

# Troubles with the European Public Sphere: What Has European Citizenship Got to Do with it?

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## Introduction

In his book *Towards European Citizenship*, written in the late 1970s, Mario Sica attempted to define the status of Europeans, describing people of the European Communities as “no longer foreigners, but not yet citizens”.<sup>1</sup> Although political, economic and social interactions between people who live in different countries of the European Union have expanded over the last thirty years, this qualification still seems to be valid. The following episode from the court of arbitration illustrates this point well.

In the arbitration dispute between a Moroccan company on one side and a German and a Spanish company on the other, the ICC Court of Arbitration in Paris appointed a Greek arbitrator as a neutral third arbitrator. The Moroccan party challenged this appointment, arguing that the third arbitrator was not neutral, because both the opposing parties (companies from Germany and from Spain) and the Greek third arbitrator were from the European Union, meaning from the same state, which was strictly prohibited by the arbitration rules.<sup>2</sup> Following this challenge, the London Court of Arbitration in Article 6.3 of its International Arbitration Rules, adopted in 1998 and confirmed in 2014, expressly envisaged that: “For the purpose of this Article, [...] citizens of the European Union shall

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<sup>1</sup> “Non più stranieri, non ancora cittadini”. See Mario Sica, *Verso la cittadinanza europea* (Towards European Citizenship), Florence, Le Monnier, 1979, p. 1.

<sup>2</sup> The case: *Société Chérifienne des Pétroles v. Société Mannesmann Industria Iberica*, Société Mannesmann Anlagenbau et Chambre de commerce internationale, TGI Paris, 18 Jan. 1991, 1996, Rev. Arb. 503. For comments see Tibor *Várady*, John J. *Barceló* III, Arthur T. *Von Mehren*, *International Commercial Arbitration. A Transnational Perspective*, St. Paul, Minnesota, West Academic Publishing, 2012, p. 338.

be treated as nationals of its different member states and shall not be treated as having the same nationality”.

If this is so, then what does EU citizenship, introduced in the Maastricht Treaty and affirmed in the Lisbon Treaty, stand for? If the above-mentioned rule clearly demonstrates that EU citizenship, understood as status, does not apply in the resolution of issues concerning conflict of jurisdiction, is it feasible to expect that the concept of EU citizenship, understood as membership of a political community, will be more functional in building and shaping a European public sphere? The issue proves to be decisive for the European public sphere, since the constitution of a public sphere rests on the figure of the citizen-subject.<sup>3</sup> Moreover, in Chris Shore’s view, EU citizenship was “designed not so much to generate support for the EU among its would-be European public, but to invent the category of European public in the first place”.<sup>4</sup>

Admittedly, the expectations regarding polity membership in the European Union appear to be particularly high: the decisive role of citizens in enabling a European public sphere to function is expressly recognized in the Lisbon Treaty:

Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly as closely as possible to the citizen.<sup>5</sup>

On this account, EU citizenship should match the ideal of a status of equal rights and full membership of the political community. Seen from this perspective, the principal aim of this chapter is to determine whether the present concept of EU citizenship enables or undermines the articulation of a democratic and inclusive European public sphere. However, since the rhetoric of both public sphere and citizenship is ubiquitous, I have first to explain what the links between a European public sphere and EU citizenship are.

## **EU Citizenship and European Public Sphere: the Ideal Links**

Although an invention of the French Revolution, the modern concept of citizenship became closely attached to the state and not to the city alone only in the 19<sup>th</sup> century.<sup>6</sup> Despite different understandings, general reflections

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<sup>3</sup> Martin Loughlin, *Foundations of Public Law*, Oxford, Oxford University Press, 2010, p. 229.

<sup>4</sup> Chris Shore, “Whither European Citizenship? Eros and Civilization Revisited”, *European Journal of Social Theory*, Vol. 7, No. 1, 2004, p. 31.

<sup>5</sup> Article 8a(3) of the Lisbon Treaty.

<sup>6</sup> Werner Heun, “Towards New Constitutional Politics of Citizenship, Identity and Minority Protection”, in: Lidija Basta Fleiner and Tanasije Marinković, *Key*

on citizenship are still under the spell of Hannah Arendt's citizenship definition as "the right to have rights", and the US Supreme Court Justice Warren's qualification of citizenship as "man's basic right".<sup>7</sup> Besides this comprehensive recognition of a right that give individuals access to other rights, in a narrow sense citizenship is conceived as a connection to a polity, in terms of its tangible components including status and rights, and in terms of less tangible concepts including identity, belonging and sense of home.<sup>8</sup> However, the oldest and the most prevailing meaning of citizenship is membership of a political community. Any conception of citizenship therefore implies a particular relationship between the individual and the state.<sup>9</sup>

An important footnote is needed here. Namely, citizenship and nationality are notions frequently used interchangeably. Yet, although they depend on each other, they are not conceived as synonyms. In international law, nationality usually describes either status or a legal relationship between an individual and a state, by which the individual is subject to a state's jurisdiction. Nationality thus serves to resolve conflicts of jurisdiction.<sup>10</sup> Citizenship, on the other hand, as the creation of entitlement, refers to the adherence to a body politic in a way that identifies a person as its full member.<sup>11</sup> It presupposes the existence of democratic institutions and individuals who as free and equal agents participate in public affairs, under the conditions authorized by law.<sup>12</sup> Yet, despite its philosophical roots, citizenship today is a recognizable legal concept, which links citizens to a territorial political entity. Legally, only nationals can be in full possession of political rights, which means that nationality serves as a criterion for exclusion from the political dimension of citizenship rights.<sup>13</sup> The connection between nationality and citizenship is clearly perceptible in the European Union. Article 20 of the Treaty on the Functioning of

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*Developments in Constitutionalism and Constitutional Law*, The Hague, Eleven International Publishing, 2014, p. 17.

