

2009

Introduction

George A. Bermann

Columbia Law School, gbermann@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [European Law Commons](#)

Recommended Citation

George A. Bermann, *Introduction*, 15 COLUM. J. EUR. L. 165 (2009).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3636

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu, rwitt@law.columbia.edu.

INTRODUCTION

*George A. Bermann**

Who would have imagined even fifteen years ago that a notion of “EU citizenship” would come to occupy center-stage in the arena of EU legal developments and widely permeate fields of EU law to which citizenship at the EU level long appeared to have little to say? By contrast, Member State citizenship lay at the heart of things from the start, as rights and obligations alike seemed to turn, at least largely, on whether an interested person bore the citizenship or nationality of a Member State.

To begin with, EU citizenship was derivative; no one could acquire it without first having acquired the citizenship of a Member State. Moreover, to the extent that the 1993 Maastricht Treaty explicitly associated EU citizenship with any particular rights, those rights were few and limited, though by no means unimportant: rights to vote and stand for election in municipal elections and elections to the European Parliament, and the right to claim consular protection by other Member States within third countries. Accordingly, even after EU citizenship had made its debut, its full consequences could not have been appreciated.

But what has come of EU citizenship and where has it taken us in the years since? If it is foundational now, what are its contours, and do those contours matter? To answer these questions, the editors of the *Columbia Journal of European Law* commissioned this special issue, the contributions to which are meant to illuminate the ways—both expected and unexpected—in which EU citizenship is making itself felt.

If there is any consensus on the EU citizenship front, it is that the very notion has undergone a radical expansion. While at first it may have connoted a more or less fixed category of civil and political rights (as noted, rights to vote and stand for election in municipal elections,¹ to claim diplomatic representation while abroad,² as well as to petition the Community institutions³), it has overflowed those boundaries. As Willem Maas writes in his piece in this issue, EU citizenship has come to subsume a host of individual rights that flow from widely disparate parts of

* Jean Monnet Professor of European Law and Walter Gellhorn Professor of Law, Columbia Law School.

¹ Treaty Establishing the European Community, art. 19, Dec. 24, 2002, 2002 O.J. (C 325) 33.

² *Id.* art. 20.

³ *Id.* art. 21.

Community law that have little by way of direct relation to civil and political participation.⁴

To the extent that the rights in question flow from express substantive provisions of the Treaty and secondary legislation, they largely constitute what has come to be called a “market citizenship.”⁵ These rights could easily be linked to citizenship because, thanks to substantive EU law, most rights recognized by the treaties or secondary legislation are predicated, albeit indirectly via Member State nationality, on citizenship in the EU.

Of course, as Dimitry Kochenov emphasizes in his piece in this special issue, entitlement to EU citizenship was and remains entirely derivative, in the sense that EU citizenship is extended only to those who have earned citizenship status within one or more Member States.⁶ One consequence—flowing from the disparities among Member States’ nationality criteria and naturalization policies, and the continuing right of Member States to determine largely unilaterally what those criteria and policies shall be—is a diversity of paths to EU citizenship. The relative durability of Germany’s aversion to dual nationality, explored in Spencer Wolff’s piece on German citizenship doctrine in this special issue, is a case in point.⁷ Thus, we see that the derivative nature of EU citizenship has lent it, from the very beginning, a contingent character that later developments have only accentuated.

But there is more. Even to say that EU citizenship incorporates a host of market rights is not enough. Thanks to secondary legislation of the EU, but mostly to Court of Justice interpretations of the basic right in Article 18(1) of the EC Treaty to move and reside freely in all the Member States,⁸ EU citizenship has come to entail a range of subsidiary rights deemed to be supportive of that basic right, plus a guarantee against nationality discrimination in the exercise of those other rights. From this there emerged a widening set of claims by a widening number of rights-holders—to the point that even persons not economically active in a Member State enjoy access to residence in all other Member States. Marlene Wind sums it up this way in her contribution to this special issue: “Nation states . . . no longer define who are the legitimate participants in their national political societies, or who can reside in their territory . . . regarding EU nationals.”⁹ Member State governments have sustained a massive loss in their own right to privilege their own citizens.

