article 151(3) EC, which empowers it to adopt its Rules of Procedure, and Article 22 of the Rules, the Council then adopted a Decision setting out detailed modalities for public access.(72) That Decision lays down a general principle of the 'professional secrecy' of the deliberations of the Council, unless it decides otherwise, and then sets out cases where the Council 'shall not' disclose documents, and cases where it 'may' do so. In particular, under Article 4(2), access

to a document may be refused in order to protect the confidentiality of the Council's proceedings. Despite the apparently clear contradiction between that statement, and the supposedly immanent principle of open government, the rules laid down by the Council have survived serious scrutiny. Curiously, the Court of First Instance was faced with an appeal by a citizen refused access to certain documents (which essentially addressed questions of process), before the Court of Justice was able to decide upon a more fundamental challenge brought by the Netherlands to the legal basis of the Council's measures. In *Carvel v. Council*, an application brought by a journalist and his newspaper, who were refused access to certain Council documents, and who had followed the procedures laid down in Article 7 of the 1993 Decision, the Court of First Instance gently chastised the Council for the 'blanket' way in which it was operating its self-imposed rules, requiring that the discretion which the Council has arrogated to itself be exercised on an individual basis.<sup>(73)</sup> This precipitated some changes to the procedural rules operated by the Council,<sup>(74)</sup> but the evidence of a further systematic campaign to obtain release of documents in the politically sensitive and exceedingly secretive arena of Justice and Home Affairs by the UK journalist Tony Bunyan indicates that the (majority of the) Council remains reluctant as a matter of substance to release many documents.<sup>(75)</sup>

Subsequently, the Court of Justice rejected the challenge brought by the Netherlands (with the support of the European Parliament) to the legal basis of the transparency rules.<sup>(76)</sup> The Netherlands challenged the use of legal bases concerned with the internal organization of the Council's work for the purposes of giving effect to a fundamental right. It suggested that this manner of proceeding also infringed the balance between the institutions, because it excluded the European Parliament - which in many important areas is now a co-legislator, and at the very least has the right to be consulted in other fields. Although the Court did appear to acknowledge the existence of the principles argued for by the applicant government, it rejected the application on the merits, finding that

'so long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions *must* take measures as to the processing of such requests by virtue of their power of internal organization, which authorizes them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration.'<sup>(77)</sup>

Thus, far from acting wrongfully, the Council had in fact acted as it should. It also rejected the plea based on institutional balance. As Curtin comments, there is an ongoing (and still unresolved) dispute about

'the legal nature of the principle of freedom of information in the Union context: the Dutch emphasise the fundamental (at least from the perspective of democratic philosophy) nature of the principle and maintain that the primary purpose of the Decision was to regulate the openness of the administration for third parties. On the other hand, the other members of the Council (with the probable exception of the Danes) are convinced that the Code of Conduct and Council Decision constitute a simple policy orientation adopted by the Council in the interests of its own good administration, subject as a matter of course to the other rules of its Rules of Procedure as well as the stringent and discretionary exceptions outlined in the Decision itself.'<sup>(78)</sup>

It is difficult to escape the conclusion, despite the wording adopted by the Court of Justice, that the EU has not adopted a rights-based approach to the question of transparency. There has not in truth been a thorough going espousing of the principle of open government, incorporating also concrete rights for individuals. The link back to the construction of EU citizenship is made by Armstrong.<sup>(79)</sup> Relating the wide-ranging exclusion of the citizen from EU decision-making processes, and from the construction of EC law, he comments:

'There is (...) a paradox at the heart of the concept of Union citizenship. The concept of citizenship has been invoked as a counterbalance to the seemingly remote institutions of the EU in order to

attach political legitimacy to EU governance. However, the essentially inter-institutional nature of EU governance has not changed leaving the Union citizen as a rather ambiguous identity within the Union's political and legal systems. (...) At no point does John Carvel as a Union citizen ever become constructed in the Court's mind.'(80)

Returning to the cautionary comments about a rights-based approach to citizenship entered above, it is worth recalling the limited ability of courts to construct and then resolve *public interest* issues through the frame of litigation and case law. Indeed, it is noticeable that the efforts of the Council in relation to the efforts made one applicant in particular - the editor of the *Statewatch* newsletter on civil liberties, Tony Bunyan - have been directed towards demonstrating that his requests for Third Pillar documents are *not* made in the public interest, but are vexatious.(81) If the Council persists in its refusal to recognise the competence of the European Parliament Ombudsman to consider Bunyan's subsequent complaint about the behaviour of the Council on the grounds that his writ does not extend to Third Pillar issues, that is likely to provoke another bitter demarcation battle between the Council and the European Parliament in relation to the latter's position as the upholder of democratic principles within EU decision-making, on which the Court will be required to be the (public interest) arbiter.(82)

