

Citizenship Rights and Freedom of Movement in the European Union

Francesco Rossi dal Pozzo

82

EUROPEAN MONOGRAPHS



Wolters Kluwer
Law & Business

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Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-4660-1

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Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

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EUROPEAN MONOGRAPHS

In the European Monographs series this book, *Citizenship Rights and Freedom of Movement in the European Union*, is the eighty-second title. The titles published in this series are listed at the end of this volume.

To my parents

Preface

The European Union (EU) 'places the individual at the heart of its activities, by establishing the nationality of the Union and by creating an area of freedom, security and justice'. This is stated in the preamble to the Charter of fundamental rights, and is borne out by the many legal provisions (both primary and secondary legislation) on the matter.

Citizenship of the EU, declared by Article 20 of the Treaty on the Functioning of the European Union (TFEU), grants all citizens of Member States a series of rights, amongst which the right of moving and residing freely, now enshrined in Article 21 TFEU and Article 45 of the Charter of Fundamental rights of the European Union, is of crucial significance, to the point of appearing, ever since its inception in the 1957 Treaty of Rome, as one of the four fundamental freedoms, that is one of the pillars of the creation of the single market.

Furthermore, the right of movement and residence is a right on which is predicated the exercising of all the other rights which are automatically recognized with nationality. Amongst these mention must be made, in particular, of the right to vote in and stand as candidates for elections for the European Parliament or in municipal elections and the right to initiate legislation, a right introduced by the Treaty of Lisbon, since these represent the tools enabling EU citizens to take part in the democratic life of the EU, contributing to their full integration in the society of the Member State in which they reside. Today we are witnessing growing attention to these matters on the part of EU institutions which are firmly confident in assigning a central role to EU citizens in their policies in the areas of freedom, security and justice. This is made clear by the 2008 Stockholm programme and, in the same vein, the European Parliament resolution of 15 December 2010 on the situation of fundamental rights in the EU, which gives it 'effective implementation after the entry into force of the Treaty of Lisbon'. With the latter document the European Parliament, in particular, asked the Commission to declare 2013, on the occasion of the twentieth anniversary of the creation of Union nationality, the 'European Year of Citizens'. The declared aim of this initiative is, first, as an awareness-raising campaign, to increase EU citizens' understanding of the rights such status confers on them, especially the most recent ones and,

secondly, to provide the chance to identify and remove the obstacles that still come between the actual exercise of rights in everyday life.

The declaration of the 2013 ‘European Year of Citizens’ has been, then, a stimulus to the author of this work to take up once again a classic theme of the EU, to examine it by looking closely at the various institutions concerned, in order to then concentrate on a close examination of those obstacles that still prevent full enjoyment of the rights recognized to EU citizens, via a careful analysis of the most recent Court of Justice case law and of some recent legislative innovations.

List of Abbreviations

<i>AJDA</i>	<i>L'Actualité Juridique: Droit Administratif</i>
<i>Bull. EC</i>	Bulletin of the European Community
<i>Bull. EU</i>	Bulletin of the European Union
<i>CDE</i>	<i>Cahiers de droit européen</i>
<i>CML Rev.</i>	Common Market Law Review
<i>D.l.</i>	<i>Decreto legge</i> – Decree-Law
<i>D.lgs.</i>	<i>Decreto legislativo</i> – Legislative Decree
<i>D.m.</i>	<i>Decreto ministeriale</i> – Ministerial Decree
<i>D.p.r.</i>	<i>Decreto del Presidente della Repubblica</i> – Presidential Decree
<i>DeG</i>	<i>Diritto e giustizia</i>
<i>DIC</i>	<i>Diritto, immigrazione e cittadinanza</i>
<i>Dir. UE</i>	<i>Il diritto dell'Unione europea</i>
<i>DPCE</i>	<i>Diritto pubblico comparato ed europeo</i>
<i>DUDInt</i>	<i>Diritti umani e diritto internazionale</i>
<i>EAEC</i>	European Atomic Energy Community
<i>EC</i>	European Community
<i>ECR</i>	European Court Reports – Reports of Cases before the Court of Justice and the Court of First Instance
<i>ECSC</i>	European Coal and Steel Community
<i>EDP</i>	<i>Europa e diritto privato</i>
<i>EEC</i>	European Economic Community