⁴ Willem Maas, *Unrespected, Unequal, Hollow?: Contingent Citizenship and Reversible Rights in the European Union*, 15 COLUM. J. EUR. L. 265 (2009).

⁵ Michelle Everson, *The Legacy of the Market Citizen*, in THE NEW LEGAL DYNAMICS OF EUROPEAN UNION 73 (Jo Shaw & Gillian More eds., 1995).

⁶ Dimitry Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights*, 15 COLUM. J. EUR. L. 169 (2009).

⁷ Spencer Wolff, Note, *Uniting the Volk: A Plea for Thick Historicizing in Analyses of Citizenship Laws*, 15 COLUM. J. EUR. L. 299 (2009).

⁸ See, e.g., Case C-85/96, *Martinez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691; Case C-184/99, *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6193; Case C-200/02, *Zhu and Chen v. Sec’y of State for the Home Dep’t*, 2004 E.C.R. I-9925.

⁹ Marlene Wind, *Post-national Citizenship in Europe: The EU as a “Welfare Rights Generator”*, 15 COLUM. J. EUR. L. 239, 263 (2009).

A decisive reflection of this development is Directive 2004/38/EC,¹⁰ which extends to EU citizens a right to residence, regardless of whether they fall within prescribed categories such as workers, students, or the self-employed—but nevertheless with access to full host country welfare benefits after five years of residence—on condition of a measure of economic self-sufficiency. But the directive may even understate the scope of citizenship. In their contributions, both Marlene Wind and, impliedly, Miriam Aziz question whether, in light of its limitations and conditions, the directive actually measures up to the standard that the Court of Justice appears to have imposed on Member States in the area of citizenship rights.¹¹

Do these developments have any dark side? Willem Maas asks pointedly whether citizenship rights might actually have become, to put it bluntly, “reversible.” In fact, what he means to ask is whether the enlargement of citizenship rights has been accompanied by an increasing fragility of those rights, in the sense of “run[n]ing the risk of not being respected . . . because the legitimacy on which [they] rest is delicate.”¹² Are EU citizenship rights “more like human rights (less meaningful because unenforceable) or more like national rights (more meaningful because backed by institutions capable of enforcement)”?¹³ As if directly answering this question, Aziz confesses serious disappointment in the current state of affairs, whether measured by the failure of the treaty reformers of recent years to construct a meaningful citizenship concept or their failure to develop adequate enforcement mechanisms for whatever set of rights it is that EU citizenship entails.¹⁴

Furthermore, enforcement or lack thereof aside, does citizenship risk becoming, as Maas puts it, “differential”?¹⁵ In a sense, this is inherent in the assimilation of EU citizenship to the corpus of EU law, which consists, after all, of a bundle of rights whose enjoyment is contingent on a host of variables such as employment status, wealth, or gender, and which may, even as a matter of EU law, actually be available to persons who make no claim whatsoever to EU citizenship.¹⁶ Indeed, enjoyment of EU citizenship rights may be contingent altogether on the presence of some aspect of cross-border movement, thus discriminating in favor of the mobile or potentially mobile. EU citizenship therefore does undoubtedly challenge the sense of unity, commonality, and equality with which—as Kochenov points out and as Wolff powerfully documents in the case of Germany—citizenship has come to be so closely associated. But since when has the European Union *not* challenged received notions of political organization?

However slender its treaty-based beginning may have been, EU citizenship has proved to be a wide portal to the recognition of claims by Member State nationals against the authorities of other Member States. The route by which this occurred and

¹⁰ Council Directive 2004/38, On the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States, 2004 O.J. (L 166) 1 (EC).

¹¹ Wind, *supra* note 9, at 261; Miriam Aziz, *Implementation as the Test Case of European Union Citizenship*, 15 COLUM. J. EUR. L. 281, 292–93 (2009).

¹² Maas, *supra* note 4, at 268.

¹³ *Id.* at 269.

¹⁴ Aziz, *supra* note 11, at 282–83.

¹⁵ Maas, *supra* note 4, at 274–77.

¹⁶ See Council Directive 2003/109, Concerning the Status of Third-Country Nationals Who Are Long-Term Residents, 2004 O.J. (L 16) 44 (EC).

the combination of benefits and incongruities that have resulted is the subject of the remarkable reflections on EU citizenship that follow.