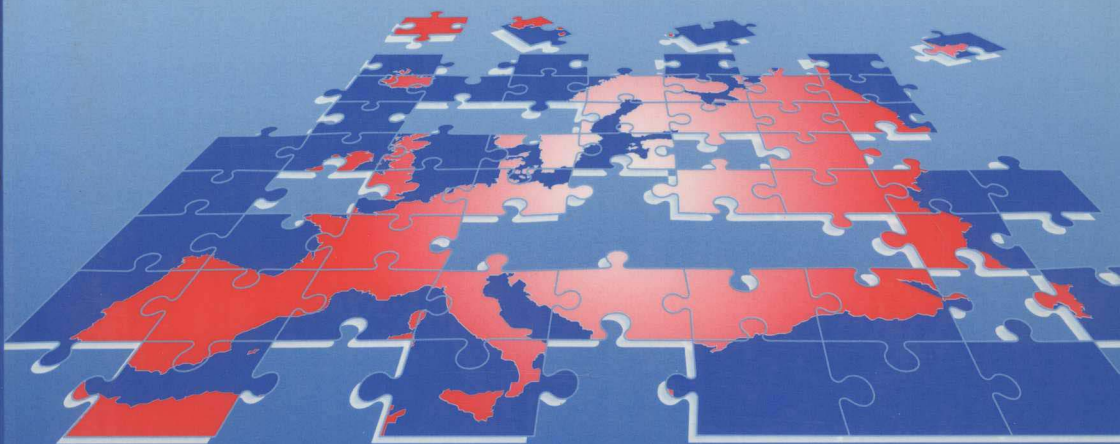


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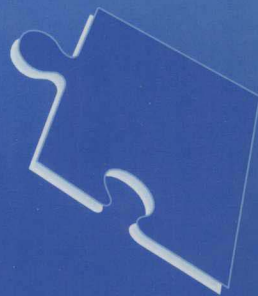
The Legal Elements of European Identity

*EU Citizenship and
Migration Law*

Elspeth Guild



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THE LEGAL ELEMENTS OF EUROPEAN IDENTITY

EU Citizenship and Migration Law

By

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Series Editor's Foreword

No one would put a question on a contractual clause to an expert of criminal law. However this is what happens on a daily basis to those brave enough to call themselves European law specialists. Nowadays, there is virtually no area of the law which is left untouched by either European legislation or by the case law of the Community courts. It is thus impossible to keep abreast of every development, making specialisation essential. As for the 'law-consumers', everyday work and study requires constant reflection and enquiry as to whether there is a directive or a recent judgment of the European Court of Justice which might affect the outcome of a certain case, or influence how a certain thesis can be developed.

The *Kluwer European Law Library* is born out of a very simple but ambitious idea: to provide a series of 'state-of-the-art' publications focused on specialised areas of EU law, which could be truly used and not simply placed on a remote shelf.

Boldly, the series has been baptised 'library' by the two members of the scientific committee of this project, Bruno de Witte and David O'Keeffe, and in the Aristotelian sense this means gradually covering all the possible ramifications of EU law. This is very well, but there is already a myriad of publications dealing with the same topics. Why another series? And what is the difference? It is always good to start with the practicalities. The library will offer svelte albeit exhaustive books at very affordable prices. This policy decision, for which full credit should be given to our publisher, should make the future books easily accessible to students and lawyers alike. It is hoped that the library could become a useful instrument, not only for those already involved in Euro-related work, but also for those who do not work on a daily basis in this field and yet may be in need of a reliable and clear text on specific topics. As for the substance, it is for the reader to judge and not for the editor to say. Just two modest remarks which are probably mere 'self-post-its'. Firstly, the topics selected are highly specific and original, and such, they are not intended to be a kind of 'nutshell textbooks' but a series of valuable short monographs. Secondly, the library does not have a targeted audience. Just good law books, which will be read by academics, students and practitioners alike.

Finally I would like to thank everybody who is involved in making this series happen, in particular Karel van der Linde at Kluwer and Andrea Cordwell James at King's College London.

Andrea Biondi
London, July 2004

Preface

This book plots the construction of identity and citizenship in European Union law. The central question which I address in the chapters which follow is: how is a European identity being created through the adoption and interpretation of immigration and citizenship laws by the European Union. While the focus is on the European Union and the interplay among the Member States in the creation and development of a legal framework of immigration and citizenship, this history can only be told in tandem with the development of immigration and citizenship rights as human rights which has been taking place at the same time in the “other” Europe – that of the Council of Europe – through the European Convention on Human Rights.

The construction of a European identity is a field which has been much discussed by both political scientists and international relations academics over at least the past 20 years. This literature is rich and deeply informative about what kind of Europe is emerging and why. However, the divide between jurists and political scientists has tended to be substantial in the field of “Europe” particularly in this area. While very informative books have been produced on the black letter law, such as K Hailbronner’s¹ and S Peers’² work, the cross-over between law and the political science perspectives has been less well charted. In this book I have sought to remedy this shortcoming of the literature. The course of EU identity measures regarding individuals is one of a gradual transformation of immigrants in nation states (i.e. migrant nationals of the Member States) into citizens without a state (in the form of citizens of the Union). This has been coupled with an increasing legal differentiation between these new “citizens” and other immigrants – those from third countries. These are issues which can only be understood through a multidisciplinary approach. Thus the chapters here are structured around the EU legal measures but with reference to and seen in the light of the major theorists on European identity including Habermas, Koskeniemi, Sandholtz and Stone Sweet, Caporaso and Žižek.

In the introduction I start by examining the concept of Europe from the perspective of the definition of the state using Weber, Beck and Giddens as guides. Into this

1 K Hailbronner, *Immigration and Asylum Policy of the European Union*, Kluwer Law International, The Hague, 2000.

2 S Peers, *EU Justice and Home Affairs Law*, Longman, London 2000.

framework, I address the question of the individual and his or her identity as attached to the state or as arising from supra-national law. Chapter 1 considers the meaning of the border as regards identity in the form of citizenship and immigrant status. When the EU starts to shift the border outwards in the form of the Single Market, what are the consequences for the individual's identity. The work of J Torpey provides the point of departure. In Chapter 2, I examine the meaning of citizenship in the context of constitutionalism, including the EU constitution. What does it mean and what are the rights of citizenship, both in the context of the literature on constitutions and the construction of "Europe"? This discussion is then followed in Chapter 3 by an examination of the content of citizenship of the Union, using the work of T H Marshall as a guide. Chapter 4 examines the residence-citizenship nexus. The relationship of the legal concept of citizenship to a specific territory is complex and contested in Europe. Here Habermas provides the important connection with the development of thinking in political science.

Chapters 5 and 6 deal with central concerns of the citizen/migrant: the right to security of residence and protection against expulsion or exclusion and family reunification. In Chapter 5 I assess what some consider the Achilles heel of citizenship of the Union, the continuing power of the Member States to expel or exclude citizens of the Union who are nationals of another Member State both from the territory and from certain economic activities. The extent to which these powers are consistent with the principle of equality among citizens is highly contentious. Further, the continuing focus on the border as the place of security against terrorism, even in an Internal Market raises important questions about whether there is variable geometry of rights in the common space. Chapter 6 examines EU family reunification law both for citizens of the Union and third country nationals under the directive adopted in 2003.

The development of migration rights as human rights in the European Convention on Human Rights is plotted in Chapter 7. Caporaso's three analytical tools for understanding the Europeanisation of the politics of identity provide assistance in understanding the interface between the EU and the ECHR in the development of rights of migration and State obedience. In Chapter 8 the move from citizen to third country national in EU law is explained from the perspective of those who are in between the two concepts: the third country nationals whose work, residence or social rights in the EU are protected by agreements between their state of nationality and the EU. The development by the EU legislator and interpretation by the ECJ of these rights is an important part of the variable geometry of being an "immigrant" in Europe. Chapter 9 then sets out the new powers in immigration and asylum inserted into the EC Treaty in 1999 with a five-year deadline for the implementation of many of them. Schedules of adopted measures in the fields of immigration, asylum, borders and irregular migration as at 1 March 2004 are included as well as an analysis of the important aspects of each measure.

