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## Union Citizenship and the Status of Third Country Nationals

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# Union Citizenship and the Status of Third Country Nationals

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## Abstract

*The essay analysis the interrelation of European policies on Union Citizenship, immigration- and antidiscrimination – policy. It is argued, that immigration policies are mainly shaped by decisions of the ECJ on the EC-Turkey associations agreements, which made the status of Turkish citizens akin to those of community workers before the implementation of Union Citizenship, which may be considered as a type denizenship for Union citizens living abroad. With the implementation of antidiscrimination provisions a dynamic of a further approximation of the status of Union Citizens and resident third country nationals has developed, which culminated in the suggestion for the development of a European “civic citizenship”, which might become the missing link between Union Citizenship, migration and antidiscrimination policies.*

## The roots of Union Citizenship<sup>1</sup>

The roots of Union citizenship can be traced back to the 1970s when Community politicians first began to discuss the topic of ‘European identity’. Initial concepts merely included student mobility, exchange of teachers and harmonisation of diplomas (Wiener 1997: 539). A broader approach emerged at the 1973 Copenhagen summit where the European Commission suggested to introduce a ‘passport union’ as well as ‘special rights’ for citizens of Member States. These were defined as the ‘political rights traditionally withheld from foreigners<sup>2</sup>’: the right to vote, the right to stand for election and the right to hold public offices. Member States were to grant these rights, which were - and in general still are - tied to naturalisation, to resident citizens of another Member State (Wiener 1997: 540). Until then mobile Community workers had only benefited from labour-related rights. Hence, migration to another Member State meant disenfranchisement. With this move, the previous focus on the linking of rights to the status of a worker or employee was replaced by the focus on the political status of a citizen. In consequence, the European Parliament adopted a resolution for uniform voting procedures to the European Parliament and a report on the rights of EC-citizens to vote and stand as candidate for local elections.

In 1975 the Heads of Government of Belgium and Italy for the first time proposed to enfranchise all Community nationals on the local level (Connolly, Day & Shaw 2005: 6). The Commission’s technical report on special rights even went further by stating that these ‘first and foremost’ imply

<sup>1</sup> A first version of this paper was written for the “State of the Art” report on Migration and Citizenship for the IMISCOE Network of Excellence. Thanks go to Rainer Bauböck and Wiebke Sievers for comments, discussions and suggestions.

<sup>2</sup> Before the introduction of Union citizenship, the term ‘foreigner’ was used in EC-documents to denote citizens of Member States living outside the state the nationality of which they held. The usage here refers to this understanding.

‘the rights to vote, to stand for election and to become a public official at local, regional and national levels’ (Connolly, Day & Shaw 2005: 8). Although the report is not completely clear on this subject, the formulation ‘at local, regional and national levels’ suggests that Community citizenship was meant to include not only local but also regional and national suffrage.

In the 1980s, the prevailing political paradigm changed towards privileging ‘negative integration’. This renewed focus on economic integration and the rights associated with freedom of movement pushed political participation into the background of debates on European Union citizenship. As a consequence, the sole steps towards reaching this goal in the 1980s were three directives establishing the right of residence for workers and their families as well as for students and the ‘Social Charter’ introducing social rights for Community citizens (Wiener 1997: 542). These improvements of social and economic rights for Community citizens residing in another Member State were, however, not accompanied by any political rights. Whereas Community workers were granted economic and social rights in the ‘Community Charter of Fundamental Rights for Workers’ in 1989, European citizenship practice did not include any political rights before 1992, when the Treaty of Maastricht was signed. Only then citizenship was defined as one of the three pillars of European political union. The provisions on citizenship, which were inserted into Article 8–8e (now 17–22) of the EC-Treaty, conferred the right to vote and stand for elections in municipal and in European elections in the Member State of residence to all citizens of a Member State, and not only to workers, as had been suggested by the Danish government (Connolly, Day & Shaw 2005: 12).