EL Journal	European Law Journal
EL Rev.	European Law Review
<i>Enc. dir.</i>	<i>Enciclopedia del diritto</i>
<i>FA</i>	<i>Il Foro amministrativo</i>
<i>FPS</i>	<i>Famiglia, Persone e Successioni</i>
<i>GAI</i>	<i>Giustizia e affari interni</i>
<i>GCM</i>	<i>Giustizia civile — massimario</i>
<i>GDAm</i>	<i>Giornale di diritto amministrativo</i>
<i>GiC</i>	<i>Giurisprudenza costituzionale</i>
<i>GU</i>	<i>Gazzetta Ufficiale della Repubblica italiana</i>
OJEC	Official Journal of the European Community (OJEU, Official Journal of the European Union, 1 February 2003)
OJEU	Official Journal of the European Union (replaces OJEC Official Journal of the European Community from 1 February 2003)
<i>PCIJ</i>	Permanent Court of International Justice – Reports of Judgments.
<i>RDEu</i>	<i>Rivista di diritto europeo</i>
<i>RDInt</i>	<i>Rivista di diritto internazionale</i>
<i>Rev. Aff. Eur.</i>	<i>Revue des Affaires Européennes</i>
<i>Rev. gén. droit int. pub.</i>	<i>Revue générale de droit international public</i>
<i>Rev. trim. droit eur.</i>	<i>Revue trimestrielle de droit européen</i>
<i>RiDPC</i>	<i>Rivista italiana di diritto pubblico comunitario</i>
<i>RInDU</i>	<i>Rivista internazionale dei diritti dell'uomo</i>
<i>RIPP</i>	<i>Rivista di diritto internazionale privato e processuale</i>
<i>SU</i>	<i>Studi urbinati</i>
<i>Supplemento ord.</i>	<i>Supplemento ordinario alla Gazzetta Ufficiale della Repubblica italiana – Ordinary Supplement to the Italian Government Gazette.</i>
<i>TEU</i>	Treaty on European Union
<i>TFEU</i>	Treaty on the Functioning of the European Union

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CHAPTER 1

Citizenship of the European Union

§1.01 ORIGINS AND DEVELOPMENT OF EU NATIONALITY

Placing the concept of European nationality in a historical context must begin from the point when, with the 1974 Paris Summit, the institution of a uniform passport for all EU citizens was proposed as a first sign of, or step towards, a union of passports and, moreover, towards the recognition of a cluster of special rights that would establish the *status* of EU citizens. It was in those years that the idea of 'a citizens' Europe' (the Tindemans Report, 1975) began to be born and, in its wake, the definition of EU nationality as expressed by the European Parliament in the draft Treaty establishing the EU of 1984.

However, it was with the Maastricht Treaty of 7 February 1992¹ that the concept of EU nationality was formally recognized by EU law, specifically in the then first pillar of European Community (EC) law (the 'pillar structure' of the EU will be discussed shortly).

With the Treaty of Maastricht, the citizens of Member States also became EU citizens, that is to say citizens of a Union founded on the European Communities, supplemented by the policies and forms of cooperation established by the EU Treaty (Article 1). It is significant that Part II of the EC Treaty (ECT), expressly dedicated to the matter of its Title, 'Citizenship of the Union', was placed immediately after the 'Principles'² and before 'Community Policies',³ thereby highlighting its general significance in the structure of the Treaty.⁴

1. The Treaty that created the EU, which entered into force on 1 Nov. 1993, in OJEC C 191 of 29 Jul. 1992 (ratified and made effective in Italy with draft Law No. 454 of 3 Nov. 1992, in *supplemento ordinario alla Gazzetta Ufficiale della Repubblica italiana* (Ordinary Supplement to the Italian Government Gazette) No 277, 24 Nov. 1992).
2. First Part, Arts 1 to 16 ECT.
3. Third Part, Arts 23 to 181a ECT.
4. See, amongst many contributions, EVANS, *Nationality Law and European Integration*, European L. Rev. 190 (1991); GAUTIER, *Citoyenneté*, in BARAV-PHILIP (ed.), *Dictionnaire juridique des Communautés européennes*, Paris, 1993, 161; KOVAR-SIMON, *La citoyenneté européenne*, Cahiers

Although the contents of the substantive law on Union nationality were supposed to be found in rules strictly belonging to EC Law, it cannot be said that the law on Union nationality was exclusively contained in the latter, so that using the term 'Union' could be inaccurate or a mere wishful expression not fulfilled by substantive law.