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Furthermore, in its defence statement in the case brought by the Swedish journalists' association, and made available on the internet by the applicant association, the Council appears to assert that a 'general and political interest' in seeking documents should in fact be a reason for denying the applicants standing to challenge the Council's decision refusing access.(83) In addition, because the applicants already had the documents they were seeking from the Council, having taken advantage of Swedish freedom of information laws, it was likewise suggested by the Council that their application to the Court of First Instance should be dismissed because it was brought for the wholly frivolous reason of checking up on the Council.

In contrast, it is worth pointing to the progressive development of administrative law in many jurisdictions in recent years, which has highlighted the capacity of judges to find justiciable issues in many unexpected places and to act as a real fetter upon arbitrary or excessive state power. There are good reasons - particularly in an emerging polity like the EU where there exists such a wide gulf between the institutions and individuals, as interlocutors - for the Court of Justice and the Court of First Instance to intervene to secure the preservation and enhancement of certain types of individual rights, as citizenship rights in the political domain. It is to be hoped that a negative response is given to the attempts by the Council to undermine what rights have so far been granted in relation to freedom of information.

It can, I think, safely be stated on the basis of this discussion that the situation in relation to transparency and especially the concrete right of access to official documents remains unsatisfactory. One problem, of course, is that the vast majority of citizens are unaware of their rights, and consequently do not make use of such rights as there are. However, it is clear that a culture of secrecy surrounding the exercise of governmental powers in the EU remains exceedingly widespread, and appears to be entrenching itself in response to the activities of civil liberties campaigners, rather than becoming more transparent. Some of the specific difficulties experienced in relation to document disclosure by the Council obviously stem from the wholly unsatisfactory degree of democratic and judicial control over the range of civil liberties issues which fall under the current Third Pillar, and the frame of any debate would be significantly changed if the IGC were to respond in a direct and positive way to the challenges posed by Third Pillar issues, something which seems unlikely to occur.



Specific proposals in relation to transparency have now emerged in the Irish Presidency draft revision of the Treaties.<sup>(84)</sup> The Presidency suggests a small change to Article A TEU whereby decisions should be taken 'as openly as possible and as closely as possible to the citizen.' That does not in itself state either a right to information, or a principle of openness which significantly limits institutional autonomy in relation to secrecy. However, the draft also proposes adding a new Article 192A EC, providing that:

'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to conditions which shall be laid down by each of these institutions under its own rules of procedure.

General principles and limits governing the exercise of that right may be determined by the Council, acting in accordance with the procedure referred to in Article 189B [co-decision].'

The European Parliament has criticised these provisions in its resolution on the draft amendments,<sup>(85)</sup> regretting in particular that 'the right to information and the right to express views on Community policies are not recognized as a general principle.' It calls the Irish Presidency proposals, 'better than nothing' and 'providing for certain improvements in this area', but nonetheless 'cautious and limited in scope' and 'weakly worded.' It recognises, however, that although there may be no right to 'information' as such, there will at least be a right of access to documents, although it is likely to operate under very similar conditions to the rights existing at present whereby it is internal Rules of Procedure which determine rights of access, subject to the possibility of a general legislative framework being laid down by the Council. The Parliament also regrets that the draft does not deal with the issue of the Council meeting, in its legislative capacity, in public - that issue being one of the other pillars of the transparency debate.

## V. Conclusions

Everson has suggested that the primary meaning of European Union citizenship at this stage of its development concerns rights of participation in 'the institutionalisation of a nascent form of European civil society'.<sup>(86)</sup> I have tried to show through two very different examples how the process of constitution-building and polity-formation through the enhancement of citizenship rights may be more than the handing down of tablets of stone from above, but part of a set of political processes whereby EU citizens themselves, through their practices as citizens, build the type of community of which they wish to be members. Other examples could be developed, including the rights of third country nationals, or the treatment of socially and economically marginalised groups in a society which ever increasingly differentiates between 'haves' and 'have-nots'. Everson's own analysis of the relationship between EU citizenship and issues of gender and feminism focused on the potential for empowerment offered by networks of women created by and sustained by the EU's own regional development policies.<sup>(87)</sup>