It is interesting to note that in the debate the European Parliament emphasised the need to rethink the ‘traditional dichotomy between citizen and foreigner’ (European Parliament 150/34 final: 9, cited in Wiener 1997: 547). To overcome this dichotomy, the Parliament and relevant NGOs demanded the extension of Union citizenship to ‘every person residing within the territory of the European Union’ (ARNE-Group 1995, cited in Wiener 1997: 547). This demand marks a significant turn from national to residence-oriented citizenship which has, however, not been put into practice. For although the extension of the local franchise to Union citizens reflected a shift of the focus of belonging from the state to the place of residence, third country nationals were excluded from this development. In this respect Union citizenship remained tied to the nation-state framework, which it otherwise intended to transcend.

In effect Union citizenship instituted a new type of fragmented citizenship: Union citizens possess civil, social and political rights (and duties) with regard to the nation state whose nationality they hold; they enjoy residential and social but not the full range of political rights vis-à-vis a second Member State in which they reside. Political rights are only granted at the local and the European levels but not at the politically more relevant nation-state level. Furthermore, rights of Union citizenship, particularly the right of residence, may still be revoked in case of threat to public order. Third country nationals enjoy social rights, providing that they are members of the labour force, but

no other rights comparable to those of Union citizens and no political rights at all. Thus the current form of Union citizenship, although extending the rights of Union citizens in other Member States, has not overcome the boundaries of state-based nationality. On the contrary, it has cemented the clear divide between nationals, Union citizens from another Member State and third country nationals.

Whereas the strategies of political actors involved in the making of European migration policies have been studied to some extent (Favell 2001, Geddes & Guiraudon 2002, Guiraudon 2001, 2003), research on the politics of European citizenship policy is still quite limited. This research gap contributes to the low level of visibility of the issue in the public discourse on European integration. In particular, too little attention has been devoted to the role of the European Court of Justice (ECJ) in the development of Union citizenship practice. In this respect, the case of Rudy Grzelczyk<sup>3</sup> deserves specific attention. This case concerned the access of a French national studying in Belgium to social benefits. Having first received these, Mr. Grzelczyk was declined the payment on grounds that he was a national of another Member State and never had been a member of the labour force in Belgium. Mr. Grzelczyk appealed to the ECJ that decided in his favour. This decision includes the institution's most focused statement on Union citizenship so far, stating that 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as expressly provided for.' Although the case concerns a Union citizen living in another Member State, this statement of the Court clearly extends the idea of non-discrimination far beyond the realm of labour-related rights. The explicit formulation seems to indicate that it intends to attribute a new importance to Union citizenship, which, nevertheless, still works like a glove turned inside out: 'It cannot act within the territory of nationality but only outside it though it purports to express citizen rights' (Guild 2004: 14).

The development of Union citizenship may be understood in a Marshallian tradition as a dynamic process driven by the tension between market-oriented and political rights, which, in effect, has led to a gradual extension of political rights for Union citizens (Guild 2004). The lack of political rights of mobile Community workers had become salient and the distinction between nationals and Member State citizens had lost its legitimacy only after - based on the idea of market equality - economic and social rights of nationals and Union citizens living in the same Member State had been approximated. Political rights at the local and European level were thus eventually granted to mobile Community citizens also in order to further promote such mobility. Since Maastricht, this dynamic seems to have come to a halt. Neither the Charter of Fundamental Rights nor the Draft Constitutional Treaty include a further reform of voting rights. It is presently an open question whether the concept of European citizenship will ever be developed further towards a federal model, which would have to include voting rights in the constitutive units of the federation, i.e. the Member States.

<sup>3</sup> Rudy Grzelczyk vs. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, C-184-99, 20 September 2001.

