

# EUROPEAN UNION CITIZENSHIP IN THE TREATY OF LISBON: ANY CHANGE AT ALL?

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European citizens were the subject of one of the three fundamental questions of the Laeken Declaration, which led up to the 2004 IGC: how to bring citizens 'closer to the European design and European institutions'?<sup>1</sup> On this basis, one would have expected the Constitutional Treaty to contain modifications to the provisions on EU citizenship, but at first glance these changes were not very spectacular. As one Dutch commentator stated, they were merely 'cosmetic'.<sup>2</sup>

The IGC mandate for the Treaty of Lisbon was to draw up a Reform Treaty with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action. The mandate explicitly required that the constitutional concept so central to the 2004 IGC was to be dropped.<sup>3</sup> The innovations resulting from the 2004 IGC with respect to the content of the amendments to the existing Treaties were, however, to be integrated into the Reform Treaty. As a consequence, some of the changes with respect to European Union citizenship, presumably those that expressed the constitutional idea, have been abandoned in the Reform Treaty.

Although apparently cosmetic on the surface, it is submitted here that the changes made to the citizenship provisions support a new direction in EU citizenship: an evolution from a complementary towards a more independent citizenship. Below, the Treaty of Lisbon modifications will be dealt with under three headings. This division draws upon the three dimensions of citizenship – the political, the legal and the psychological

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<sup>1</sup> See Laeken Declaration, Annexes to the Presidency conclusions – Laeken, 14 and 15 December 2001, SN 300/1/01 REV1, p. 21.

<sup>2</sup> R. Barents, *Een Grondwet voor Europa: Achtergronden en Commentaar* (Kluwer, 2005), 211.

<sup>3</sup> See IGC Mandate, Annex 1 to the Presidency conclusions – Brussels, 21 and 22 June 2007, 11177/1/07 REV1, point I.3.

dimension – used by Carens in his book *Culture, Citizenship and Community*.<sup>4</sup> In principle, citizenship amounts to membership of a political community. The political dimension therefore forms the first heading.

## §1. THE POLITICAL DIMENSION

The political dimension of citizenship refers to citizens as members of a political community; it considers how the community should treat its citizens and to the way in which citizens form a source of legitimacy for that community. For EU citizenship, the political dimension refers to how Union citizens participate in the EU decision-making structure, to the way in which the Union should treat its citizens and to how the Union citizens can legitimize the Union.<sup>5</sup>

The political dimension was present in the formulation of Article I-1 of the Constitutional Treaty, which stated that it ‘Reflect[ed] the will of the citizens and the States of Europe to build a common future’. This formula was used instead of the previously proposed ‘peoples and states of Europe’ as better reflecting the Union’s double legitimacy.<sup>6</sup> Such reference to the citizens of the Union, almost as constituents, is nowhere found in the Lisbon Treaty. Instead, Article 1 of the new TEU repeats the formula of ‘an ever closer union among the peoples of Europe’, in line with point 3 of the Reform Treaty IGC mandate that ‘The TEU and the TFEU will not have a constitutional character’.

However, constitutional elements can nonetheless still be detected in the citizenship provisions of the Lisbon Treaty. The place of EU citizenship in Article 9 of the new TEU, under title II ‘Provisions on Democratic Principles’, for instance, refers to the participation of citizens in the political debate. Article 10 of the new TEU states in paragraph 2 that citizens are directly represented at the Union level in the European Parliament, and in paragraph 3 that every citizen shall have the right to participate in the democratic life of the Union. Where these paragraphs 2 and 3 do not explicitly limit these rights to Union citizens, it seems nonetheless arguable that they must be interpreted as exclusively for EU citizens, because paragraph 4 of Article 10 refers exclusively to Union citizens and states that ‘political parties at the European level contribute to forming European political awareness and to expressing the will of the citizens of the Union’.

<sup>4</sup> J. Carens, *Culture, Citizenship and Community. A Contextual Exploration of Justice as Evenhandedness* (OUP, 2000).