<sup>7</sup> Jo Show, Igor Štiks, "Introduction", in: Jo Show, Igor Štiks (eds.), *Citizenship Rights*, Surrey and Burlington, Ashgate, 2013, p. xi.

<sup>8</sup> Ayelet Shachar, "Citizenship", in: Michael Rosenfeld, Andrés Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, pp. 1004-1005.

<sup>9</sup> Will Kymlicka, "Multicultural States and Intercultural Citizens", *Theory and Research in Education*, Vol. 1, No. 2, 2003, p. 147.

<sup>10</sup> Stefan Kadelbach, "Union Citizenship", *Jean Monnet Working Paper*, Vol. 9, No. 3, 2003, p. 11, <http://www.jeanmonnetprogram.org/archive/papers/03/030901-04.pdf>.

<sup>11</sup> *Ibid.*, p. 12.

<sup>12</sup> Loughlin, *op. cit.*, p. 229.

<sup>13</sup> Kadelbach, *op. cit.*, p. 13. This is a point where any practical difference between citizenship and nationality ends and in terms of constitutional law they are usually (but not in all jurisdictions) used as synonyms.

the EU, which is a constitutive part of the Lisbon Treaty, provides the following: “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”.

For the time being, the European Union cannot be identified with functional democracy. Democratic deficit seems to be a chronic disease of the European Union. Despite significant efforts undertaken over the last seventy years to connect the “messianic” project of European integration with democracy, democracy in the Union still seems “a foreign implant”.<sup>14</sup> In addition to the democratic deficit, the Union also suffers from information and communication deficits, understood as a lack of knowledge and information-sharing about EU policies.<sup>15</sup> Among different remedies chosen to mitigate these deficits and enhance democratic legitimacy of the Union, the creation of a European public sphere, due to its ability to connect citizens and political institutions, has become an evident need.

Yet the conceptualization of a European public sphere, or rather European public spheres, is a tricky issue, since observers still cannot agree whether, when we speak about the Union, we speak about one or several public spheres.<sup>16</sup> However, whether one decides to conceptualize the European public sphere in terms of one transnational public sphere or in terms of a sphere constituted through the process of “Europeanization” of national public spheres, it is its connection with democracy that matters. The public sphere is an essential element of democracy.<sup>17</sup> It is a space in which citizens should develop and articulate “public will”, and a channel to influence political decision-making.<sup>18</sup> Bearing this in mind, a European public sphere is needed in order to respond to the increasing powers of the Union’s institutions. Habermas, who is both highly praised and highly criticized for his conception of the public sphere,<sup>19</sup> is nevertheless

<sup>14</sup> On the “messianic” nature of European integration see Joseph H.H. Weiler, “Europe in Crisis – On ‘Political Messianism’, ‘Legitimacy’ and the ‘Rule of Law’”, *Singapore Journal of Legal Studies*, 2012, pp. 248-268.

<sup>15</sup> For a discussion on information and communication deficits in the EU see Markus Thiel, “European Public Spheres and the European Union Communication Strategy: From Deficits to Policy Fit?”, 2012, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2099664](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2099664).

<sup>16</sup> See Stefanie Walter, “EU citizens in the European public sphere(s): An empirical analysis of the visibility of EU citizens across the 27 member states”, pp. 4-6, <http://www.ecpr.eu/Filestore/PaperProposal/9adb8ae4-33f5-4d20-b05f-72859741e615.pdf>.

<sup>17</sup> For more see Mayte Peters, “The Democratic Function of the Public Sphere in Europe”, *German Law Journal*, Vol. 14, No. 5, 2013, pp. 673-694.

<sup>18</sup> Anne-Katrin Arnold, “Defining the Public Sphere (in 3 Paragraphs!)”, <http://blogs.worldbank.org/publicsphere/defining-public-sphere-3-paragraphs#comments>.

<sup>19</sup> Jürgen Habermas, “The Public Sphere: An Encyclopedia Article”, 1964, trans. Sara Lennox and Franck Lennox. This article originally appeared in Fischer Lexicon, *Staat*

instrumental in urging the creation of a European public sphere as a powerful remedy against the democratic deficit in the European Union: “There will be no remedy for the legitimation deficit, however, without a European-wide public sphere – a network that gives citizens of all member states an equal opportunity to take part in an encompassing process of focused political communication”.<sup>20</sup>

At this point, it should be clarified that, seen as a remedy for democratic deficit in the Union, the understanding of a European public sphere cannot be reduced to simply a network for communication and information sharing, because this thin understanding cannot explain in what sense public deliberation and political decision-making are connected.<sup>21</sup> Rather, as Eriksen notes, starting from the premise that in a modern society “a norm is deemed to be legitimate only when all affected have accepted it in a free and rational debate”, the idea of public sphere “has a problem-solving function” and implies

[...] a sphere of political justification intrinsic to democracy.<sup>22</sup> Without it, there is no democratic legitimacy because it revolves on the probability of including all potentially affected.<sup>23</sup>

Therefore, ideally, a European public sphere should be comprehended as a space in which equal citizens, by making use of their rights and freedoms granted to them by the institution of European citizenship, may engage in a Europe-wide debate about different political, social and economic issues and through which they can influence decision-making.