As no reporting procedure has been implemented, there is no comprehensive information available on the transnational voting practices of Union citizens. With regard to elections to the European Parliament, the available data show a significantly lower turnout of Union citizens living in a Member State the nationality of which they do not hold as compared to nationals of this state. Not only registration in voting registers is low. With the exception of the Irish Republic (turnout-rate 1999: 43,89 per cent), turnout-rates in 1999 in most Member States have been lower than 30 per cent, and in six Member States lower than 10 per cent (Connolly, Day & Shaw 2005: 16). There are no data on turnout rates for municipal elections available, but the low number of non-nationals elected to municipal councils reported to the Commission clearly shows that Union citizens are not well represented in local councils (Connolly, Day & Shaw 2005: 16) and that they do not often make use of the political opportunity structure available to them.

## **Union citizenship or European denizenship?**

From a theoretical point of view, the concept of Union citizenship poses several questions. First and foremost, the body politic to which Union citizenship refers – the European Union – is not the body conferring or withdrawing the status. Union citizenship is conceptualised as a supplement to nationality of a Member State, thus its acquisition or loss is regulated by rules outside the legislative procedures of the European Union (Preuss, Everson, Koenig-Archibugi & Lefebvre 2003: 5). The ECJ has stated in the *Michelletti* case<sup>4</sup> that the national competence of a Member State to recognize a person as a national of another Member State must be exercised with due respect for Community law. This also might be interpreted to imply that acquisition and loss of citizenship must be exercised with the same due respect. However, this judgement has not had a major impact (cf. Guild 1996: 45, de Groot 2003: 19). Thus granting and withdrawing Union citizenship remains the sole competence of the Member States, which – according to their national traditions of citizenship – employ dramatically different legal regulations and practices<sup>5</sup>.

There is some evidence of convergence with regard to access for second generation immigrants and a trend towards liberalisation in most Member States. However, nationality laws in the Member States stay divergent with regard to most other aspects, e.g. the implementation of *ius soli*, waiting periods or the extension of citizenship to family members (cf. Hansen & Weil 2001b: 11ff.). In effect, the boundary between citizens and non-citizens varies depending on country of residence and citizenship policies in this country: Third country nationals will in one Member State acquire the right to naturalise after three to five years and may then take up residence in another Member State, while others with similar migration biographies who have settled in this latter state might still face a threat of expulsion due to minor offences. These differences seriously impact on the

<sup>4</sup> *Michelletti vs. Delegacion del Gobierno en Cantabria* (1992), ECR – I 4239.

<sup>5</sup> Declaration No 2 on nationality of a Member State appended to the Maastricht Treaty confirms that the question of whether an individual possesses the nationality of a Member State is settled solely by reference to the national law of the Member State concerned. Access to Union citizenship is thus defined through national laws on nationality, including conditions for naturalisation.

political and social integration and the mobility of immigrants in Europe. As long as the Member States continue to be the gatekeepers of access to Union Citizenship by holding the sole right to regulate acquisition and loss of citizenship, they can even undermine Union policies with regard to the integration of immigrants by setting strict standards for naturalisation or enhancing the differences between the legal position of third country nationals and their own nationals. Thus Union citizenship as ‘citizenship of attribution’ (Wihtol de Wenden 1999: 95) has not contributed to the equalisation of the status of third country nationals in the territory of the European Union.

Until 2004 Union citizens enjoyed strong protection only in the areas of labour market participation, access to social rights, and antidiscrimination. Since 2004 their right to residence has been strengthened considerably.<sup>6</sup> From a theoretical point of view, the use of the term ‘citizenship’ for the status of Union citizens residing in another Member State and its potential for political integration in that Member States is nevertheless still questionable. Measured against an understanding of citizenship as a bundle of rights securing civil, social and political participation, the rights conferred to Union citizens outside the state of their nationality fulfil these criteria only in the field of social rights and security of residence. Access to political rights and higher public offices still is limited. The content of European citizenship has therefore been described as anaemic (Follesdal 2001: 314) and as characterized by a ‘striking absence of rights that could trigger a more active concept of citizenship’ (Prentoulis 2001: 198, cited by Preuss et al. 2003: 5). This lack of active citizenship raises the question whether Union citizenship ever will develop integrative powers comparable to those of Member State citizenship.

In an optimistic view, Union citizenship might be understood as an ‘aspirational citizenship’ with a potential of continuous further development. The current implementation of antidiscrimination provisions into the EC-Treaty and the Charter of Fundamental Rights may be seen as an example of the developmental potential of the concept. Nevertheless, both reforms do not improve the political opportunity structure for Union citizens. This issue is closely related to the institutional structure and the democratic deficit of the European Union. As long as the Council, and not the European Parliament, is the main decision-making body, the rights to vote and stand as a candidate for the European Parliament are no adequate substitutes for the right to vote in elections for national parliaments since these are the only institutions controlling the heads of government and ministers who forge the decisions of the Council.

## **Union citizenship and policies vis-à-vis third country nationals**

Up to the 1990s, the connection between European policies vis-à-vis third country nationals and Union citizenship was rather weak. Until the 1992 Maastricht Treaty, immigration policies were

<sup>6</sup> European Parliament and Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/365/EEC, 90/365/EEC and 93/96/EEC, Official Journal (OJ) L 158, 30 April 2004, p. 77.

developed in extra-European fora mainly concerned with security issues (Trevi-group, Ad-hoc-group immigration, Schengen group etc.), whereas policies vis-à-vis third country nationals (often also termed ‘integration policies’) were dealt with in the framework of social and regional policy and, because of jurisdiction of the ECJ on the EEC-Turkey Association Agreement, in the Association Council.

It took the Commission until 1985 to publish a suggestion for a Decision of the EC to consult with non-Member-States on immigration policy. This development prompted some Member States to approach the ECJ on the question of the Commission’s competence to deal with migration policy which it based on its competence in the field of social policy determined in Art. 118 European Community Treaty (TEC).

The ECJ confirmed this competence but denied it in the field of culture.<sup>7</sup> Nevertheless, this decision opened the door to a host of legal and funding measures for the integration of immigrants into the labour market and society. From the mid 1980s onwards, measures for the integration of immigrants became an important element within general labour market programmes funded by the European Social Fund (ESF), such as ‘Employment’, ‘Integra’ or ‘Adapt’; and at the beginning of the 1990s the Commission also started to fund measures against discrimination. Since the mid 1990s the integration of immigrants also became an important element in programmes of the Regional Funds, e.g. ‘URBAN’ or ‘INTERREG’. Furthermore, the European Commission pressed in 1997 for an amendment of Regulation (EC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community in order to give third country nationals access to social rights. This was eventually realised in Regulation (EC) 859/2003. In the mid 1980s the Association Agreements with third countries, particularly the EEC-Turkey Association Agreement and the Decisions of the Association Council 2/76, 1/80 and 3/80<sup>8</sup>, became relevant for EC migration policy making. The Agreement was concluded in 1963 and envisaged a gradual establishment of closer economic links with Turkey with a view towards eventual membership. It included provisions on the progressive introduction of freedom of movement for workers (Art. 12), establishment (Art. 13) and services (Art. 14). In 1970 an Additional Protocol was negotiated, setting a timetable for i.a. the gradual establishment of freedom of movement for Turkish workers to be implemented between 1 December 1976 and 30 November 1986 (Cicekli 2004: 2). However, this goal conflicted with the immigration policies of the Member States which had introduced restrictions on immigration in the 1970s.

<sup>7</sup> Germany and others vs. Commission (1987) ECR, I-3254; see also Hoogenboom (1992: 39).

<sup>8</sup> Agreement Establishing an Association between the EEC and Turkey, signed at Ankara, 12 September 1963, approved on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113), Decision of the Association Council No. 2/76 on the implementation of Article 12 of the Ankara Agreement (adopted at the 23<sup>rd</sup> meeting of the Association Council on 20 December 1976), Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association, Decision No 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families. As both decisions never have been published in the OJ, the court first had to decide on their legal status. In the case Meryem Demirel vs. Stadt Schwäbisch Gmünd (case 12/86), it declared that the Decisions of the Association Council formed a part of the *acquis communautaire*.

This situation led to a stalemate in the development of the relations between the EC and Turkey. In this situation the ECJ unintentionally became the main actor of policy development. In a series of 24 decisions between 1987 and 2004 (Cicekli 2004: 3), the Court established a wide-ranging interpretation of the decisions of the Association Council 1/80 and 3/80 whose effect was to approximate the right of Turkish members of the workforce and their families to the rights of Community workers, including the prevention of expulsion on general preventive grounds.<sup>9</sup> The ECJ also employed a broad concept of family including a stepson of a Turkish migrant worker into the definition of a family member.<sup>10</sup> On the other hand, Turkish workers who were no longer part of the workforce were excluded from the protection of the Agreement and the Association Council decisions (Cicekli 2004).<sup>11</sup> Thus the ECJ has established a clear demarcation line between rights associated with labour-market participation and the extension of rights to non-members of the labour market that has occurred in the field of European citizenship policies. This highlights the limits set by the labour-market orientation of the Association Agreements. Nevertheless the agreements became the role – model of the European Commission for the future status of third-country-nationals in the European Union.

In the area of traditional EU policy making, migration issues were moved closer to the European institutions in the Treaty of Maastricht that defined immigration as an ‘issue of common interest’ and absorbed the previously existing fora into the so-called ‘Third Pillar’. Although this pillar mixed intergovernmentalism with elements of the Community method in a complicated and cumbersome decision-making process, its results were limited to security concerns. The deficiencies of the ‘diluted intergovernmentalism’ (Kostakopoulou 2000:498) of Maastricht led the Council and the Commission to agree on the need to bring migration policy under Community competence, which eventually was agreed in the 1998 Treaty of Amsterdam.

This latter treaty did not only set up a new institutional framework including the majority of former third-pillar issues under Community competence. It also extended this competence into areas of immigrant integration. This transfer was to be completed within five years after its entry into force (i.e. by 1 May 2004). However, the Tampere European Council of 1999 prematurely transferred the right of initiative to the European Commission and thus strengthened the position of the latter considerably (cf. Apap & Carrera 2003: 2-4, Benedikt 2004: 63-143, Hofmann, Jandl & Kraler 2004, Schibel 2004).

The refugee crisis in Kosovo and the lack of coherent Union policies in the field provided the background for this meeting devoted to Justice and Home Affairs issues. The conclusions of this summit clearly sketched the equalisation of the legal status of long-term residents with that of Union citizens as a major goal for a future EU immigration policy: ‘The legal status of third

<sup>9</sup> Ömer Nazl et al. vs. Stadt Nürnberg (C-340/97) (2000) ECR I-957.

<sup>10</sup> Engin Ayaz vs. Land Baden-Württemberg, C-275/02, 30 September 2004.

<sup>11</sup> Ahmet Bozkurt vs. Staatssecretaris van Justitie (C-434/93) (1995) ECR I – 1475.



country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident' (Presidency Conclusion 1999: 21). In the following years, references to the Tampere conclusions were implemented into i.a. the European Employment Strategy and the Lisbon strategy.

In its Communication on a Community immigration policy, presented already in November 2000, the Commission sketched the outlines of a Union immigration and integration policy shaped by the 'spirit of Tampere'. The Communication confirmed the need for developing a common EU policy concerning 'separate but closely related issues of asylum and migration' (COM 2000 (757) final: 3). Acknowledging the demographic need for immigration, the paper demanded the opening of legal channels of immigration for labour migrants (COM (2000) 757 final: 3) and the development of a common policy for controlled admission of economic migrants. With regard to the legal status of third country immigrants, the Communication suggested a wide-ranging approximation of their legal status with those of nationals of the Member States, coining the term 'civic citizenship' for the ideas elaborated in the Tampere Presidency Conclusions. The contours of this new concept and its potential implications will be discussed in a separate section below.