<sup>5</sup> See S. Besson and A. Utzinger, ‘Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora’s Box’, 13 *Eur. L. J.* 573 (2007), 586. They argue that one should think more ‘about how to best develop the political dimension of EU citizenship in ways that match its *sui generis* post-national political organization’. Magette argues that it is not a post-national concept of EU citizenship, but a trans-national concept that is developed, see P. Magette, ‘How can one be European? Reflections on the Pillars of European Civic Identity’, 13 *Eur. L. J.* 664 (2007).

<sup>6</sup> P. Norman, *The Accidental Constitution* (EuroComment, 2003), 250.

Article 14 of the new TEU is even more telling. It contains the provision that the European Parliament 'shall be composed of representatives of the Union's citizens'. If one recalls that the European Parliament is in fact supposed to represent 'the peoples of the States brought together in the Community' (Article 189 EC), the shift in approach is visible.

Furthermore, the citizens' initiative, a new provision that provides citizens with the possibility to participate in the political debate, figures also in Title II of the new TEU, in paragraph 4 of Article 11. It gives Union citizens the right to petition the Commission to propose an EU legal initiative. The petition must be supported by at least one million citizens, and include nationals from a 'significant number' of Member States. The procedures and conditions, including the exact number of Member States from which the citizens will have to come, has to be determined by the European Parliament and Council, acting in accordance with the ordinary legislative procedure – the slightly amended co-decision procedure. It remains to be seen whether the citizens' initiative leads to a greater participation of Union citizens in the European debate. The threshold of one million citizens seems very high, although the internet makes EU-wide campaigns certainly possible.<sup>7</sup>

The link between citizenship and fundamental rights, explicitly established by Title II of part I of the Constitutional Treaty, *Fundamental Rights and Citizenship of the Union*, is abandoned in the Lisbon Treaty. This is to be understood as a consequence of the IGC mandate to abandon the constitutional concept. Another consequence of that decision is that the text of the Charter of Fundamental Rights will not be included in the Treaties.

Nevertheless, the constitutional concept remains present in the political dimension of EU-citizenship as it can be found in the Lisbon Treaty. In relations with its citizens, the Union shall observe the principle of equality of its citizens, as can be concluded from Article 9 new TEU: 'In all its activities, the Union shall observe the principle of equality of *its citizens* (my italics), who shall receive equal attention from its institutions, bodies, offices and agencies.' In the TFEU the present Articles 12 and 13 EC have been moved into Part Two TFEU, Non-discrimination and Citizenship. It seems that in the Constitutional Convention, the provisions of non-discrimination on the basis of nationality and citizenship were separated on the grounds that the non-discrimination provision would also apply to non-EU citizens.<sup>8</sup> It is questionable whether the relocation of the non-discrimination articles, in particular Article 12 EC, has an impact on their

<sup>7</sup> An example is the 'oneseat' campaign started by Swedish MEP Cecilia Malmström, in order to locate the European Parliament exclusively in Brussels, see [www.oneseat.eu](http://www.oneseat.eu). The site claims that one million citizens have already signed the petition. It is doubtful whether such a decision on the location of the Parliament can be the subject of a citizens' initiative. The initiative serves to invite the Commission to submit a proposal on matters where citizens consider that a legal act of the Union is required. However, Article 289 EC provides that 'The seat of the institutions of the Community shall be determined by common accord of the Governments of the Member States'. There is no mention of a Commission proposal. This text has not changed in the Treaty on the Functioning of the Union.

<sup>8</sup> Norman, *The Accidental Constitution*, 194.

personal scope. Although some argue that the Title of Part Two, non-discrimination *and* citizenship, indicates that the right to non-discrimination based on nationality is not limited to Union citizens,<sup>9</sup> the text of Article 12 EC itself has not changed. The text of Article 13 EC has been modified only in the sense that it now gives the European Parliament consent powers over non-discrimination legislation. Therefore it seems unlikely that measures based on Article 19 TFEU (the actual Article 13 EC) will only apply to Union citizens.