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*und Politik*, new edition, Frankfurt am Main, Fischer Bucherei, 1964, pp. 220-226, and is now available at [http://www.socpol.unimi.it/docent/barisione/documenti/File/2008-09/Habermas%20\(1964\)%20-%20The%20Public%20Sphere.pdf](http://www.socpol.unimi.it/docent/barisione/documenti/File/2008-09/Habermas%20(1964)%20-%20The%20Public%20Sphere.pdf); Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society (Studies in Contemporary German Social Thought)*, Cambridge, Mass., London, The MIT Press, 1991. For a discussion see for example Lincoln Dahlberg, “The Habermasian Public Sphere and Exclusion: An Engagement with Poststructuralist-Influenced Critics”, *Communication Theory*, Vol. 24, No. 1, 2014, pp. 21-41; Amy Allen, “The Public Sphere: Ideology and/or Ideal?”, *Political Theory*, Vol. 40, No. 6, 2012, pp. 822-829; Simon Susen, “Critical Notes on Habermas’s Theory of the Public Sphere”, *Sociological Analysis*, Vol. 5, No. 1, 2011, pp. 37-62; Christian J. Emden, David Midgley (eds.), *Beyond Habermas: Democracy, Knowledge, and the Public Sphere*, New York, Berghahn Books, 2012; Robert C. Holub, *Jürgen Habermas: Critic in the Public Sphere (Critics of the Twentieth Century)*, London, New York, Routledge, 1991.

<sup>20</sup> Jürgen Habermas, “Why Europe Needs a Constitution”, *New Left Review*, No. 11, 2001, p. 17.

<sup>21</sup> Erik O. Eriksen, “Conceptualizing European Public Spheres: General, Segmented and Strong Publics”, *ARENA Working Paper*, 2004, pp. 14-15.

<sup>22</sup> *Ibid.*, p. 1.

<sup>23</sup> *Ibid.*

In other words, it should be an inclusive sphere, or in Eriksen's words "a democratic sovereign – a collective entity able to act".<sup>24</sup> Since rights talk most directly ensures citizens' voices are heard, the package of citizenship rights included in Europe's founding Treaties which highlights the political dimension of citizenship bears particular significance. Thus, the participatory dimension of EU citizenship, constructed in terms of voting rights, enhances democratic legitimacy through participation in decision-making.<sup>25</sup> Bearing in mind that, traditionally, a public sphere is not identified with will formation but only with opinion formation, some may claim that voting rights have nothing to do with the functioning of the European public sphere. However, voting rights are a constructive element of the European public sphere since they presuppose the existence of transnational discourse from which legitimacy of decision-making primarily stems. This is not to deny that democratic legitimacy cannot be ensured only by a functional parliament.<sup>26</sup> As Mayte Peters correctly observes, the permanent dialogue between the parliament and the public is as important for democratic legitimacy as the act of voting itself.<sup>27</sup> Accordingly, the participative dimension of EU citizenship which enables interaction not only between EU citizens and the parliament, but also every-day interaction between EU citizens and EU administration, also figures in facilitating a European public sphere.<sup>28</sup> Lastly, no less important for building the European public sphere is the identity dimension of EU citizenship, which revolves around the issue of belonging or the question of who European citizens should be.

Put differently, if one wants a European public sphere to function in the way public spheres function in national democracies, then a framing concept to set up a European public sphere should be built on such a concept of EU citizenship that provides for rights, participation and identity at supranational level. However, since at present the concept of EU citizenship is built on nationals rather than on citizens with full political rights, the functioning of an inclusive European public sphere remains an elusive idea. Consider the following.

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<sup>24</sup> *Ibid.*

<sup>25</sup> For a useful discussion on this topic see for example Stijn Smismans, "New Governance – The Solution for Active European Citizenship, or End of Citizenship?", *Columbia Journal of European Law*, Vol. 13, No. 3, pp. 595-622.

<sup>26</sup> Dieter Grimm, "Braucht Europa eine Verfassung?", *JuristenZeitung*, Vol. 50, 1995, p. 581, 587.

<sup>27</sup> Peters, *op. cit.*, p. 680.

<sup>28</sup> Smismans, *op. cit.*, p. 599.

## A European Public Sphere: Challenges from an EU Citizenship Perspective

Arguably, EU citizenship originates from the free movement of goods and the right to work anywhere within the territory of the member states, entrenched back in 1952 in the Treaty of Paris establishing the European Coal and Steel Community.<sup>29</sup> However, the actual legal recognition of EU citizenship came more than forty years later, with the formation of the Union and the adoption of the Maastricht Treaty.

The inclusion of the citizenship clause in the Maastricht Treaty was a final signal that the construction of the European Community, as a limited project of functional integration based on market interests, had reached its limits. In order to close a growing gap between the Community and citizens in the member states, and to address legitimate concerns regarding the Community's model of governance, in 1993 the European political elite turned to the citizenship concept on account of the cementing role it had played in constructing a public sphere and sense of identity in the context of the nation-state. Bearing in mind that the oldest and most basic meaning of citizenship is a sort of membership in a political community, it was believed that the citizenship clause would speed up progress towards the integrationist agenda and building "ever closer Union".<sup>30</sup>

In constitutional democracies, rights have offered the dominant approach to the citizenship issue. In recent times, some authors, lead by Habermas, have argued that rights can define the subject and the sphere of the polity. In Habermas's view, rights have the potential to substitute a sense of belonging as a source of identity in the Union.<sup>31</sup>

Besides the broad proclamation that "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties", the Maastricht Treaty also referred to the package of specific rights that should have given substantial meaning to Union citizenship. The rights included in the package ranked from the right to free movement and residence, which was seen as a precondition for exercising rights and freedoms in the Union, to the rights ensuring the citizens' political participation in the European entity, including the right to vote and to

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<sup>29</sup> Willem Maas, "The Origins, Evolution, and Political Objectives of EU Citizenship", *German Law Journal*, Vol. 15, No. 5, 2014, p. 800.