To return to the points made at the beginning of this paper, however, it must also be concluded that the key to reflecting upon the potential for development of EU citizenship in the context of the present IGC lies in utilising and problematising the heritage of citizenship, in both an internal EU context, and in a broader socio-political and historical sense. It is unfruitful to consider whether citizenship could or would have become a thorny question within the EU integration project if the external rationale for the current focus (a wide-ranging resurgence of interest in citizenship) had not

been operative. Suffice it to say that it is always dangerous to treat the EU as a product only of internal forces, somehow hermetically from its global or regional European environment.<sup>(88)</sup>

By way of a final comment, it should be recalled that whatever the politicians do conclude in the context of the *Maastricht II* conclave some time in mid-1997 it will serve the goal of European integration naught if it is not acceptable at a popular level. It is not clear to me as an independent observer that the politicians have indeed learnt the lessons of *Maastricht I*. It is possible that they will produce a more transparent and understandable text, capable of explanation to a broad electoral constituency. However, it is clear that fundamentally the processes have changed little, even though a great deal more information is now readily available in a raw form through the medium of the internet and the world wide web. Whatever talk of transparency there may be, and however successful politicised individuals may have been in forcing the disclosure of documents which the Council is unwilling to release, the experience of the Dutch 'Non-Papers' elaborating upon the Irish Presidency Draft is salutary. While the original Irish Draft was made available quickly through the internet, and in paper form (although it is marked *limité*), the Non-Papers were released not by the Member States<sup>(89)</sup> but by a Dutch Green MEP. It seems clear if regrettable that transparency still remains largely unheard of around the negotiating tables occupied by the treaty makers.

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## Endnotes

(\* ) The text of this working paper is based on a presentation made to a Conference on *Political Union and the Agenda of the IGC*, Irish Centre for European Law, Trinity College, Dublin, November 30 1996. It draws heavily upon a larger project on European Union citizenship entitled 'Citizenship of the Union: Towards Postnational Membership' to be published in the *Collected Courses of the Academy of European Law 1995*, Kluwer International, 1997, forthcoming. Permission to republish is acknowledged with thanks.

(1) 'European Citizenship and Human Rights', in Winter, Curtin, Kellermann and de Witte (eds.), *Reforming the Treaty on European Union: The Legal Debate*, The Hague, etc.: Kluwer Law International, 1996..

(2) 'The Quest for Legitimacy in the European Union', (1996) 59 *Modern Law Review* 349, esp. pp.356-361.

(3) Council Directive 94/880 on the exercise of the right to vote and stand in municipal elections OJ 1994 L368/38.

(4) Council Directive 93/109 on the exercise of the right to vote and stand in European parliamentary elections OJ 1993 L329/34.

(5) La Torre, 'Citizenship: A European Wager', (1995) 8 *Ratio Juris* 113 esp. pp119-120.

(6) See Wilkinson, 'Towards European Citizenship? Nationality, Discrimination and Free Movement of Workers in the European Union', (1995) 1 *European Public Law* 417.

(7) Council Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity OJ 1990 L180/28; Council Directive 93/96 on the right of residence for students OJ 1993 L317/59; Council Directive 90/364 on the right of residence OJ 1990 L180/26.

(8) See the trenchant criticisms of Weiler of this and other 'citizenship' provisions for adding nothing

new to the existing rights of nationals of EU Member States, but on the contrary of 'trivializing' the concept of citizenship to the point of 'embarrassment': Weiler, op. cit. *supra* n. esp. p65. Scepticism is also very apparent in Lyons, 'Citizenship in the Constitution of the European Union: rhetoric or reality?', in Bellamy (ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives*, Aldershot: Avebury, 1996.

(9) 'Towards a European Citizenship', *Europe Documents*, No. 1653, October 2 1990.

(10) Prominent examples include Case 186/87 *Cowan v. Le Trésor public* [1989] ECR 195 (right of a UK tourist attacked on the Paris underground to French criminal injuries compensation payments by virtue of his status as a recipient of services and entitlement to freedom of movement, coupled with the right to non-discrimination on grounds of nationality) and Case 293/83 *Gravier v. City of Liège* [1985] ECR 593 (right of a French student to non-discriminatory treatment by a Belgian university, as migrant students come within the scope of protection of the EC Treaty).

(11) See the rather acerbic summary of the thin record of implementation of Articles 8-8E EC in Weiler, op. cit. *supra* n. at p66.

(12) Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929.