How should we evaluate the changes to the Treaty texts? Some consider these political improvements related to EU citizenship ‘quite minor’ and ‘replicating national structures at the European level’.<sup>10</sup> Nevertheless, the changes show signs of a constitutional conceptualization of EU citizenship and a tendency to make a direct link between EU citizens and their political representation at Union level. Whereas Union citizenship so far has been rights-based and not duties-oriented, the developments in the Area of Freedom, Security and Justice can arguably change that. Direct representation is a corollary of a more duty-oriented citizenship, and the more explicit bond between EU citizens and the European Parliament can be seen as supporting a development towards a rights and duties oriented Union citizenship.

## §2. THE LEGAL DIMENSION

The legal dimension is narrowly connected to the definition of EU citizenship. The Treaty turns individuals (in the present case the nationals of the Member States) into EU citizens and attaches legal consequences to that label.<sup>11</sup> The legal dimension stands for the formal rights and duties that a legal order connects to citizenship.

The Lisbon Treaty gives a definition of EU citizenship in both the Treaty on the European Union – Title II (Provisions on Democratic Principles), Article 9 – and in the Treaty on the Functioning of the Union – Part Two (Non-discrimination and Citizenship of the Union), Article 20. Citizenship, as it is in the present Treaty, is granted only to nationals of the Member States,<sup>12</sup> so no change there. But the next sentence contains a

<sup>9</sup> See S. Peers, *Statewatch Analysis: EU Reform Treaty Analysis no. 3.2.*, 8 August 2007, 2, available at <http://www.statewatch.org/euconstitution.htm>.

<sup>10</sup> See Besson and Utzinger, ‘Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora’s Box’, 586. Their remarks were made with respect to the modifications in the Constitutional Treaty that are now replicated in the Lisbon Treaty.

<sup>11</sup> See N. Barber, ‘Citizenship, Nationalism and the European Order’, 27 *Eur. L. Rev.* 241 (2002), 242.

<sup>12</sup> In the Constitutional convention, proposals were made to grant European citizenship after five years of residence to third country nationals or to grant European citizenship to refugees and stateless persons, but these proposals did not make it into the final version, see Conv. 574/1/03, 64 ff available at <http://european-convention.europa.eu/bienvenue.asp?lang=EN&Content=>, the website of the European Convention, last visited at 5 April 2008. The wording of the respective articles in the Treaty of Lisbon is: ‘Every national of a Member State shall be a citizen of the Union’. ‘Every person holding the nationality of a Member State shall be a citizen of the Union’.

modification, similar in both provisions: Citizenship of the Union shall be *additional to* national citizenship and shall not replace it.<sup>13</sup> The wording 'shall be additional to' replaces 'shall complement'. This seems a very small and cosmetic amendment. It was however done for a reason and it is submitted that this modification supports a move towards a more independent Union citizenship. The fortunes of this wording since its inception are telling in that regard. They also show that there is no clear guidance on how to interpret the new wording.

A first indication to support a development towards a more autonomous development of Union citizenship can be found in the Convention documents, where the change in wording was proposed. In the summary description of the preliminary draft of the Convention presidency, the change is motivated by reference to Union citizenship as a dual citizenship. The wording 'be additional to' is supposed to indicate that national citizens are also Union citizens and are free to use either citizenship, 'as he or she chooses; with the rights and duties attaching to each'.<sup>14</sup> The intention of dual citizenship is lost in subsequent documents of the Convention, where it is stated that the changed wording 'follows that given in the current EC Treaty'.<sup>15</sup> A possible explanation for this loss might be that several amendments were initially proposed to bring out the dual citizenship more clearly by changing the wording into 'citizens of the Member States are *also* citizens of the Union'. It was felt that the wording 'shall be additional to' was not clear enough. The amendments were not accepted, and it is that that appears to motivate the belief that the wording 'shall be additional to' merely presents a cosmetic change.