<sup>30</sup> For more see Paul O'Neill, Susan R. Sandler, "The EU Citizenship Acquis and the Court of Justice: Citizenship Vigilante or Merely Vigilant Treaty Guardian", *Richmond Journal of Global Law and Business*, Vol. 7, No. 3, 2008, pp. 206-208.

<sup>31</sup> Jürgen Habermas, *Between Facts and Norms*, Appendix II: Citizenship and National Identity, Cambridge, Polity Press, 1996, pp. 491-515.

stand for elections to the European Parliament and local municipalities, and the right to petition, to information, and the access to documents.<sup>32</sup> The Maastricht Treaty also promised its citizens the citizen-friendly right to enjoy the protection of the diplomatic and consular authorities of any member state in the territory of a third country, provided that the member state of which they were nationals was not represented.<sup>33</sup> The Lisbon Treaty, adopted with the objective to place ‘the individual at the heart’ of the Union’s activity, brought minor changes to specific citizenship rights, with a significant exception in the area of free movement compatible with the Union’s broader competence in the field of social security and social protection.<sup>34</sup>

However, as soon as the Maastricht Treaty simply provided that “every person holding the nationality of a Member State shall be a citizen of the Union”, it became clear that EU citizenship, as a political and democratic concept, suffered from many deficiencies, including what Show termed as structural “citizenship deficit”.<sup>35</sup> If EU citizenship is to remedy the democratic deficit at EU level, then its conceptual deficiencies, which is why it is still premature to talk about equality among EU citizens, represent a major blow to the articulation of the inclusive European public sphere. Below, I explain why.

### ***Who is a European Citizen?***

The citizenship clause implanted in the Maastricht Treaty did not resolve the issue of what the ultimate gateway to Union citizenship was, because it was silent about the possible converse category of persons who were citizens of the Union but not nationals.<sup>36</sup> The issue was defined in the Amsterdam Treaty, which supplied the citizenship clause with the following explanation: “Citizenship of the Union shall complement and not replace national citizenship.” This limiting phrase was again highlighted in the Lisbon Treaty, which provides that “citizenship of the Union shall be additional to and not replace national citizenship”.

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<sup>32</sup> See Articles 8a, 8b and 8d of the *Treaty on the European Union* (Maastricht Treaty), which inserted these rights into the EC Treaty.

<sup>33</sup> *Ibid.*, Article 8c.

<sup>34</sup> See Article 20 of the Treaty on the Functioning of the European Union, a part of the Lisbon Treaty.

<sup>35</sup> Jo Show, “E.U. Citizenship and Political Rights in Evolving European Union”, *Fordham Law Review*, Vol. 75, No. 5, 2007, p. 2553 sq.

<sup>36</sup> Rainer Bauböck, “Why European Citizenship? Normative Approaches to Supranational Union”, *Theoretical Inquiries in Law*, Vol. 8, No. 2, 2007, p. 481.

Thus, EU citizenship not only derives from member state nationality, it also bears their state-centered understanding of citizenship since the Treaty's provisions have established the primacy of state nationality in the European legal order. From the very beginning, Union citizenship, envisaged as a tool for building a political bond between individuals and the European Union, has not been in a possession of the Union itself. On the contrary, the concept of nationality was and still is to be determined by national law, and not autonomously according to Union law.

If the nationality of a member state is a condition for acquiring Union citizenship, then this implies that the main issue of who is an EU citizen and who is not, is not to be resolved by the Union but by the member states. This, however, may cause problems, because on the issue of citizenship, national traditions sometimes include a portion of confusion and injustice. In particular, they sometimes stand in sharp contradiction with the demand for equality, a major premise on which the conceptualization of the public sphere is based. Here, I am drawing attention to a group of individuals who have the potential to be treated as EU citizens, but who are excluded from all rights corresponding to Union citizenship because they are not treated as nationals in their own member states. This includes members of the Russian minority in Estonia and Latvia who are treated in these countries as stateless persons,<sup>37</sup> as well as the now surpassed example of the lawful permanent residents born and bred in Germany who, until the citizenship law reform in the year 2000, had no legal right to become full members of the body politic, and whose non-citizen status prior to the reform had been handed down from generation to generation.<sup>38</sup>

There are also some groups of people who temporarily were not considered full EU citizens. For example, despite the foundation EU citizenship through the free movement of persons, several member states had restricted immigration from Bulgaria and Romania. The restrictions were lifted in January 2014. Finally, as Willem Maas shows, there is also an announced EU policy of establishing a category of permanent second-class citizens: in the Negotiating Framework for Turkey, the possibility for Turkish citizens to be permanently distinguished from citizens of other member states in the areas of free movement, structural policy and

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<sup>37</sup> Stefan Kadelbach, "Union Citizenship", in: Armin V. Bogdandy, Jürgen Bast (eds.), *Principles of European Constitutional Law*, Oxford, Oxford University Press, 2011, p. 451.

<sup>38</sup> For a German example see Shachar, *op. cit.*, p. 1010.

agriculture is considered.<sup>39</sup> If this policy becomes reality, then, as Maas argues, it will “strike at the heart of EU citizenship”.<sup>40</sup>

We must remember that both the concept of citizenship and the concept of public sphere rest on the idea of equality. While citizenship is defined as “a status of equal membership within a bounded polity”,<sup>41</sup> the idea of a public sphere presupposes that “equal citizens assemble into a public and set their own agenda through open communication”.<sup>42</sup> Here, the idea of equality refers to “the assumption that enjoying the legal status of citizenship, alongside possessing simple humanity, is enough to be treated by the competent authority as well as society as a whole in the same way as other citizens are treated”.<sup>43</sup> Although there is a long on-going debate on what equality should mean, according to the most common views, equality revolves around respect, justice and fairness. Accordingly, the first reason why Union citizenship bears little significance in the formation of inclusive and democratic European public sphere is the fact that its authority does not eliminate the stigmatization and alienation of certain group of the EU population, which in turn deprives stigmatized and alienated group of citizens of the possibility for their voices to be respected and to be recognized as members of a deliberative public sphere and communicative community. If citizenship is deprived of one of its constitutive elements, such as a common sense of belonging, the functioning of the European public sphere, based on equal access to all affected, is hardly possible.<sup>44</sup>

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<sup>39</sup> Willem Maas, “Unrespected, Unequal, Hollow? Contingent Citizenship and Reversible Rights in the European Union”, *Columbia Journal of European Law*, Vol. 15, No. 2, 2009, pp. 272-273. Among many solutions, the Negotiating Framework with Turkey provides the following “12: Turkey’s acceptance of the rights and obligations arising from the *acquis* may necessitate specific adaptations to the *acquis* [...]. Long transitional periods, derogations, specific arrangements or *permanent safeguard clauses*, i.e. *clauses which are permanently available as a basis for safeguard measures* (emphasis mine) may be considered. The Commission will include these, as appropriate, in its proposals in areas such as freedom of movement of persons, structural policies or agriculture.” See *Negotiating Framework*, 3 Oct., 2005, [http://ec.europa.eu/enlargement/pdf/turkey/st20002\\_05\\_tr\\_framedoc\\_en.pdf](http://ec.europa.eu/enlargement/pdf/turkey/st20002_05_tr_framedoc_en.pdf).

<sup>40</sup> Maas, *op. cit.*, pp. 272-273.

<sup>41</sup> Rainer Bauböck, Virginie Guiraudon, “Introduction: Realignment of Citizenship: Reassessing Rights in the Age of Plural Memberships and Multi-Level Governance”, *Citizenship Studies*, Vol. 13, No. 5, 2009, p. 439.

<sup>42</sup> Eriksen, *op. cit.*, p. 3.

<sup>43</sup> Dimitry Kochenov, “Citizenship without Respect: the EU’s Troubled Equality Ideal”, *Jean Monnet Working Paper* 08/10, p. 6, <http://www.jeanmonnetprogram.org/papers/10/100801.pdf>.

<sup>44</sup> Smismans, *op. cit.*, p. 617.

### ***Exclusivity of Voting Rights: Member State Nationals Only***

An inherent link between two crucial aspects of citizenship, participation and identity is at the forefront of contemporary society. First of all, by accepting to bind ourselves by laws, “we, the people’ also define ourselves as ‘we’ in the very act of legislation”.<sup>45</sup> Therefore, “it is the law that establishes unity”.<sup>46</sup> What follows from here is that the specific rights that should give a substantial meaning to Union citizenship include, first of all, electoral rights.

The electoral rights attached to EU citizenship do not facilitate integration and identity through law. At this stage, under Union legislation, the allocation of voting rights creates within each member state two subgroups of EU citizens: those who happen to be national citizens of that state, and those so-called mobile citizens, who only reside in that state but are not its nationals.<sup>47</sup> The most important right that mobile citizens do not enjoy under the EU Treaties is the franchise in regional and national elections and referenda, with the exceptions of Irish citizens in the UK, and British citizens in Ireland, who can vote in national elections. Mobile EU citizens enjoy only limited voting rights and may stand for only local and European parliamentary elections. Accordingly, a desirable aim proclaimed in 1975 by the European Commission of “complete assimilation with nationals as regard political rights” has not been achieved.<sup>48</sup>

It is not that the European political elite does not recognize that giving additional voting rights to non-nationals in another member state is a prerequisite for developing the sense of belonging to the Union. In its Report of 2006 on Citizenship, which was rejected in the European Parliament due to the influence of the European People’s Party, the Commission suggested that extending the voting rights of non-nationals in member states would make a tangible contribution to the feeling of belonging to the European Union, indispensable for genuine EU citizenship.<sup>49</sup>

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<sup>45</sup> Seyla Benhabib, “Transformation of Citizenship: the Case of Contemporary Europe”, *Government and Opposition*, Vol. 37, No. 4, 2002, p. 451.

<sup>46</sup> Eriksen, *op. cit.*, p. 29.

<sup>47</sup> Heather Lardy, “The Political Rights of Union Citizenship”, *European Public Law*, Vol. 2, No. 4, 1996, pp. 626-627. For a discussion see for example Bauböck, *op. cit.*, pp. 474-481; Show, *op. cit.*, pp. 2549-2579.

<sup>48</sup> Commission of the European Communities, *Towards European Citizenship*, COM (75) 321 final (July 2, 1975), [http://aei.pitt.edu/5572/1/002205\\_2.pdf](http://aei.pitt.edu/5572/1/002205_2.pdf).

<sup>49</sup> European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Report on the Commission’s Fourth report on Citizenship of the Union* (1 May 2001-30 April 2004), A6-0411/2005, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//NONSGML+REPORT+A6-2005-0411+0+DOC+PDF+V0//EN>.

As Jo Show suggests, limited political participation of one category of EU citizen in a member state of their residence, shows the negative democratic impetus embedded in Union citizenship.<sup>50</sup> Namely, one can hardly argue that local franchise is necessary in order to prevent citizens from suffering political disadvantage, while at the same time maintaining that being deprived of the much more important national franchise is an acceptable restriction of the mobile EU citizens' right to free movement.<sup>51</sup> Rather, as the last resort for states to fight against the "humiliation of the state" that EU constitutional discourse encourages,<sup>52</sup> the non-extension of voting rights to non-nationals in national elections predominately serves to protect the national sovereignty of member states.<sup>53</sup>

The fact that the key values of citizenship, participation and identity remain ignored in the EU citizenship concept is confirmed by the case of the third-country nationals. Since the member states still control access to EU citizenship, around 20 million people who permanently live in the EU with the citizenship of a non-member country are deprived of European electoral rights.<sup>54</sup> Thus, around 4.1% of the EU population do not participate in the elections for the European Parliament. If one bears in mind that not all member states allow third-country nationals to participate in local elections, then it is quite obvious that active participation in the political life of the Union is still seen as a privilege to be earned.<sup>55</sup>

Finally, starting from the initial premise that the identity dimension of citizenship is closely connected with participation in decision-making, one may argue that the relatively low impetus of EU citizenship on enhancing democracy in the Union derives from the fact that the European Citizens' Initiative has not been directly linked to EU citizenship. Namely, the Lisbon Treaty has instituted a possibility which allows one million citizens from at least seven member states, to participate directly in the development of EU policies, by calling on the European Commission to

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<sup>50</sup> Show, *op. cit.*, p. 2564.

<sup>51</sup> *Ibid.* In order to avoid difficulties for enabling a person to have two votes in separate regional or national elections, Show suggests relaxation of expatriate and absentee voting rules at the level of the member states. *Ibid.*, pp. 2565-2569.

<sup>52</sup> Gareth Davies, "The Humiliation of the State as a Constitutional Tacit", in: Fabian Amtenbrink and Peter A.J. van den Berg (eds.), *The Constitutional Integrity of the European Union*, The Hague, T.M.C. Asser, 2010, pp. 147-174.

<sup>53</sup> Lardy, *op. cit.*, p. 632; Show, *op. cit.*, p. 2564.

<sup>54</sup> Eurostat, Migration and Migrant Population Statistic, [http://ec.europa.eu/eurostat/statisticsexplained/index.php/Migration\\_and\\_migrant\\_population\\_statistics](http://ec.europa.eu/eurostat/statisticsexplained/index.php/Migration_and_migrant_population_statistics).

<sup>55</sup> For more see for example Dimitry Kochenov, "Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights", *Columbia Journal of European Law*, Vol. 15, No. 2, 2009, pp. 225-229.

make a legislative proposal.<sup>56</sup> It is the first ever participatory democracy instrument at EU level which is expressly linked to nationals of the member states, and surprisingly, not to EU citizens. So, yet another opportunity for citizens living in the EU to identify with the Union has been missed. Although it may be more a matter of legislative drafting than of a particular policy, a direct connection between EU citizenship and the citizens' initiative would not only contribute rhetorically to strengthening the participatory and identity dimension of EU citizenship, it would also symbolize the direct participation of EU citizens in the deliberation of EU policies at transnational level.

Now, if one bears in mind that to a large extent, the EU constitutional order is the result of judicial intervention, it is worth exploring what approach the European Court of Justice has taken towards the above-mentioned inherent inequalities attached to the notion of EU citizenship. We must remember that in order to promote the integration agenda and remove obstacles to effective market integration, it was the European Court of Justice which interpreted the Community's founding treaties, first as a constitutional charter, and then as a constitution; made sense of Community norms through the doctrines of the supremacy and direct effect; and upgraded Community law to cover human rights protection. According to the same Court, the move to constitutionalize the founding Treaties has ended up in the Community's and today the Union's autonomous legal system, whose subjects are not only the member states but their nationals as well.<sup>57</sup>

When, though the insertion of a citizenship clause in the Maastricht Treaty, citizens appeared to be placed in the center of the promised "ever-closer union among the peoples of Europe", the European Court of Justice, almost a decade later, stressed that "Union citizenship is designed to be the fundamental status of nationals in the member states, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality".<sup>58</sup> In sharp contrast to the bulk of its decisions which supported the integration agenda, or even those which boosted integration in directions not mentioned in the Treaties, this

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<sup>56</sup> Article 8b(4) of the Lisbon Treaty.

<sup>57</sup> For a discussion of this point see Violeta Beširević, "Constitutional Review in a Democratic Deficit Setting: The Case of the European Union", in: Miodrag Jovanović, *Constitutional Review and Democracy*, The Hague, Eleven Publishing International, 2015, pp. 83-107.

<sup>58</sup> ECJ: European Court of Justice, case C-184/99, Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, [2001] ECR I-6193.

statement by the Court suggested that the EU citizenship clause included nothing more than freedom of movement and non-discrimination.<sup>59</sup>

In recent decisions, the same Court connected EU citizenship to “the genuine enjoyment of the substance of the rights”, alluding, thus, that it would be ready to overcome the tradition of the market citizen, and move into the realm of Hannah Arendt’s vision, identifying citizenship with the “right of rights”.<sup>60</sup> Yet this is an impression of an elusive nature. Namely, under the Court’s case law, only those who move and those who are involved in cross-border situations in other ways, enjoy certain rights, and only with regard to the market and social dimensions of EU citizenship.<sup>61</sup> Even in such cases, in order to expand the meaning of cross border situations, the Court has often applied a twisted logic to derive fundamental rights from the exercise of free movement.<sup>62</sup> In other words, according to the Court’s approach, EU citizenship affords certain rights only when it is underpinned by the logic of free movement.<sup>63</sup>

While to a large extent the Court has worked to integrate EU migrants into the market and welfare society of member states, its efforts to strengthen the participatory dimension of EU citizenship necessary for individuals to exert political power has remained rather modest. Thus, the Court has been assertive in strengthening the voting rights of EU citizens, who have been deprived of enjoying their rights by their member states of residence, when it comes to elections for the European Parliament. For example, in 2006 the Court found that the practice of Spain according to which Gibraltarans, although EU citizens under the British Treaty of Accession, were deprived a possibility to vote for the EU Parliament, was not in conformity with the founding Treaty.<sup>64</sup> Although the Court has acknowledged that “in the current state of Community law, the definition of the persons entitled to vote and stand as a candidate in elections to the European Parliament falls within the competence of each member state”, it nevertheless stressed that the relevant Treaty provisions did not

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<sup>59</sup> For a discussion of this point see Anastasia Iliopoulou-Penot, “The Transnational Character of Union Citizenship”, in: Michael Dougan, Niamh Nic Shuibhne, and Eleanor Spaventa (eds.), *Empowerment and Disempowerment of the European Citizen*, Oxford and Portland, Hart Publishing, Oregon, 2012, pp. 15-35.