However, from the very beginning, EU provisions themselves placed nationality in a broader landscape, clarifying its nature as an instrument aiming 'to strengthen the protection of the rights and interests of the nationals of its Member States' (third indent of Article B of Treaty on European Union (TEU) as then in force, now Article 3(2) TEU) and indeed identifying them as one of the motivating factors urging Member States to ratify the Treaty establishing the European Union (see, to this effect, the preamble to the TEU).⁵ One cannot but agree with the critique that consistency and orderliness would have dictated that Union nationality should be governed by the 'provisions common' to the Treaty on the Union and the Community Treaties, (i.e., in Title I, Articles 1–7), or in an ad hoc Title, just as (now) the TEU dedicates Title II to the rights of citizens and their active involvement in the democratic life of the Union). The limited jurisdiction given, at the time, to the Court of Justice in the Treaty on the Union⁶ would have, however, greatly reduced the judicial guarantees of rights connected to the status of EU citizenship, guarantees that, within the ECT framework, were ensured to the same extent as any other status deriving from the EC. Any discrepancies in provisions on nationality between the EC and EU Treaties were also made good by the Treaty establishing a Constitution for Europe (commonly referred to as the European Constitution), which never entered into force because it was never ratified.

The latter, in addition to transforming the Charter of Fundamental Rights, turning it into an integral part of the Treaty itself (Article I-9, it 'constitutes Part II' of the Treaty), would have reserved one of its basic rules to nationality (Article I-10), as well as the rule on fundamental rights.

de droit européen, 1993, 285; MEEHAN, *Citizenship and the European Community*, London, 1993; RUZÉ, *Nationalité, effectivité et droit communautaire*, *Revue générale de droit international public*, 1993, 107; various contributions in NASCIMBENE (ed.), *Nationality Law in the European Union. Le droit de la nationalité dans l'Union européenne*, Milan – London, 1996; DOLLAT, *Libre circulation des personnes et citoyenneté européenne: enjeux et perspectives*, Brussels, 1998; various contributions in O'LEARY–THILKAINEN (eds.), *CITIZENSHIP AND NATIONALITY STATUS IN THE NEW EUROPE*, LONDON 1998; MAGNETTE, *La citoyenneté européenne*, Brussels, 1999; various contributions in WEIL–HANSEN (eds.), *Nationalité et citoyenneté en Europe*, Paris, 1999; ROSSI, *I cittadini*, in *Il diritto privato dell'Unione europea*, TIZZANO (ed.) 1, Torino, 2000, 97; CONDINANZI–NASCIMBENE, *Cittadinanza dell'Unione e libera circolazione delle persone*, in *Trattato di diritto amministrativo europeo. Parte speciale*, CHITTI–GRECO (eds.), 1, Milano, 2007, 87; CONDINANZI–LANG–NASCIMBENE, *Cittadinanza dell'Unione e libera circolazione delle persone*, Milan, 2006 (and by the same authors: *Citizenship of the Union and Freedom of Movement of Persons*, Leiden, 2008); MORVIDUCCI, *I diritti dei cittadini europei*, Torino, 2010, 3; TIZZANO, *Alle origini della cittadinanza europea, Il diritto dell'Unione europea*, 2010, 1031; in TRIGGIANI (ed.), *Le nuove frontiere della cittadinanza europea*, Bari, 2011; CORTESE, *Il rilievo della cittadinanza nel sistema dell'Unione europea: l'interazione tra cittadinanza 'nazionale' e cittadinanza dell'Unione*; and NICOLIN, *La cittadinanza europea*, in ZAGATO (ed.), *Introduzione ai diritti di cittadinanza*, Venezia, 2011, 125 and 111.

5. In the Preamble to the TEU, in the version in force the Member States declare 'resolved to establish a citizenship common to nationals of their countries'.

6. See Art. 46 of the TEU.

The two rules would have constituted Title II of Part I, dedicated specifically to 'Fundamental rights and nationality of the Union'. With the entry into force of the European Constitution the three-pillar structure of the EU would have disappeared, ensuring full jurisdiction to the Court of Justice, together with national Courts which in fact also apply EC law (Article I-99), except with regard to the areas of foreign policy, public policy and common security and defence policies.