However, the first draft version of the Reform Treaty for the IGC did not uphold the definition of the Constitutional Treaty but repeated the current definition ('complement').<sup>16</sup> This is surprising if one takes into account that the IGC mandate explicitly states that modifications to the Constitutional Treaty were introduced as a result of consultations with the Member States. Furthermore, the modifications Member States wanted to make to the Constitutional Treaty are clearly indicated in the mandate. With respect to citizenship, it is indicated that it will only be located in part two of the Treaty on the functioning of the Union, but there is no indication that the innovation in the definition is to be modified.<sup>17</sup> So the return to the current wording of the definition of Union citizenship in this first draft of the Reform Treaty might have been a slip of the pen rather than a conscious decision. Nevertheless, the IGC mandate is clear about the position of Union citizenship: it should no longer figure in the Union Treaty. The problem

<sup>13</sup> In the French version, 'La citoyenneté de l'Union s'ajoute à...' replaces 'La citoyenneté complète...'. Article 20 of the Treaty on the Functioning of the Union states: 'Citizenship of the Union shall be additional to and not replace national citizenship.'

<sup>14</sup> CONV 369/02, 9.

<sup>15</sup> See, e.g., CONV 528/03, 14. This explanation is given in all subsequent documents, see e.g. CONV 598/03, 12.

<sup>16</sup> See Note from the presidency of the IGC of 23 July 2007, CIG 1/07.

<sup>17</sup> See Presidency Conclusions of the Brussels European Council, annex I, IGC Mandate, 11177/1/07/REV, 16 and 30.

might have been its close connection to fundamental rights under Title II of part I in the Constitutional Treaty. At the insistence of the EP representatives during the IGC,<sup>18</sup> the concept of European citizenship has resumed the place it merits and now appears as follows in Article 9 of the new TEU: '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.'

Does the new formulation matter? The – especially Danish – fear that national citizenship will lose its meaning led to the inclusion of the phrase that Union citizenship will not replace national citizenship in the Amsterdam Treaty. But is it possible that Union citizenship and national citizenship become two separate variables? If Union citizenship *complements* national citizenship, there is no Union citizenship without national citizenship. If Union citizenship is *additional to* national citizenship, then there might one day be Union citizenship without national citizenship. Of course, the Treaty would need another modification as to determine who would qualify for contributed Union citizenship, but it is important that the concept of Union citizenship offers the possibility. At least now it is imaginable that long term resident TCN's could obtain Union citizenship without obtaining national citizenship and enjoy the rights and duties that attach to Union citizenship.<sup>19</sup> An additional citizenship is more in line with the formula the ECJ uses in relation to Union citizenship: 'destined to be the fundamental status of nationals of the Member States'.<sup>20</sup> For how can a complementary element to national citizenship be seen as its fundamental status?

For now, the wording gives expression to a development seen in case-law, where nationals are more often 'using' their Union citizenship instead of invoking their national citizenship in claiming rights against their own Member State. A number of cases can be cited in that respect, of which the recent case *Eind* seems to be the most notable.<sup>21</sup> In this case, Union citizenship gives the eleven year old Surinam daughter of a Dutch national the right to continue to live with her father in the Netherlands after they started a family life in the United Kingdom, a right she could not claim based on her father's Dutch citizenship.

The rights and duties attached to Union citizenship can be found in both the new TEU and the TFEU. For a large part, they cover the rights that are actually attached to Union citizenship, such as the right to move and reside freely, the right to vote and stand

<sup>18</sup> Letter to the EP, 23 October 2007. See also S. Peers, *Statewatch Analysis, Reform Treaty Analysis no. 2.1*, 23 October 2007, 11 available at <http://www.statewatch.org/euconstitution.htm>.

<sup>19</sup> It would respond to concerns frequently expressed that nationality-based Union citizenship is too exclusive, see e.g. Besson and Utzinger, 'Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box', 580.

<sup>20</sup> Case C-184/99, *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para. 31.

<sup>21</sup> Case C-291/05, judgment of 11 December 2007, nyr. Other interesting cases in this respect are Case C-192/05 *Tas-Hagen and Tas*, ECR 2006 p. I-10451, and joined Cases C-11/06 and C-12/06, *Morgan and Bucher*, judgment of 23 October 2007, nyr.

as a candidate in both EP and municipal elections, the right to diplomatic protection and the right to petition the European Parliament, to apply to the European Ombudsman and to address the institutions in any of the Treaty languages. The Constitutional Treaty gave some 'new' rights to all citizens, such as personal data protection. In fact, this right already existed, though not in this explicit form. Personal data protection is already the subject of a Community directive<sup>22</sup> and Article 286 EC obliges Community institutions and bodies to protect personal data. Other 'general' citizen's rights have been amended, such as the right of access to documents now encompassed in Article 255 EC. It has been expanded to documents of all Union institutions, bodies, offices or agencies. In the Constitutional Treaty, these rights were included in part I under the Title 'The Democratic Life of the Union'. The genuinely 'new' right under this title, the citizens' initiative, was granted to EU citizens only.

*In the new TEU*, political rights are attached to Union citizenship in Title II 'Provisions on democratic principles'. The political rights the new TEU attaches to EU citizenship are the rights to be represented by the European Parliament, to participate in democratic life of the Union and to make use of a citizens' initiative. These rights have been discussed above under the heading of the political dimension. The right of access to documents and the right to personal data protection still apply to all citizens. However, they are no longer to be found under this title, but they have been moved to Part One (Principles) Title II (Provisions of general application) of the TFEU.<sup>23</sup> The Reform Treaty excludes the field of foreign and security policy from the right to personal data protection. This was part of the IGC mandate for the Reform Treaty based on consultations with the Member States.<sup>24</sup>

*In the TFEU*, Union citizenship figures in Part Two, entitled 'Non-discrimination and citizenship'. Again, some citizenship rights are not restricted in scope to EU citizens, others are. As stated above, the actual non-discrimination Articles 12 and 13 EC no longer feature in Part One (Principles), but have been moved to Part Two, where they are located next to the EU citizenship provisions.

The rights attached to EU citizenship are (not-exhaustively) summed up in Article 20 TFEU and are further elaborated in the remaining Articles (21–25 TFEU) of Part Two. They correspond to the rights actually attached to Union citizenship by the EC Treaty. Again, some of these rights are not exclusive to Union citizens, such as the right to petition the European Parliament or the European Ombudsman. Although they are mentioned in Article 20(2) TFEU as rights attached to Union citizenship, Articles 227

<sup>22</sup> Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to processing of personal data and on the free movement of such data, OJ 1995 L281/31.

<sup>23</sup> To Articles 15 and 16 TFEU respectively.

<sup>24</sup> See also S. Peers, *Statewatch analysis: EU Reform Treaty Analysis no. 3.2*, 8 August 2007, 8, available at <http://www.statewatch.org/euconstitution.htm>.



and 228 TFEU make clear that all natural persons have these rights.<sup>25</sup> The right to move and reside freely is still exclusively attached to Union citizens, as are the rights to vote and stand as a candidate in European Parliament and municipal elections, and the right to diplomatic protection. These rights as such are not new, but there the legal basis to adopt legislation to facilitate the exercise of these citizenship rights has been renewed. These can be found in Articles 21–25 TFEU.

Article 21 TFEU gives the Council the possibility to adopt unanimously, after consultation with the European Parliament, measures concerning social security or social protection. The EC Treaty explicitly excludes these measures in Article 18. The EC Treaty also explicitly excludes measures on passports, identity cards, residence permits and any other such documents from Union competence. The competence to enact passport measures was given to the Council in the EU citizenship provisions under the Constitutional Treaty. The Reform Treaty relocated this competence to the Area of Freedom, Security and Justice, to Article 77(3) TFEU. As a consequence, the United Kingdom, Ireland and Denmark may opt-out on measures concerning passports and identity documents.<sup>26</sup>

Article 23 TFEU adds a legal basis for Union measures to facilitate diplomatic protection; the Council shall act in accordance with a special legislative procedure, and the European Parliament is to be consulted. In comparison, under the EC Treaty, under Article 20 EC, Member States took these measures among themselves.

Article 25 TFEU is a reformulation of Article 22 EC. The Commission shall report every three years on the application of the provisions of Part Two. Since the non-discrimination provisions figure now in this part, their application also will have to be included in the Commission's reports to Parliament, the Council and the Economic and Social Committee. The second paragraph of the article has been amended by the Lisbon Treaty. The Council may, *after* obtaining the consent of the European Parliament, unanimously adopt provisions to strengthen or add to the rights under Article 20(2), which will have to be ratified by the Member States before any such amendments can enter into force. The article thus gives the power of consent to the European Parliament. However, the procedure no longer applies to the strengthening of rights mentioned in all of Part Two, but only to those in Article 20(2). It is understandable that the non-discrimination articles are excluded from this procedure. Article 20(2) lists the rights

<sup>25</sup> The right to address other institutions and bodies in one of the Treaty languages is in the text that is now available linked exclusively to Union citizens in Article 24. However, the Article will need to be cleared in the final version of the Treaty text, as it still copies the text of Article 21 EC and refers to Articles 7 and 314 of the EC Treaty. Besides, it seems illogical to restrict this right to Union citizens, whereas access to documents is available to all individuals.

<sup>26</sup> Though in the United Kingdom, terminology is changing from opt-out towards the possibility of opting-in, especially since in Cases C-77/05 and C-237/05, both judgments of 18 December 2007, nyr, the Court upheld measures on *inter alia* security features, biometric passports and on the establishment of an European Agency for the management of operational co-operation at the external borders. These measures were taken without the UK, although the UK had wanted to participate.



*inter alia*, so without limitation. In that respect, it is remarkable that Article 25 TFEU appears in a simplified revision procedure to add new rights to the list.

In conclusion, an analysis of the legal dimension of EU citizenship in the Lisbon Treaty reveals that the changes to the substance of the existing rights are not very important. The citizens' initiative is the only genuinely new right attached to EU citizenship. However, the amendments made to the EU citizenship provisions certainly support a further development towards an independent status of EU citizen and the rights attached to it.

### §3. THE PSYCHOLOGICAL DIMENSION

The psychological dimension of EU citizenship refers to a sense of belonging, an identification of EU citizens with the Union. It is admittedly impossible to impose a certain feeling or identification by Treaty texts. However, there are elements in the text of the Lisbon Treaty that show an aspiration towards a stronger and more direct engagement between EU citizens and the Union.

Article 3 of the new TEU contains the objectives of the Union. Surprisingly, the aim of the Union is not to promote the well-being of its citizens, but that of 'its peoples' (para. 1). The article continues with the Union's aim of offering an area of freedom, security and justice to 'its citizens' (para. 3),<sup>27</sup> and, in its relations with the wider world, to contribute 'to the protection of its citizens' (para. 5). Thus, the Union becomes guardian of the safety of its citizens, both internally and externally. It is a clear indication that the direct link between the Union and its citizens is becoming more intense, and that the intermediate level of Member States is by-passed.

Article 13 of the new TEU is another sign of the aspiration to link EU citizens directly to the Union. The institutional framework of the Union shall among other things 'serve its interests, those of its citizens and those of the Member States'. The interests of EU citizens are declared an independent category, next to those of the Union and those of the Member States.

In all these instances, the psychological dimension of EU citizenship finds expression in the use of '*its* citizens'. Once EU citizenship is no longer granted via nationality based citizenship, it steps outside the national framework and becomes the status of those who are 'belonging to' the Union.

### §4. FINAL REMARKS

The amendments to EU citizenship provisions by the Treaty of Lisbon may be considered minor if one takes them separately. Taken together, they point at a direction in which

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<sup>27</sup> For comparison, the text of Article 29 TEU mentions 'citizens' in general, instead of 'its citizens'.

EU citizenship might be going. The slightly different wording in the definition of EU citizenship, the contribution of competence to the Union for measures to 'facilitate' the exercise of rights attached to citizenship even in the field of social security and social protection, the minor changes in the political dimension of EU citizenship and the aspiration towards a stronger link between EU citizens and Union that is reflected in the wording of several provisions together give the impression that EU citizenship is developing towards an autonomous and trans-national concept.<sup>28</sup>

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<sup>28</sup> On the transnational structure of Union citizenship see P. Magnette, 'How can one be European? Reflections on the Pillars of European Civic Identity'.