<sup>60</sup> ECJ: European Court of Justice, case 34/09 Ruiz Zambrano v. Office national de l’emploi (ONEm), [2011] ECR I-01177.

<sup>61</sup> Rainer Bauböck, “The Three Levels of Citizenship within the European Union”, *German Law Journal*, Vol. 15, No. 5, p. 758.

<sup>62</sup> *Ibid.*

<sup>63</sup> ECJ: European Court of Justice, case C-434/09, *McCarthy v. Secretary of State for the Home Department*, [2011] ECR I-03375.

<sup>64</sup> ECJ: European Court of Justice, case C-145/04, *Spain v. UK*, [2006] ECR I-7917.

preclude the member states from granting the right to vote and to stand as a candidate to certain persons other than EU citizens.<sup>65</sup>

In a case concerning the Netherlands, also settled in 2006, the Court further elaborated this ruling.<sup>66</sup> The Court was asked whether a member state might exclude from the right to vote in European elections certain categories of its own nationals resident in an overseas territory associated with the Community. It ruled that although member states can subject the right to vote and to stand as a candidate in European elections to a requirement of residency in the territory in which the elections were held, the principle of equal treatment required that there should not be unjustified difference of treatment of nationals in comparable situations.<sup>67</sup> Since, according to Dutch legislation, the Dutch citizens living in a non-member country were entitled to vote in European elections, while Dutch citizens living in Aruba, the Netherlands' overseas territory were not, the Court ruled that such practice violated the principle of non-discrimination.<sup>68</sup>

Accordingly, while still dependent on national legislation, it is thanks to the Court that the right to vote in European elections has become “a normal incident of EU citizenship, even if this is not explicitly stated in the Treaties”.<sup>69</sup> In addition, EU citizenship achieved some significance in reducing reverse discrimination, that is, in limiting the ability of member states to deny their nationals the rights enjoyed by other EU citizens.

To summarize, without equal opportunities for full participation in the political life of the Union, including participation in the transnational discourse of the European public sphere, the norm of Article 8(3) of the Lisbon Treaty under which the EU currently lives – “Every citizen shall have the right to participate in the democratic life of the Union” – remains more a matter of aspiration than of the actual state of affairs.

### ***Non-Exclusivity and Low Levels of Awareness of Active Citizens' Rights***

Unlike voting rights, the enjoyment of other participatory rights attached to the concept of EU citizenship which highlights the idea of the “active citizen”, including the right to petition, to information, and access to

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<sup>65</sup> *Ibid.*, par. 78.

<sup>66</sup> ECJ: European Court of Justice, case C-300/04 M. G. Eman and O. B. Sevinger v. College van burgemeester en wethouders van Den Haag, [2006], ECRI I-08055.

<sup>67</sup> *Ibid.*, par. 61.

<sup>68</sup> *Ibid.*, par. 57-61.

<sup>69</sup> Jo Show, “Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism”, *EUI Working Paper*, RSCAS 2010/60, p. 22, [http://eudo-citizenship.eu/docs/RSCAS%202010\\_60.pdf](http://eudo-citizenship.eu/docs/RSCAS%202010_60.pdf).

documents, is not dependent on member state nationality. The right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union, apply to “every citizen of the Union” (meaning residents as well), and not only to the citizens who hold EU citizenship.

Accordingly, when it comes to the rights that bring citizens closer to EU administration, the link “citizenship=nationality=participation” ceases to exist.<sup>70</sup> As Smismans suggests, this solution permits different concussions, depending on the perspective from which it is assessed.<sup>71</sup> On the one hand, this is yet another manifestation of the failure of EU citizenship to create an identity, since it does not offer a variation of exclusive participatory rights which non-nationals would not enjoy. On the other hand, non-exclusivity of active citizens’ rights demonstrates an ideal of self-governance at Union level, because even residents who do not enjoy voting rights can, nevertheless, develop a sense of belonging to the Union.<sup>72</sup>

Assuming that the latter conclusion is closer to Shore’s hypothesis that EU citizenship was invented to create a category of “European public”, then the question which demands an answer is to what extent the above-mentioned rights influence the functioning of the European public sphere?

A democratic function of the public sphere is that of accountability.<sup>73</sup> The most traditional way to fulfill this function is to secure transparency in decision-making, because transparency provides citizens with a louder, if indirect voice. Broadly speaking, “transparency concerns the degree to which information of any kind about a given entity is made available to the general public”.<sup>74</sup> In the presence of semi-functional representative democracy in the Union, the proper functioning of transparency measures plays an even more important role than these measures play in functional democracies. The importance of transparency and participation for enhancing democracy in the Union has been particularly stressed by the European Court of Justice: “increased openness enables citizens to participate more closely in the decision-making process and guarantees

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<sup>70</sup> Smismans, *op. cit.*, p. 615.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Peters, *op. cit.*, p. 687.

<sup>74</sup> Deirdre Curtin, “The Role of Judge-Made Law and EU Supranational Government: A Bumpy Road from Secrecy to Translucence”, in: Dougan, Shuibhne, and Spaventa (eds.), *op. cit.*, p. 102.

that the administration enjoins greater legitimacy and is more effective and more accountable to the citizen in a democratic system”<sup>75</sup>.

While the right to petition the European Parliament or Ombudsman symbolizes the protective aspect of the traditional right to complain, the right to access documents, usually in combination with the right to information, directly serves to enhance the legitimacy of decision-making processes, and stresses the participatory dimension of citizenship. Arguably, the right to access documents, a concrete expression of the transparency principle, has acquired the status of fundamental norm in the EU constitutional order.<sup>76</sup> Although, by the rule, individuals must be granted access to documents without having to prove a special interest, the right to access documents has been highly ‘legalized’ with several key exceptions, and conditioned by the exercise of other fundamental rights such as, for example, the right to informational privacy and data protection.<sup>77</sup> Consequently, to what extent Union citizens are to participate in the public debate will also depend, among many things, on the meaning accorded to the legitimate public interest when disclosure is refused.

Within its role of interpreting EU law, the European Court of Justice has deployed a more assertive approach in interpreting transparency-related rights than in cases concerning the voting rights of Union citizens. Although it has not developed a general principle of transparency or declared a general right to public information, the Court has annulled a number of Commission and Council decisions by which they had refused access to their documents.<sup>78</sup> Moreover, the Court has not hesitated to subject EU legislation to transparency requirements, even when transparency does not figure as a principle in the relevant legislation.<sup>79</sup>

Notwithstanding the fact that transparency has perhaps acquired the status of general principle of EU law,<sup>80</sup> and the European Court of Justice’s willingness to stretch transparency related rights beyond the borders defined in EU legislation, there are some non-legal tendencies that signal the relatively low impact of transparency related rights on enabling a European public sphere. First, it seems that the Brussels administration

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<sup>75</sup> ECJ: European Court of Justice, Joined Cases C-39/05P and C52/05P, *Turco v. Council of Ministers*, [2008] ECR I-4723, par. 45.

<sup>76</sup> Curtin, *op. cit.*, p. 108.

<sup>77</sup> *Ibid.*

<sup>78</sup> Paul Craig, and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, Oxford, Oxford University Press, 2011, p. 544.

<sup>79</sup> *Ibid.*, p. 549. See for example ECJ: European Court of Justice, case T-246 and 332/08 *Melli Bank plc. v. Council*, [2009] ECR II-2629.

<sup>80</sup> Koen Lenaerts, “‘In the Union we Trust’: Trust Enhancing Principles of Community Law”, *Common Market Law Review*, Vol. 41, No. 2, 2004, p. 321.

has not completely acknowledged the fact that transparency goes beyond the due process principle in administrative proceedings, because it tends to complain that the actual users of the so-called “Access Regulation”, “disrupt the efficient working of the decision-making process (both legislative and administrative)”.<sup>81</sup> Second, the citizens living in the EU rarely assert active citizens’ rights necessary to facilitate their participation in the political life of the Union.<sup>82</sup> This is particularly true when it comes to the right to access documents and information. In addition, although transparency in decision-making became of increased importance in the Union after the Maastricht Treaty, the vision of the “active citizen” was explicitly embraced relatively lately in the EU founding documents – yet in the Lisbon Treaty. Thus, while active citizens’ rights provide an institutional device which encourages the functioning of the European public sphere more than voting rights attached to the concept of EU citizenship, without having the “active citizen” at Union level, the possibility of having a functional European public sphere remains rather remote.

## **Conclusions**

Today, the development of a fully-fledged European public sphere has been perceived by many as the solution to the legitimization crisis in the European Union. If it was created to invent a European public, as Shore suggests, which should itself mitigate the democratic deficit at Union level, as Habermas asserts, then the EU citizenship regime envisaged in the EU Treaties seems to be rather useless on both accounts.<sup>83</sup>

As I have demonstrated, the present concept of EU citizenship works more against than in favor of an inclusive European public sphere. The structural deficiencies inherent in the derivative status of EU citizenship and the fact that the rights attached to the EU citizenship regime are not conceived as to be “self-standing entitlements to full [...] political membership” in the European Union,<sup>84</sup> confirm this conclusion. Most of all, the European Court of Justice, famous for being assertive in cases that have the potential to advance European integration in one way or another, by interpreting the EU citizenship clause embodied in the Treaties, offers no more than the protection for mobile EU citizens and

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<sup>81</sup> Curtin, *op. cit.*, p. 127.

<sup>82</sup> Kadelbach, “Union Citizenship”, *op. cit.*, p. 459.

<sup>83</sup> Gérard Raulet argues in a similar manner. See Gérard Raulet, “The European Crisis: A Crisis of Democratic Legitimacy”, *Belgrade Journal of Media and Communications*, Vol. 2, No. 4, 2013, p. 11.

<sup>84</sup> Eleftheriadis, Pavlos, “The Content of European Citizenship”, *German Law Review*, Vol. 15, No. 2, 2014, p. 795.

immigrants in transnational situations. Although surprising, the Court's approach follows a considerable number of Europeans for whom the Union symbolizes primarily the "freedom to travel, study and work",<sup>85</sup> and not identity of the kind evoked by Churchill – "I am European".<sup>86</sup> To overcome this perception, which undermines the potential of the European public sphere, the institution of changes in the legal concept of EU citizenship, both at European and member state level, may represent a first step.

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<sup>85</sup> Iliopoulou-Penot, *op. cit.*, p. 35 and f. 99.

<sup>86</sup> Sir Winston Churchill, Speaking to a "United Europe" meeting at the Royal Albert Hall in London, 14 May 1947.