In the area of 'hard law', the 'spirit of Tampere' was far less successful. Between 1999 and 2001, the Commission published several proposals for Council Directives regulating the status of third country nationals, i.a. with regard to the right to family reunification, the status of long-term residents and entry for paid or self employment.<sup>12</sup> These proposals were driven by the idea to equalise the rights of third country nationals with those of Union citizens in the respective fields as far as possible.

In the consecutive negotiations in the Council the directives both on family reunification and on the status of long term residents were watered down considerably (cf. Apap & Carrera 2003). After substantial pressure from the old 'guest-worker states' Austria and Germany in particular, the directive on entry for employment failed altogether.

<sup>12</sup> Proposal for a Council Directive concerning the status of third country nationals who are long-term residents, COM (2001) 127 final, Proposal for a Council Directive on conditions of entry and residence for third country nationals for the purpose of paid employment and self employed economic activity, Proposal for a Council Directive on the right to family reunification, (COM (1999) 638 final.

The other two directives were agreed in the Council in 2003.<sup>13</sup> Particularly the directive on long-term residents gives Member States rather broad discretion, making it likely that major provisions will be implemented by political actors only after decisions of the ECJ. With regard to the family reunification directive, the European Parliament already has approached the ECJ, arguing that the limitations on family reunification laid down in the directive might violate the European Convention on Human Rights. Although the directives improve the status of third country nationals in some areas, such as social rights, family reunification and freedom of movement, their rights still are limited compared to those of Union citizens. For example, only migrants residing in a Member State for more than five years may profit from the long-term-resident directive. Both directives do not guarantee in any way a homogeneous status of third country nationals throughout the European Union. Bilateral agreements with third countries and all more favourable provisions of the Association and Cooperation Agreements may be retained (Apap & Carrera 2003: 21). Furthermore, the directives contain several serious limitations of the rights conferred to long term residents when these appear to conflict with public policy goals and public security.

Summing up, Union citizenship best can be described as a highly hierarchical ‘citizenship of reciprocity’ (Withol de Wenden 1999: 94). ‘At the centre we find the national of the State where he is living, then the Europeans whose rights are reciprocal with those given to foreigners<sup>14</sup> in other European states, then the long term non-European residents, the non-European non-residents, the refugees, and at the margins, the asylum seekers and the illegals’ (Withol de Wenden 1999: 96). Although the 2003 Directive on Long Term Residents<sup>15</sup> transfers some of the rights of Union citizens to this group of third country nationals, their status still cannot be compared with that of Union citizens. Politically, the debate on Union citizenship with its focus on Member State nationals has seriously undermined the idea of a ‘citizenship of residence’ for which migrants’ organisations mobilized in the 1970s and 1980s (Withol de Wenden 1999: 96). It resurfaced only in 2000 with the introduction of the concept of ‘civic citizenship’ in the Commission’s Communication on a Community Immigration and Integration Policy (COM (2000) 757 final).

It remains to be seen whether the divergence between the strengthening of internal mobility by the new Union citizenship directive, on the one hand, and the hesitant approach towards migration from third countries and these migrants’ mobility rights within the Union, on the other hand, will be overcome in the near future. Although political documents suggest an approximation of legal statuses, the directives stop short of reaching this goal. This might also explain why the 2003 Communication suggests some moves with regard to naturalisation policies in order to overcome

<sup>13</sup>Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, OJ L 016, 23 January 2004; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3 October 2003, pp. 0012 – 0018.

<sup>14</sup> See footnote 1

<sup>15</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents.

this stalemate. Analysing possible legal bases for Community action in this field and the position of Member States towards harmonisation of naturalisation policies will be the task of future research.

### European Citizenship and antidiscrimination

By introducing a new Article (Art. 13) into the TEC, the Treaty of Amsterdam for the first time supplied the European Union with competence in the field of fighting discrimination based on 'race' and ethnic origin (Bell 2002a,b, Geddes & Guiraudon 2002, Liegl, Perchinig & Weyss 2004: 13 - 17). This change was achieved after NGOs working in the field of migrants' rights (Chopin & Niessen 2001) and the European Parliament had exerted pressure. Despite previous deferments by some Member States, the Council agreed upon two directives implementing measures against discrimination based on ethnic origin – the Racial Equality Directive<sup>16</sup> and the Employment Equality Directive<sup>17</sup> – in 2002. The rather quick adoption of these directives was ironically accelerated by the inclusion of the extreme right-wing Freedom Party into government in Austria and the subsequent diplomatic ostracism against Austria (Tyson 2001).

Although they differ in scope – discrimination outside working life is only prohibited with regard to 'race' and ethnic origin –, both directives provide protection against four different forms of discrimination: direct and indirect discrimination, discriminatory harassment, and instruction to discriminate. The wording of the directive – 'on grounds of' – indicates that the prohibition of discrimination also applies to so-called perceived characteristics, which gives the directive a wide material scope. Indirect discrimination is defined as a situation where an apparently neutral provision, criterion or practice puts persons with a certain racial or ethnic origin or religion or belief at a disparate/disproportionate disadvantage compared with other persons. The protection against discrimination conferred by the directives applies to all persons who are on the territory of one of the EU Member States, irrespective of their nationality (Liegl et al. 2004: 9). These provisions might open the door for an eventual inclusion of discrimination based on nationality in the understanding of 'indirect discrimination'. Despite the reluctance of the Member States to implement the directives, it is likely that subsequent decisions of the ECJ will harmonise the protection against racial discrimination and discrimination based on ethnic origin in the coming years.

Apart from its legal aspects, the discourse on antidiscrimination has massively influenced European Union policy making in the field of employment policies. In 2003, measures against discrimination of third country nationals have been defined as a target of the Employment Guidelines and the Lisbon Strategy and more than half of the projects within the ESF-funded programme 'EQUAL' dealt with issues of staff diversity, including antidiscrimination and integration of immigrants. The

<sup>16</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>17</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

implementation of antidiscrimination measures also is a major point in the ongoing debate on European Corporate Responsibility Standards (cf. Liegl et al. 2004: 50ff.).

The exclusion of discrimination based on nationality and the different scopes of protection in the directives remain the main weaknesses of EU-antidiscrimination regulations. Future research will have to examine the usage of the concept of indirect discrimination at European and Member State levels and its potential to prevent discrimination based on nationality. Furthermore, thorough studies on the adequacy and efficiency of the implementation system will be necessary to develop clear criteria for evaluating the quality of antidiscrimination systems (Perchinig 2003).

## **The concept of civic citizenship**

The concept of civic citizenship<sup>18</sup> was first introduced in 2000 in a Communication of the Commission: ‘The legal status granted to third country nationals would be based on the principle of providing sets of rights and responsibilities on a basis of equality with those of nationals but differentiated according to the length of stay while providing for progression to permanent status. In the longer term this could extend to offering a form of civic citizenship, based on the EC Treaty and inspired by the Charter of Fundamental Rights, consisting of a set of rights and duties offered to third country nationals’ (COM (2000) 757 final: 21).