(13) See Szyszczak, 'Making Europe More Relevant to its Citizens: Effective Judicial Process', (1996) 21 *ELRev.* 351 at footnote 7. The criticism is of the narrow and textually strict reading of the Treaty given by the Court of Justice in Case C-91/92 *Dori* [1994] ECR 3325.

(14) See generally Weiler, op. cit. *supra* n.; de Búrca, op. cit. *supra* n. esp. pp356-361; *Justice and Fair Play*, Federal Trust Paper No. 6 for the Intergovernmental Conference 1996.

(15) Laffan, 'The Politics of Identity and Political Order in Europe', (1996) 34 *JCMS* 81.

(16) The effect of EC law is often to confer economic and sometimes social rights upon nationals of third countries lawfully resident in the Member States.

(17) Mouffe, 'Preface: Democratic Politics Today', in Mouffe (ed.), *Dimensions of Radical Democracy*, London: Verso, 1992, p8.

(18) Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe*, Chicago/London: University of Chicago Press, 1994 at p159.

(19) Bellamy, 'The Constitution of Europe: Rights or Democracy?', in Bellamy, Bufacchi and Castiglione (eds.), *Democracy and Constitutional Culture in the Union of Europe*, London: Lothian Foundation Press, 1995 at p153.

(20) Bellamy, op. cit. *supra* n. at p162.

(21) De Búrca, 'The Language of Rights and European Integration', in Shaw and More (eds.), *New Legal Dynamics of European Union*, Oxford: Oxford University Press, 1995.

(22) Della Sala and Wiener, 'Constitution-Making and Citizenship Practice - Bridging the Democratic Gap in the EU?', SEI Working Paper No. 18, Sussex European Institute, University of Sussex, 1997.

(23) Wiener, 'Citizenship Policy in a Non-State. Implications for Theory', Paper delivered to the 2nd ECSA World Conference on Federalism, Subsidiarity and Democracy in the European Union,

Brussels, May 1994; see further Wiener, *Building Institutions: The Developing Practice of European Citizenship*, Boulder, Col.: Westview, 1997 (forthcoming).

(24) Weiler, 'Fin-de-Siècle Europe', in Dehousse (ed.), *Europe after Maastricht. An Ever Closer Union?*, Munich: Law Books in Europe, 1994.

(25) BVerfGE 89, 155; published in English as *Brunner* [1994] 1 CMLR 57. See generally MacCormick, 'The Maastricht-Urteil: Sovereignty Now', (1995) 1 *ELJ* 259. Habermas, 'The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship', (1996) 9 *Ratio Juris* 125 at p137 describes the decision as revealing a 'tragic irony' since the attempt to defend the nation state against erosion by requiring a certain degree of cultural homogeneity amongst its people is unrealistic in view of the current weaknesses of the nation state.

(26) See generally 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', (1995) 1 *ELJ* 219.

(27) Weiler, op. cit. *supra* n. at pp243-244.

(28) Weiler, op. cit. *supra* n. at p250.

(29) Weiler, op. cit. *supra* n. at p253.

(30) Cf. the similar approach taken by Garcia and Wallace, 'Conclusion', in Garcia (ed.), *European Identity and the Search for Legitimacy*, London: Pinter, 1993.

(31) Preuß, 'Problems of a Concept of European Citizenship', (1995) 1 *ELJ* 267 at p280.

(32) Preuß, op. cit. *supra* n. at p280.

(33) This should not be taken to mean that I ascribe little or no importance to social citizenship and social rights in the context of polity-formation and the citizenship dimension. The inclusion of a new chapter on unemployment in the Dublin draft outline, as well as the appeal by the Commission to notions of a European Social Model in its suggestions for amendments to the Treaties suggests that those most directly involved in the process of polity-formation through the IGC recognise the relationship between 'welfare-state building' and 'polity-formation'. See further Shaw, 'The many pasts and futures of European Union Citizenship', Paper presented at the Anglo-Spanish Workshop on *The European Union: Polity Formation under Postnational Conditions*, Sussex European Institute, Brighton, March 1997.

(34) I must acknowledge having seen in early draft an as yet unpublished paper by Catherine Barnard entitled '*P v S*: kite flying or a new constitutional approach', in which many of these questions are discussed in detail.

(35) Case C-13/94 [1996] 2 CMLR 247.

(36) Directive 76/207 OJ 1976 L39/40.

(37) See Skidmore, 'Can Transsexuals suffer sex discrimination', (1997) 19 *Journal of Social Welfare and Family Law* 105.