Sandholtz and Stone Sweet examine how the process of integration creates its own dynamic which sparks new political arenas and thus qualitatively changes the nature

of politics. In light of their work, I examine in Chapter 10 the development of the new EU international relations policies of enlargement, the Wider Europe and the Doha round of WTO negotiations as it impacts on immigration. The future of EU immigration law seems as much bound up in the external policies of the EU as with the policies being pursued in the context of Justice and Home Affairs. Mikkeli characterises the idea of Europe as an identity which is structured around the difference of the other, be it skin colour, religion, culture or whatever. I examine in Chapter 11 the consequences of the adoption of measures against racial and other discrimination at the EU level with immigration law and policy. To what extent is Mikkeli proved right or wrong in law by the approach of the EU legislator towards racial discrimination? Chapter 12 examines the directive on long term resident third country nationals adopted in November 2003 in some detail. I set out in this chapter the provisions of the directive and their context. Žižek's work on Europe's fascination with the Real and the Other provides the prism through which to examine the wider significance of the directive.

The conclusion seek to bring together some of the main themes of the book, concerning the legal framework of identity in Europe. The intersecting and conflicting policies, approaches and venues is among the most startling of aspects of this work. It will be some time before the meaning of the legal elements of identity in Europe will become clear. Not only must clarification be awaited from the European Court of Justice but also from the European Court of Human Rights. The decisions of the highest courts in Europe alone will not provide any final answer on European identity. The most important test is whether the people of Europe embrace the concept as it is developing and accept its legitimacy. To understand this process, our colleagues in political science and international relations are indispensable.

I would like to thank a number of people for their help and support throughout the period of writing and revising this book. First, I must thank Didier Bigo of Sciences-Po for his endless and selfless help in discussing political science theory with me. Kees Groenendijk and Paul Minderhoud of the University of Nijmegen, Carol Harlow of the LSE and Ryszard Cholewinski of the University of Leicester provided me with might need legal criticism on some chapters which are much improved as a result. Andrew Neal of Keele has been a most careful and patient help, reading all the chapters and editing them for me. There are many other persons, too numerous to mention, who have assisted me greatly with their discussion, insight and ideas. Finally I must thank the European Commission Framework V programme ELISE and Framework VI programme Challenge which have both provided me with financial support to enable me to finish this project.

Abbreviations

CAT	UN Convention against torture and other cruel, inhuman or degrading treatment or punishment 1984
CEEC	Central and Eastern European Countries
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
JHA	Justice and Home Affairs

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Introduction

Identity and the Individual in Europe

This book is about European citizenship and migration law.¹ The subject immediately presents a number of questions and issues about its scope. Europe, citizenship and migration all require some delineation and definition. However the definition is only possible through the gradual examination of the law and its framework in Europe. What is central to the ideas in law and practice of citizenship and migration is that they are ways of classifying types of identity and belonging in respect of individuals. Belonging to what, however, is one of the questions which is pivotal to this book. Definitions of the state, whether by Weber,² Giddens³ or Tilly,⁴ involve a territory, people and a political class/administration exercising authority. The term European citizenship and migration law begs the question of the state. What “state” of Europe is the territory within which these categories of belonging and separation apply?

In classic state theory, the state, through its bureaucracy, embraces the citizens to provide protection in various forms and to extract resources.⁵ In law this is expressed as a relationship between identity, in the form of citizen versus foreigner, borders, as the container within which the state bureaucracy operates, and legal order, which provides the rules of the relationship.⁶ I shall examine each element as it relates to “Europe”: territory, people and the political class/administration. The first focus as

1 This text is complete as at 1 May 2004. The article numbers used in respect of the EC Treaty take into account the changes made by the Nice Treaty. The corresponding article numbers of the EU Constitution are those agreed in June 2004 and as posted on the Statewatch website.

2 M Weber, *Economy and Society*, vol 1, Ed Roth G & Wittich C, University of California Press, Berkeley, 1978.

3 A Giddens, *A Contemporary Critique of Historical Materialism*, vol 2, *The Nation-State and Violence*, University of California Press, Berkeley and Los Angeles, 1985.

4 C Tilly, *The Formation of Nation States in Western Europe*, Princeton University Press, Princeton, 1975.

5 G Noiriel, *Etat, nationalité et immigration vers une histoire du pouvoir*, Belin, Paris, 2001.

6 M Albert, D Jacobson, Y Lapid (eds), *Identities, Borders, Orders*, University of Minnesota Press, Minneapolis/London, 2001.