This idea was re-emphasized in several consecutive documents, particularly in the 2003 Communication on Immigration, Integration and Employment (COM (2003) 336 final), which demanded a holistic integration strategy fusing the European Employment Strategy, civic citizenship and nationality, and the fight against discrimination into an integrated concept aimed at managing, not preventing, migration. The Commission also linked the idea of civic citizenship to a suggested improvement of political participation at the local level for third country nationals, thus bringing the neglected issue of local voting rights for third country nationals back into integration policies. Furthermore, it commented for the first time on naturalisation policies, suggesting automatic or semi-automatic access to nationality for the second and third generation of immigrant descent. For the rights to be included in civic citizenship, the Commission pointed to the Charter of Fundamental Rights as a reference text (COM (2003) 336 final: 23). It might therefore be interesting to examine these rights conferred to Union citizens by the Charter.

Basically, they include the right to seek employment and to residence (Art. 15.2 and Art. 45), which has been reinforced by the recent directive consolidating Union citizenship, the prohibition of discrimination based on nationality (Art. 21.2), diplomatic and consular protection (Art. 46), and voting rights at municipal level and for the EP (Art. 39 and 40). The rights of access to documents, to petition to the European Parliament and the European Ombudsman (Art. 42, 43 and 44) are not limited to Union Citizens but apply to any natural or legal person residing or having his or her registered office in a Member State.

<sup>18</sup> For a critical evaluation see Bauböck (2004b).

Notwithstanding the antidiscrimination directives and the directive on the status of long-term residents, third country nationals do not enjoy the same level of residence rights as Union citizens. They are not protected against discrimination based on nationality and do not have voting rights at the local level and to the European Parliament. An extension of these rights to third country nationals as envisaged in the Communication could close the gaps in the antidiscrimination directives and the directive on long-term residents. An equalisation of residence rights would automatically also include harmonisation with regard to the right to family reunification. Thus the concept of 'civic citizenship' could become a tool for gradually harmonising the status of third country nationals with Union citizens and guaranteeing a common legal status for immigrants in all Member States. It could finally question the still existing nexus between Member State nationality and European citizenship. Nevertheless, major political rights – the right to vote at the national level – and access to all public offices would still be withheld, so the core of this nexus would stay untouched. Despite this caveat, the introduction of a specific 'European' status for third country nationals could in future open a new dynamic towards eventually extending political rights for Union and civic citizens to the provincial or even national level.

'One cannot, conceptually and psychologically (let alone legally) be a European citizen without being a Member State national', J. H. H. Weiler stated in his famous 1997 Jean Monnet Lecture at the London School of Economics (Weiler 1997: 510). Weiler interprets European citizenship as bridging the national and supranational, 'eros and civilisation', in a way that allows 'nationality and statism to thrive, their demonic aspects under civilizatory constraints' (Weiler 1997: 511).

Whereas Habermas' concept of constitutional patriotism stays bound to the nation state, seeking to tame nationality by constitutional reason, Weiler transfers this task to Union citizenship. The concept of civic citizenship even goes a step further and uncouples Union citizenship from Member State nationality. This might be an indication that in future civilisation could prevail, confining Eros to its ancestral realm: the private sphere. Suggesting an extension of the legal status of third country nationals to those of Union citizens without asking for belonging to a Member State, the concept might also question the still existing link between nationality and Union citizenship and thus become a tool for the development of a true Union citizenship deserving this name.

This enlightened approach to Europe, in which rights would be based on residency, not nationality, might well have the potential to overcome the state-boundedness of naturalisation (Kostakopoulou 2003). European citizens would then no longer have to carry the burden of a Member State nationality. Thus civic citizenship might have the potential of reaching beyond nationality-based measures of political integration, such as the toleration of dual nationality.

The concept, which stresses the prohibition of discrimination based on nationality and the right to vote at local level, might also be the missing link between Union citizenship, antidiscrimination

policy and EU migration policies. Nevertheless, it is still as vague as the first concepts of Union citizenship have been, and it is not at all clear whether civic citizenship is regarded as an interim status before naturalisation or as a permanent legal status conferred and withdrawn directly by European Union institutions. Both doors are open. But given the fact, that it took some twenty years until Union citizenship became reality, one might have to accept, that it will be the historians task to report about the decision taken.

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