(38) See generally Flynn, 'Europe on its Way Towards a General Non-Discrimination Clause', Schneider (ed.), *The Position of Women in the European Union in the 21st Century: A Legal and Economic Perspective*, Maklu, 1997 forthcoming; Bell and Waddington, 'The 1996

Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article', (1996) 25 *ILJ* 320.

(39) *Report of the Court of Justice on certain aspects of the application of the Treaty on European Union*, paras. 19-23.

(40) See generally Penner, 'The Canadian Experience with the Charter of Rights: Are there lessons for the United Kingdom', [1996] *Public Law* 104.

(41) For a comparison of EC law and Canadian law on the use of concepts of equality see More, "'Equal Treatment" of the Sexes in European Community Law: What does "Equal" Mean?', (1993) 1 *Feminist Legal Studies* 45.

(42) See generally Stychin, 'Constituting Sexuality: The Struggle for Sexual Orientation in the South African Bill of Rights', (1996) 23 *Journal of Law and Society* 455.

(43) On the symbolism of European Union rights-giving see Weiler, op. cit. *supra* n. at p79.

(44) Tully, *Strange Multiplicity: Constitutionalism in an age of diversity*, Cambridge: Cambridge University Press, 1995; see generally on the impact (actual and potential) of new constitutionalism upon EU constitution-building processes Della Sala and Wiener, op. cit. *supra* n..

(45) Irish Presidency draft proposals for the amendment of the EC/EU Treaties: *The European Union Today and Tomorrow. Adapting the European Union for the Benefit of its Peoples and Preparing it for the Future. A General Outline for a Draft Revision of the Treaties*, Brussels, December 5 1996, Conf. 2500/96. Available on the internet:

<http://europa.eu.int/en/agenda/igc-home/general/pres/index.html>

[http://www.irlgov.ie/iveagh/eu/state/treaty\\_rev/index.html](http://www.irlgov.ie/iveagh/eu/state/treaty_rev/index.html)

See generally Shaw, 'The 1996-97 Intergovernmental Conference and the 'Citizen' Dimension of the European Union: a brief commentary', (1997) 19 *Journal of Social Welfare and Family Law*, No. 2.

(46) Non-Paper Nr. 6 *Fundamental Rights and Non-Discrimination*, Conference of the Representatives of the Governments of Member States, Secretariat, Brussels February 26 1997, Conf/3827/97 (available on the internet on the Dutch Green Party site under the auspices of the Dutch MEP Nel van Dijk: <http://www.xs4all.nl/~nelvdijk/nonpaper6.html>).

(47) See for example the reaction of the European Parliament: EP Resolution of January 16 1997 on the general outline for a draft revision of the Treaties (available on the internet at <http://www.db.europarl.eu.int/dg7>) which specifically cites regret that the clause will not have direct applicability.

(48) Case C-450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051.

(49) D'Oliveira, 'European Citizenship: Its Meaning, Its Potential', in Dehousse, op. cit. *supra* n. at p147.

(50) Laffan, op. cit. *supra* n. at p93.

(51) 'The Question of Democratic Representation', in Winter *et al*, op. cit. *supra* n..

(52) Lenaerts and de Smijter, op. cit. *supra* n..

(53) Breton, 'Identification in Transnational Political Communities', in Knop, Ostry, Simeon and

Swinton (eds.), *Rethinking Federalism: Citizens, Markets and Governemnts in a Changing World*, Vancouver: University of British Columbia Press, 1995 at p50.

(54) The development of electoral rights under Article 8B EC are dealt with fully by Oliver, 'Electoral Rights under Article 8B of the Treaty of Rome', (1996) 33 *CMLRev.* 473, covering the 'municipal' and 'European' electoral rights of EU citizens.

(55) See Vauber, 'Comments on the Article by Lenaerts and de Smijter', in Winter *et al* op. cit. *supra* n. at p200. See generally Smith (ed.), *National Parliaments as Cornerstones of European Integration*, London/The Hague: Kluwer, 1996; Andersen and Burns, 'The European Union and the Erosion of Parliamentary Democracy: A Study of Post-parliamentary Governance', in Andersen and Eliassen (eds.), *The European Union: How Democratic Is It?*, London, etc.: Sage, 1996; Birkinshaw and Ashiagbor, 'National Participation in Community Affairs: Democracy, the UK Parliament and the EU', (1996) 33 *CMLRev.* 499.

(56) See generally Curtin, 'Betwixt and Between: Democracy and Transparency in the Governance of the European Union', in Winter *et al*, op. cit. *supra* n..

(57) See generally on freedom of information in the EU: Birkinshaw, 'Freedom of Information and Open Government: The European Community/Union Dimension', (1997) *Government and Information Quarterly* no. 1, forthcoming.

(58) As Chiti points out ('The Right of Access to Community Information under the Code of Practice: the Implications for Administrative Development', (1996) 2 *EPL* 363 at p370) it is wrong simply to conflate transparency with the right of access to information, which there is a current tendency to do.

(59) See generally Lewis, *Choice and the Legal Order. Rising above Politics*, London: Butterworths, 1996, esp. pp143-146.

(60) Chiti, op. cit. *supra* n. at p370, suggests two additional elements: the 'simplification and rationalization of Community and national legislation', through means such as consolidation, repeal of superfluous instruments, and drafting improvements; and the 'repartition of competences between Community and Member States' the 'level of the 'intensity' of Community action' (i.e. the subsidiarity and proportionality principles). These issues are not further considered here because they do not have direct 'citizenship' implications.

(61) Article 7(5) of the Council's Rules of Procedure. See Curtin, op. cit. *supra* n. at p106.

(62) Twomey, Case Note on *Carvel v. Guardian*, (1996) 33 *CMLRev.* 831 at p839.

(63) Case T-105/95 *WWF (UK) v. Commission*, judgment of March 5 1997: the Court of First Instance found that the Commission was required to explain why categories of requested documents fell within the 'public interest' exception to disclosure, although it was not required to do so in respect of each individual document.

(64) Case C-58/94 *Netherlands v. Council* [1996] 2 *CMLR* 996 at paras. 34 and 35.

(65) *Ibid*, at para. 36.

(66) [1996] 2 *CMLR* 996 at 1002 (para. 6).

(67) The usage of the democratic heritages of the Member States in order to generate a meaningful

principle for the new EU polity is an example where the parasitic nature of the EU constitution and of its conception of political citizenship fulfils an important and positive function. Without the constitutional heritages of the states which it comprises, the EU would lack all historical depth.

(68) [1996] 2 CMLR 996 at 1009-1010 (para. 19).

(69) See Curtin, *op. cit. supra n.* at p114 *et seq*; de Búrca, *op. cit. supra n.* at pp368-371.

(70) OJ 1993 C156/5.

(71) OJ 1993 L340/41.

(72) Council Decision 93/731 OJ 1993 L340/43.

(73) Case T-194/94 [1995] 3 CMLR 359.

(74) Council Code of Conduct on access to minutes and statement in the minutes, Bulletin EU 10/1995.

(75) See *Statewatch*, Vol. 6, no. 3, May-June 1996: 'Secrecy application splits EU. Eight governments vote for secrecy - seven back openness'.

(76) Case C-58/94 *supra n.*

(77) Emphasis added; at para. 37 of the judgment.

(78) Curtin, *op. cit. supra n.* at p103.

(79) Armstrong, 'Citizenship of the Union? Lessons from *Carvel and The Guardian*', (1996) 59 *MLR* 582 at p586 *et seq*.

(80) *Op. cit supra n.* at p588; a similar point is made by Twomey, *op. cit. supra n.* at p838.

(81) See 'EU: Secrecy Report "secret", then released', *Statewatch* September/October 1996, Vol. 6, no. 5, p22. The Council suggests in its report on the working of the Code of access to documents that 'applicants are not required to give reasons for the interest they take in the Council's proceedings. Yet the very nature of certain applications sometimes elicits the thought that steps are being taken to test the system rather than exercise a legitimate option. It might therefore be worth considering whether a provision should be made for access to documents which are manifestly excessive or involve disproportionate costs to be refused, where appropriate, after examination of the reasons for the applicant's interest.'

(82) See Bates, 'EU guards its secrets', *The Guardian*, March 24 1997.

(83) Case T-174/95 *Tidningen Journalisten, Svenska Journalistförbundet Tidning v. Council of the European Union* pending; see <http://www.jml.su.se/dig/>.

(84) *Supra n.*

(85) *Supra n.*

(86) 'Women and Citizenship of the European Union', in Hervey and O'Keeffe (eds.), *Sex Equality Law in the European Union*, Chichester: Chancery Wiley, 1996 at p205.

(87) Everson, op. cit. *supra* n..

(88) Wallace, *Regional Integration: The West European Experience*, Washington, D.C.: The Brookings Institution, 1994.

(89) It seems that the Dutch were willing and took steps to make the documents public, but that release was resisted by the other Member States.

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