§1.02 CHANGES INTRODUCED BY THE TREATY OF LISBON

The modifications already in the European Constitution have been mostly taken up again by the Treaty of Lisbon, signed on the 13 December 2007 and in force since 1 December 2009, at the end of a long process of reform started in 2001 at the Laeken European Council (14–15 December 2001) but cleansed, so to speak, of all those elements, especially of a formal nature, which evoked the idea of a Constitutional Treaty, which had been a sticking point and at the base of Member States' refusal to ratify it.⁷

With the Treaty of Lisbon the institutional architecture of the EU underwent important changes. By virtue of the new Article 1(3) TEU, the EU replaces and succeeds the European Community, which thus disappears along with any distinction between it and the Union, unlike had been the case in the past. This institutional change entailed, first of all, a change of name of the Treaty establishing the European Community, becoming the Treaty on the Functioning of the European Union (TFEU). Second, all references to the European Community disappeared, which should be followed by the disappearance, in legal language, of all references to the Community; in particular, the expression 'Community law' should be replaced with the expression 'EU law'. Third, the disappearance of the Community demolishes, on the formal level, the comparison between the EU's structure and the image of a Greek temple, with a single pediment (single institutional framework) and a common base (general provisions, having transversal scope), built upon three pillars: Community, characterized by cooperation realized via the European Communities, common foreign and security policy and, finally, police and judicial cooperation in criminal law (the abovementioned 'pillar' structure).

The rules on Union nationality were reproduced without substantial changes, but the citizen's active participation in the democratic life of the Union is strengthened, new institutes having been introduced.

The TEU's new Title II, 'Provisions on Democratic Principles', opens with Article 9, affirming the Union's obligation to observe the principle of the equality of its citizens, 'who shall receive equal attention from its institutions, bodies, offices and agencies'. As had already been provided for in Article 17 ECT, the rule declares that every national of a Member State is a citizen of the Union. Citizenship of the Union, the rule specifies (as does Article 20 TFEU) 'shall be additional to national nationality',

7. For remarks of a general nature, see NASCIBENE, *Il diritto dell'Unione europea dopo Lisbona. Diritti fondamentali e 'cooperazione Schengen' nei rapporti fra l'Unione europea e la Svizzera*, Lugano, 2010, 1.

thus modifying, at least in part, the earlier provision (Article 17 ECT) according to which EU nationality was a complement to national nationality, although not substituting it.⁸

Although such wording may suggest certain autonomy on the part of EU nationality with respect to national nationality, the former remains ancillary to the latter, on which depend both acquisition and loss. There still is not, at the moment, a complete and autonomous concept of European nationality.

The actual content of the rights enjoyed by European citizens is governed by the TFEU, the second part of which is dedicated to 'Non-Discrimination and Citizenship of the Union'. After having restated the general prohibition of non-discrimination, which the Court of Justice in its case law divides into direct discrimination, on grounds of nationality, and indirect discrimination, on grounds other than nationality such as, for example, residence, but which represents just as unfavourable treatment for the citizen of a different Member State (Article 18 TFEU, formerly Article 12 ECT) and after having described the correct judicial procedure to follow in order to take appropriate action to combat discrimination based on sex, racial or ethnic origin (Article 19 TFEU, ex Article 13 ECT), the Treaty restates, in Articles 20–25, the principles regarding the rights enjoyed by EU citizens (ex Articles 17–22 ECT).

These rights, moreover, may be expanded by virtue of a special legislative procedure, that is with the unanimous decision of the Council, subject to the approval of Parliament, and following the consent of the Member States, in accordance with their respective constitutions (a procedure already provided for by the ECT but never actually put to use before).⁹

§1.03 RELEVANT LAWS

There are various rules in the Treaties referring in a variety of ways to the status of citizen of the Union (some of which will be examined later): (a) Article 3(2) TEU (one

8. In the past, the ECT (Art. 17) provided that 'Union citizenship', instituted by the Treaty, 'shall be additional to national citizenship and shall not replace it'. 'Citizen of the Union' is more specifically 'a national of a Member State': each State, then, has the task of defining who its nationals are and, indirectly, who Union citizens are. However, the European Constitution states (Articles I–10), with only formal difference (as in the current TEU, the creation of the citizenship was no longer mentioned, since this was considered a given): 'Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.' The Treaty of Lisbon reuses the expressions used by the European Constitution.
9. The Commission presented various reports on the implementation of provisions on citizenship: the report on the period 1 May 2004 to 30 Jun. 2007, in Communication COM(2008) 85 of 15 Feb. 2008 (see the European Parliament resolution of 2 Apr. 2009 on problems and prospects concerning European Citizenship (2008/2234(INI)) in OJEU C 137 E of 27 May 2010, reflecting much doubt over the capacity of regulation currently in force to fully answer the need to protect citizens of the Union) and in particular, EU Citizenship Report 2010 Dismantling the obstacles to EU citizens' rights COM(2010) 603 of 27 Oct. 2010, together with document COM(2010) 602 of 27 Oct. 2010, On progress towards effective EU Citizenship 2007–2010 and document COM(2010) 605 of 27 Oct. 2010, Report on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC).