Journal of Ethnic and Migration Studies Vol. 24 No. 4: 639–656 October 1998

European citizenship and immigration after Amsterdam: openings, silences, paradoxes

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Abstract *European Union citizenship, as a form of citizenship beyond the nation state, entails the promise of the formation of a heterogeneous and democratic European public, empowering citizens and ethnic residents. Notwithstanding this promise, the 1996 intergovernmental conference that culminated in the Treaty of Amsterdam (signed on 2 October 1997) did not extend the personal scope of Union citizenship to include long-term resident third country nationals. Other substantive reforms, however, such as the inclusion of an anti-discrimination clause, the institutionalisation of the right to information, the strengthening of democratic accountability and the enhanced respect for human rights, all improve the rights of citizens, and ethnic migrant residents and members of other disadvantaged groups generally. The partial communitarisation of the third pillar has furnished the basis for a Community immigration and asylum policy that is subject to increasing democratic and judicial control. However, it has also opened the way for the installation of exclusionary categories and the 'security' narrative on immigration control, which has largely characterised the third pillar within the system of Community law.*

The institutionalisation of Union citizenship by the Treaty on European Union (1 November 1993) has provided an impetus for the consideration of central issues of European polity formation.[1] Among them is the meaning and boundaries of membership in the prospective Euro-polity, and their impact on ethnic migrant communities and minority groups, as well as broader considerations about the role of European citizenship in the construction of a system of 'multiple-levelled governance without a state' (de Burca 1996; Caporaso 1996; Marks 1993; Wiener and Della Salla 1997).

Perhaps the most distinguishing characteristic of the literature on European citizenship over the past few years has been its critical character, rather than its attention to the potentialities of this institution and its normative philosophical implications (exceptions are Meehan 1997; Shaw 1997; Wiener 1997). Undoubtedly, there are good reasons for this tendency. First, the institution of Union citizenship has added little substantially new to existing Community law: with the exception of electoral rights in European Parliament and local elections (Article 8b EC, now Article 19) and the right to diplomatic and consular protection (Article 8d EC, now Article 21) (Closa 1994; Guild 1996a; O'Keeffe 1994; Martinello 1995; O'Leary 1996; d' Oliveira 1995). This has led sceptics to dismiss European citizenship as being either a mercantile form of citizenship born out of the demands of economic integration, and/or empty rhetoric designed to enhance the Commission's legitimacy. It is certainly the case that the location of Union citizenship in the new Part Two of the European Treaty attests its significance, but it remains to be seen whether the European Court of Justice will make this concept a central pillar of the Community legal order.[2] Second,

1369-183X/98/040639-18

European citizenship has not created a direct legal bond between the individual citizens and the Union, since the decisive qualifying factor remains tenure or acquisition of member state nationality. This results in the exclusion from the benefits of European citizenship, of approximately 12–13 million residents who are nationals of third countries (of whom 4.8 million are citizens of the 12 non-EU Mediterranean countries; Eurostat 1998); an exclusion that has repercussions for the claims of democracy in the EU. Third, the rather limited material scope of European citizenship, coupled with the fact that it means very little to the vast majority of Europe's citizens who for whatever reason cannot or do not want to cross borders (Koslowski 1994), makes it a status inferior to that of national citizenship.

And yet despite these limitations, European citizenship remains at the centre of growing attention, as it becomes increasingly clear that the importance of European citizenship lies not so much in what it is, but in what it should or might be. Union citizenship as a form of institutional design entails several interesting possibilities. Among them is the prospect of a 'post-national' political arrangement, which may facilitate multiple membership by both natural and legal persons, in various overlapping and interlocking communities formed on various levels of governance (Meehan 1993, 1997). Union citizenship also entails the 'promise' of a heterogeneous, de-nationalised democratic community in Europe, which takes seriously the plight of ethnic migrant communities and other disadvantaged groups (Kostakopoulou 1996). Yet despite this promise, the Amsterdam Treaty has not added anything of substance to Union citizenship. Nor has it extended the personal scope of Union citizenship to include long-term resident third country nationals. This is unfortunate, for the individuals and groups to whom Union citizenship might appeal the most, may precisely be the ones who are thus excluded from national political processes.

The purpose of this article is to outline the transformative dynamic entailed by Union citizenship and, by juxtaposing it with the stark reality of exclusion and discrimination of ethnic migrants and other minority groups in the European Union, to flesh out some ideas for further institutional reform. Such an endeavour is timely considering the modest outcome of the 1996 intergovernmental conference (IGC). However, beyond the Amsterdam Treaty lies the challenge of the configuration of the Union of the twenty-first century. This is a challenge that cannot be met without visionary ideas and institutional reforms in its institutions, its socio-political targets and its treatment of citizens, residents and migrants.

Novel features of Union citizenship

Although theorists agree that citizenship of the European Union (which I will also refer to 'European citizenship') constitutes a new and unprecedented form of citizenship (Delanty 1997; Evans 1991; Meehan 1993; Preuß 1995, 1996; Shaw 1997; Touraine 1994; Weiler 1995, 1996), the *differentia specifica* of this novelty is not entirely clear. One possible approach would be to trace the novelty of this institution in the supranational setting of the European Union. Given that citizenship has traditionally denoted a relationship between the individual and the state, the transcendence of this nation state rooted relationship cannot but lead to the reconfiguration of the concept of citizenship.

In the supranational setting, citizenship can no longer denote full membership in a nation's public life but is instead associated with different objectives and

concerns. In its 'incipient' form, for instance, European citizenship was tied up with internal mobility of labour and the idea of the internal market (Plender 1976). Progressively, it then became associated with concerns about how new economic institutions and experiments could become more anchored in actual communities, how the single market idea could be transformed into a People's Europe. Finally, the Treaty on European Union tied the Community law rights of free movement to the political status of the citizen of the Union, in an attempt to strengthen the democratic basis of the Community.

Citizenship thus features centrally in the quest for new transnational structures that turn 'aliens' into associates in a common venture aimed at ensuring peace, prosperity and the effective protection of rights. True, this process is riddled with fundamental ambiguities, contradictions, and tensions. The opposing tendencies of intergovernmentalism and supranationalism, which have shaped the development of Community discourse and policy on citizenship, are also reflected in the crystallised form of Union citizenship. For example, the restrictive personal scope of Union citizenship is a feature of intergovernmentalism. Equally, the weakening of traditional state prerogatives with regard to the entry and residence of economically active or economically self-sufficient member state nationals has been accompanied by the reinforcement of the dichotomy of citizens and 'aliens', be they resident third country nationals, migrants, asylum seekers or refugees (Baldwin-Edwards 1997). However, egalitarian processes co-exist with processes of exclusion. For all the shortcomings of European institutions, it is difficult not to be impressed by the extent to which Community rights' jurisprudence has transformed immigration law and practice in the member states. Nor must we lose sight of the possibility that the demands of European integration may induce further relaxation of established nationality law principles (Closa 1994; Evans 1991: 214–17).

Since European citizenship does not share the same institutional setting with national citizenship, it follows that it cannot be of a like nature. It is perhaps for this reason that both Habermas (1992, 1996) and Weiler (1995, 1997: 119), in a number of well known interventions, have argued for the decoupling of citizenship and nationality at the supranational level. According to Weiler, European citizenship would consist of 'shared values, a shared understanding of rights and societal duties and shared rational intellectual culture which transcend organic-national differences' (1997: 118). National citizenship would remain the realm of affinity and a symbol of nationhood, whilst European citizenship would be the realm of law and universal values. Such a differentiation may appease anxieties about possible absorption of national citizenship by European citizenship, but it is not as unproblematic as it may first appear. First, the characterisation of national publics as organic-cultural overlooks civic constructions of the nation, that is, publics who define 'belonging' rather in political terms and adhere to the *ius soli* principle. In addition, it 'freezes' and denies the continued mutability of the nation state caused by global economic pressures and international migration. Notably, the latter has put into question traditional assumptions about both the unity and homogeneity of civic publics, and has forced states to consider seriously demands for respect for 'unassimilated otherness' (the challenge of diversity) and for political inclusion (the challenge of membership). Finally, Weiler's argument seems to have been informed by the distinction

between civic and ethnic nationalism: a distinction that has emerged within the nation state paradigm and may not serve the new European context.

The complexity of the interaction between 'old' (i.e., national) and 'new' citizenships is highlighted by the term multiple citizenship, which is often used to denote the distinctiveness of European citizenship. According to Meehan, the emerging new citizenship is 'neither national nor cosmopolitan, but [...] multiple in the sense that the identities, rights and obligations associated [...] with citizenship are expressed through an increasingly complex configuration of common Community institutions, states, national and transnational voluntary associations, regions, alliances of regions' (1993: 1). Citizenship may have historically been linked to the emergence and crystallisation of nation state communities, but it can no longer be confined within them. Citizenship rights can be granted by other levels of jurisdiction, and duties need not be reduced to those which individuals owe the sovereign state (Heater 1991: 163–64). However, the challenge of multiple citizenship is not simply to allow for multiple standards of citizenship and for institutional pluralism, but to transform both the scope and nature of these citizenships.

The Community law rights of free movement and residence as well as Community sex equality and labour law have led to a gradual transformation of national citizenships, albeit only in a partial manner (i.e., with respect to member state nationals). What is interesting in such a process is not the 'opening' of national citizenship 'from within' so as to allow nationals of other member states to obtain citizenship by naturalisation, but the shifting of boundaries 'from outside' though the conferral of rights that are enforceable before national courts.

The notion of 'immigrant' or 'temporary guest' has gradually been replaced by that of Union citizen (Böhning 1972: 18–19 cited in Wilkinson 1995: 418). Accordingly, the presence in the territory of a host member state of workers from other member states, and others such as work-seekers, the self-employed, service-providers and tourists, as potential recipients of services (*Luisi and Carbone v. Ministero del Tesoro* (Cases 286/82 and 26/83 [1984] ECR 77) is no longer a matter of state toleration and consent. It is, instead, an issue of fundamental rights. In the pre-Maastricht era, formal rights of free movement and residence were also conferred on the economically independent, retired persons, students and their families, provided that they have sufficient resources to avoid becoming a burden on the social assistance system of the host state and are covered by health insurance (see Council directives 90/364 [OJ 1990 L 180/26], 90/365 [OJ 1990 L180/30], 90/366 replaced by Dir. 93/96 EEC [OJ 1993 L 317/59]). Having said this, it is important to mention here that the language of universality and equal application that accompanies the free movement rights tends to conceal the institutional and structural conditions that determine both the allocation and exercise of these rights. Union citizenship may have been presented as a 'de-gendered', 'de-raced' and 'classless' concept, but, in reality, its scope reflects gender, race and class differentials; it excludes long-term resident third country nationals and does not embrace non-active economic actors who are not self-sufficient, be they women engaging in domestic work and care for dependent relatives, unemployed people, or persons who have not acquired the necessary skills due perhaps to institutionalised racial discrimination in education and labour markets. In addition, differential levels of protection against racial discrimination in national legislations often function

as a disincentive for the cross-border movement of ethnic migrant citizens. Nevertheless, European citizenship, like citizenship itself, should be regarded as provisional; that is, as negotiable. In this respect, the extensive rights that workers from other member states and their families enjoy by virtue of Community law have not only ruptured conventional understandings of citizenship, but have also set an important precedent for third country nationals and other excluded groups.

More specifically, workers of one member state have the right to search for work in another member state and to accept actual offers of employment; to leave their state of origin to take up activities as employed persons in the territory of another member state; to move freely within that territory; to stay there for the purpose of employment and remain after the termination of that employment. Discrimination as regards access to employment, remuneration and other conditions of work, and in matters relating to social and tax advantages, housing and education is prohibited under Regulation 1612/68 (OJ 1968 L257/2). Family members of these EU nationals (i.e., the spouse, descendants who are either under the age of 21 or dependent relatives in the ascending line; see Article 10 of Reg. 1612/68) enjoy security of residence and have the right to take up employment in the host member states. In addition, the children of EU nationals are entitled to be admitted to the host state's educational courses under the same conditions as nationals of that state and to receive educational grants and assistance (*Casagrande v Landeshauptstadt Munchen* (Case 9/74) [1974] ECR 773; *Echternach and Moritz* (Cases 389/87 and 390/87) [1989] ECR 723; [1990] 2 CMLR 305; *Di Leo v Land Berlin* (Case C–308/89) [1990] ECR I–4185)). This suggests that the integration of working EU nationals and of their families into the socioeconomic fabric of the host member state is seen as the by-product of equality of treatment, and not of naturalisation and/or assimilation. But if the dictum 'to belong is to conform' has been put into question with respect to Union nationals, why should the member states require demonstrations of subjective allegiance to the host country from non-EU migrants?

Furthermore, *de facto* membership of EU nationals in the civil society of each country leads to partial *de jure* membership in the political community, through the conferral of rights of political participation in local and European Parliament elections in the host member state (Article 8b(1), now Article 19(1)). This has important implications for national citizenship and identity if only because it severs the link between national community and the enjoyment of political rights. True, the Community law principle of equality has not been extended to include voting rights in national parliamentary elections. Critics might also observe that there is no shared public realm at the European level (see Grimm 1995: 292–97), as there are no European political parties at present. Even European Parliamentary elections are fought on the basis of national political stakes. However, the fact that transnational possibilities for political participation are still rooted in national institutions does not unequivocally demonstrate either that a Euro-wide democracy is impossible,[3] or that national citizenship remains the only meaningful and unsurpassable principle of democratic political organisation (Schnapper 1997: 212–15).

On the contrary, the EU may be a polity with the potential to do what national democracy cannot, that is, to 'cultivate respect for a politics of democratic governance by pluralizing democratic energies, alliances and spaces of action that exceed the closures of territorial democracy' (Connolly 1993: 66). Any

assessment of the chances for more participatory structures in the EU, therefore, must take into account the opening of the public sphere as well as the various qualitative changes occurring in the public sphere there. The opening up of the public sphere refers to the multiplication of 'access points' for subnational, national and transnational groups to enter the policy-making process (Mazey and Richardson 1993: 18) and influence the Commission and the European Parliament. This, of course, does not mean that the situation is one of pluralist equality. Nor are all policy areas similarly exposed to input from organised interests. What this group mobilisation nevertheless indicates is the opening up of possibilities for more participatory politics, for empowerment of actors who have been disadvantaged by the national policy-making process, and for increased bargaining, complexity and influence in a zone of law-making that is relatively autonomous from national political agendas and goals (Mény et al. 1996). The new practices and channels of participation enable individuals to enjoy various associative relations that do not bind them to a specific nationality (Preuß 1995). In this respect, the novelty of European citizenship may be identified in its capacity to change our understanding of citizenship and prompt a rethinking of membership with a view to opening up new forms of political community. Otherwise put, Union citizenship holds out the promise of what I call a 'constructive' approach to citizenship, which is more respectful of 'difference' and more inclusive than nationality-based models of citizenship (see Kostakopoulou 1996).

Membership, community-building and third country nationals in the European Union

If one of the major challenges facing European citizenship is to achieve inclusiveness in the practice of citizenship, this challenge can hardly be met as long as the various forces that fashion the political arrangements in the EU privilege assumptions and concepts rooted in the nation state paradigm. Mobilising notions of the past in order to explain developments in the future may be methodologically unfruitful (Koopmans 1992: 1049; Linklater 1996; Wessels 1997) as well as substantively deficient. The emerging Euro-polity is neither a mirror image of the state, nor can it be explained in terms of assumptions and ideas derived from processes of national community formation.

And yet national executives who take part in intergovernmental bargaining often transplant assumptions, ideas and knowledge from the national level to the supranational one. A good example of such an intentional 'paradigm transfer' has been the conditioning of the acquisition of Union citizenship upon member state nationality (Article 8(1) EC, now Article 17(1)). Through this article the member states have grafted quasi-nationalist ideas and their notions of 'who shall belong' in the emerging Euro-polity into the supranational form of citizenship. By so doing, they have confirmed Majone's insight that the 'ability of policy makers to innovate depends more on their skill in utilising existing models than on inventing novel solutions' (1991: 79).

In the field of citizenship, however, utilising existing models entails the risk of transplanting the legacy of old problems to the EU. The rules and conditions of membership that apply to national publics cannot be appropriately transcribed to the European public. It is doubtful whether European citizenship can be an institutionalised reflection of pre-political 'ethno-national' views about

community and identity, for there are no such things at the European level. Rather, it is the task of the institution of citizenship to generate a sense of community in Europe (Preuß 1996) and to build the generalised channels of trust within which a European identity can take root. Evidently, this quest for community and the search for just institutions need not take place within the confines of a single political culture or even of a 'supranationally shared political culture' whose constitutional parameters have nevertheless been fixed by the majority cultures of the member states (Habermas 1992, 1996). It has to be conducted within the context of a wider, culturally heterogeneous political community that is open to disagreements, to critique, to new ideas and even to cultural collisions.

Europe's deep diversity as well as the profound disagreements over both the project of European unification and its future shape, open up the possibility for a novel conception of community. This has to be a community held together by the concern and willingness of its constituent units to work together, creating 'an ever closer union among the peoples of Europe', by designing appropriate institutions that best reflect their aspirations, accommodate their differences and meet their similar or distinct needs. The European political community may thus be conceived of as 'a community of concern, engagement and shared risks' or a 'community of interests and aspirations' (Kostakopoulou 1996). Such a community is held together neither by some kind of consensus over the final shape of the Union, nor an agreement over a common set of determinate values (Lehning 1997: 117–19) nor even a cohesive identity in a communitarian sense. Rather, what seems to sustain the sense of community is a sense of commitment on behalf of the constituent units to the future of the Union, in the sense that 'we are all in this together', and 'we will collectively shape this process by designing appropriate institutions'.

A community of this kind would have to include all those who have legitimate stakes in its future, be they nationals of the member states or long-term resident third country nationals. At present, third country nationals have the right to apply to the Ombudsman and to petition to the European Parliament (Article 8d), and may enjoy 'derived' rights as family members of Union citizens or employees of undertakings providing services in another member state (see *Rush Portuguesa* and *Van der Elst* cases: *Rush Portuguesa Lda v Office National d'Immigration* (Case C–113/89) [1990] ECR I–1417, [1991] 2 CMLR 818; *Van der Elst v Office des Migrations Internationales* (Case C–43/93) [1994] ECR I–3803).

Third country nationals could also be beneficiaries of agreements concluded under Articles 228 and 238 EC by the Community with third states. These agreements form an integral part of Community law, but confer only limited rights on specific classes of third country nationals (Alexander 1992; Guild 1996b; Peers 1996). As a consequence, a considerable number of long-term resident third country nationals do not have the right to travel within the EU: any travel from one state to another – even if only in transit or for a short stay – is subject to the rules of the individual member states. In addition, third country nationals do not enjoy the benefits of free residence, access to employment, family reunion, and, generally speaking, the protection against discrimination that EC law affords to member state nationals and European Economic Area nationals (the Community has competence in conditions of employment of legally residing third country nationals). This exclusion is difficult to justify from

a normative point of view, given that these people have often been living their whole lives within the territory of the member states and have made this territory the centre of their socio-economic life. As both interested and affected parties, third country nationals should not be silenced by *a priori* definitions of what properly constitutes the legitimate denotation of citizenship or assumptions about where the boundaries of the supranational political community should be. And although one understands the political pressures and the intergovernmentalist logic underlying the restrictive personal scope of Union citizenship, such a compromise can only come at the expense of furthering the development of European citizenship.

Broadly speaking, there are two ways of remedying the civic inclusiveness deficit in the EU; namely, through reforms at the national level aiming at facilitating the third country nationals' acquisition of national citizenship, or by extending the personal scope of Union citizenship. The former could involve either a deregulatory form of liberalisation of naturalisation rules along the lines suggested by Evans (1994) and Hansen (1998), or a Community-induced harmonisation of the national laws governing acquisition and loss of citizenship. Legislative harmonisation could take the form of minimum harmonisation where a Community measure lays down a minimum set of criteria and requirements for citizenship acquisition thereby 'acting as a floor'. The problem with this mechanism is that it leads to downward harmonisation. Alternatively, uniform Community provisions could supplement existing national arrangements. In this respect, a directive or regulation applying uniformly to all the member states could form the foundation of a code of European nationality and of Euro-naturalisation procedures. The distinct disadvantage of this, however, is that it would replicate the nationality model of citizenship at the European level and project the European adventure as a quest for statehood. It is also doubtful whether the position of third country nationals would improve by conditioning their admission on the satisfaction of certain criteria, modelled upon those required by national laws, such a lawful entry and residence, age, employment status, good character, loyalty to the aims of the Union, assimilation and so on (O'Keeffe 1994: 105). A third possibility might be a multilateral convention drawn on the basis of Article 220 EC (now Article 293) along the lines of the European Convention on Nationality adopted by the Council of Europe in 1997.

Whereas deregulatory liberalisation of naturalisation laws would not put an end to the varying rules and conditions for acquisition of citizenship throughout the Union, harmonisation is bound to be resisted on the grounds that the EU lacks competence in this area. Bearing in mind how jealously the member states guard their exclusive competence in the determination of nationality, the European Union Migrants' Forum, in its proposals for the revision of the TEU at the 1996 IGC, suggested another institutional mechanism, namely, the acquisition of Union citizenship by reason of lawful residence in the Union for a period of five years or more. This could be achieved through an amendment to Article 8(1) EC (now Article 17(1)). The absence of political will may be a pragmatic constraint on such a reform, but reforms almost never emerge naturally; they are the product of processes of negotiation and political activism.

Conditioning European citizenship on domicile may be a crucial step in redressing the inequitable position of third country nationals, but by no means can it be the sole determinant factor in alleviating this or any other form of inequality. Essential for inclusion and belonging with respect in the Euro-polity,

as indeed in any other polity, are also policies and strategies designed to combat existing structures of socioeconomic inequality and discrimination that lie behind the polity's formal adherence to universal principles. This could take the form of more differentiated forms of EU citizenship designed to tackle multifaceted exclusion. I have elaborated elsewhere the precise content of a differentiated European citizenship, which may include group rights and more 'outcome-oriented' measures, regional rights for increasing opportunities for self-governance, socioeconomic rights, and a greater commitment to democratic politics (Kostakopoulou 1996). What needs to be mentioned here is that an inclusive European citizenship may be a crucial institutional device in fostering a civic culture of anti-discrimination in the EU. Such a culture would help cultivate an ethos of responsibility and respect for the Other, and would obligate policy makers to take all the necessary measures to combat racism and xenophobia, both through legislation and education as well as to take action with regard to poverty and social exclusion.

The vitality and success of such an anti-discrimination culture depend as much on inclusive citizenship as on how the EU responds to the challenge of immigration. External rules on entry say a lot about the nature of the polity and its organising principles (Favell 1997; Kostakopoulou 1997), and affect the treatment and incorporation of settled migrants and residents. More importantly, the consequences of a political unit's official policy on immigration are felt not only by those who seek admission but by the whole community.

In the European Union, the emergence of a restrictive and law-enforcement immigration regime in both its pre-Maastricht 'para-Communitarian' phase and the post-Maastricht third pillar structure raised the spectre of an authoritarian Europe in the making. Criticisms have been directed against the intergovernmental methodology *per se* (e.g. the secretive negotiations, the absence of involvement of the European Parliament or judicial supervision, the ineffectiveness of decision-making and so on) as well as the rights' deficit of many of the agreed policies.[4] Against this background, it is not surprising that the future of the third pillar soon emerged as a central issue at the 1996 IGC. Both the European Parliament (1995a, 1995b) and the Commission (1995) supported the transfer of asylum and immigration policy from the third pillar into the first. This position was endorsed by the Reflection Group (1995) and the Madrid European Council (European Council 1995). The Irish Presidency proceeded to draw a framework for this partial communitarisation by devising a new Title on *Free Movement of Persons, Asylum and Immigration* (European Council 1996). Under the Irish proposals, the new title would cover immigration, asylum, visas, rules governing the crossing of internal and external borders, common rules for the free movement of third country nationals and action against drug-related crime. The Presidency left open the precise location of the new title within the Treaties, but it stated that it favoured its inclusion into the first pillar. The precise role of the Community institutions and the decision-making procedures under this Title were left for the intergovernmental conference to decide. These proposals were endorsed and refined by the Dutch government that assumed the Presidency at the beginning of 1997.

The initiative to introduce a single constitutional basis and more democratic control in immigration issues was a welcome development. However, the proposed procedural reforms were not accompanied by a re-examination of the issue of immigration and a reflection on the dialectic of inclusion and exclusion

that sets apart EU nationals/Union citizens from non-EU migrants. During its term, the Irish Presidency assumed that migration and asylum flows were a security problem and the path of reform followed logically from such a construction. In so doing, it foreshadowed the political processes that construct immigration as a security threat and opened the way for the installation of exclusive categories within the system of Community law. In the remainder of the article, I will explore the wider implications of this in the context of the broader discussion on the provisions of the Amsterdam Treaty that impact upon the rights of citizens, residents and migrants.

Citizens, ethnic minorities and migrants after Amsterdam

Although 'bringing Europe closer to its citizens' was a salient agenda item of the intergovernmental conference (IGC) that undertook the revision of the Treaties on which the European Union is founded (March 1996–June 1997), the Amsterdam Treaty consolidated the restrictive conception of citizenship institutionalised by the Treaty on European Union. The new Treaty did not extend the personal scope of Union citizenship to long-term resident third country nationals. Nor did it introduce any significant changes to the material scope of the institution. It has merely added a new subparagraph to Article 8d (now Article 21) stating that 'every citizen of the Union may write to the institutions or bodies referred to in this Article or in Article 4 in one of the languages mentioned in Article 248(1) and have an answer in the same language'. And in symbolic recognition of national concerns, the Amsterdam Treaty has also inserted in Article 8(1) (now Article 17(1)) the statement that Union citizenship shall complement and not replace national citizenship.

The absence of institutional reforms to Articles 8 *et seq* EC is disappointing given the prominence of the issue of citizenship in the reports adopted by the Community institutions on the functioning of the Treaty on European Union. Non-governmental organisations (NGOs) had also campaigned for a new constitutional dynamic in the domain of citizenship both prior and during the IGC. Despite inertia in the Commission and the absence of consensus on the legal status of third country nationals, even within the European Parliament (1996a, 1996b), pressure groups such as the European Union Migrants' Forum (1995), the Starting Line Group (1997), the European Anti-Poverty Network (1996), the European Women's Lobby (1996) had called for the extension of European citizenship to these individuals. What is significant about these proposals is that they made it clear that creating a heterogeneous and inclusive citizenship in the EU is neither a policy problem nor a problem of institutional design; it is, instead, a problem of political will.

It is perhaps due to the intense and skilful lobbying done by NGOs that a new anti-discrimination clause has been inserted into the Treaty. Article 13 [ex Article 6a] enables the Council, acting unanimously on a proposal from the Commission and after consulting the EP, to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion and belief, disability, age or sexual orientation'. This clause is a significant breakthrough in that it places discriminatory behaviour within the remit of the Treaty and the Community's legislative competence. However, the new provision suffers also from some important limitations. First, its optional character (i.e., the Council ... may) means that the provision will not give rise to individual rights that can be relied upon in

national courts, and that the Court will not adjudicate on actions against the member states until directives have been issued. Second, the requirement of unanimity is likely to undermine the effectiveness of this article as some governments object to any EU intervention in this sphere. Third, the marginal role that the European Parliament will play, coupled with the fact that the application of this article will be limited to measures that already fall within the Community competence, makes the clause quite restrictive. Whilst the insertion of a directly effective anti-discrimination clause within the Union citizenship provisions still remains a future goal, in the short term, NGOs would have to keep up pressures on the Commission and the states to introduce and adopt implementing legislation in this area.

The incorporation of the Social Agreement, which previously applied to 14 states, into the Treaty is also a positive development. It lays the foundations for the design of a coherent European social policy, and compensates for the absence of a reference to the idea of a European social citizenship in the new Treaty. Although the provisions in this chapter have been strengthened to ensure equal opportunities and equal treatment for men and women in the workplace and the fight against social exclusion is now enshrined in the Treaty, the new common social policy is still limited. Important issues such as social security, redundancies and worker representation still require unanimity. In addition, the common social policy needs to incorporate the right to work and rights in employment (e.g. provisions on minimum wage, the rights of association and strike and so on) as well as to provide effective protection for the elderly, children and adolescents, the unemployed and unpaid workers (i.e., women engaging in family and caring work). The institutionalisation of such aspects of social citizenship would help transform Union citizenship from a 'virtual quality' to a status that is meaningful even to citizens who do not avail themselves of the right to free movement. A similar effect on the status of citizenship – albeit of a more symbolic nature, might have the emphasis that the Treaty puts on the protection of fundamental rights. Accession by the European Union to the European Convention of Human Rights may have not been achieved, but the Amsterdam Treaty has established a new sanctions procedure, which provides for the suspension of certain rights for member states who seriously and persistently breach these principles (Articles Fa(1) and (2) TEC, Article 7 on renumbering).

The attempt to enhance the citizens' involvement in the shared adventure of European integration has been accompanied by measures designed to strengthen the democratic legitimacy of the EU. The co-decision procedure now applies to most areas of legislation and has been simplified. This places the European Parliament on an equal footing with the Council in the legislative process. In addition, the Amsterdam Treaty has introduced closer ties with national parliaments via a new *scrutiny reserve*. Under a protocol annexed to the Treaty, national parliaments will have a six week period to scrutinise and debate legislative proposals or proposals for measures falling within the ambit of the third pillar before these are placed on the Council's agenda. Although this provision is primarily designed to enhance the powers of scrutiny of national parliaments in EU matters,[5] it may lead to the creation of institutional links between the European Parliament and national parliaments, and even of new fora of deliberation among parliaments themselves.

A positive step toward enhancing political participation and mobilisation is made by the institutionalisation of a new right to access to European Parliament,

Commission and Council documents (Article 255 (ex Article 191a)). The exercise of this right of information is, nevertheless, subject to principles and limits on grounds of public and private interest to be decided by the Community by qualified majority voting and co-decision within two years. And although the secretive legislative process of the Council of Ministers is to continue (the Council has, nevertheless, agreed to make available all third pillar measures), this article commits the EU to greater openness into its decision-making processes.

More openness and democratic accountability has also been introduced in immigration and asylum-related matters as a result of the partial communitarisation of the third pillar. The Community method will now be used for policies on visas, immigration and asylum, the rights of third country nationals, external border controls, and judicial cooperation in civil matters. Police cooperation and judicial cooperation in criminal matters remain in the third pillar, whose remit has now been extended to include action against racism and xenophobia, and offences against children. More specifically, the new Title IV (formerly, Title IIIa on the 'Progressive Establishment of an area of Freedom, Security and Justice'), sets out a five-year transitional period from the entry into force of the Treaty during which the Council will continue to take decisions by unanimity and the Commission will share the right of initiative with the member states, before a possible decision at the end of that period to move to qualified majority voting and co-decision with the European Parliament (Article 67 (ex Article 73o)). The transitional period does not apply to measures concerning the list of third countries whose nationals require visas and a uniform format for visas, as these have been subject to qualified majority voting since Maastricht. In addition, after the transitional period, measures on the procedures and conditions for issuing visas by the member states and rules on uniform visa will be adopted by qualified majority voting and co-decision.

However radical and potentially very significant the communitarisation of significant areas of the third pillar may be, we must not lose sight of the fact that progress in Justice and Home Affairs has come at the price of fragmentation of EU policy-making processes. The prospect of a five year transitional period did not help overcome certain delegations' resistance to communitarisation. Britain, Ireland and Denmark decided to opt out from the new Title and negotiated special arrangements (Article 69 (ex Article 73q)). These are laid down in two protocols applicable to Britain and Ireland, and a further protocol applicable to Denmark. The former protocols recognise the common travel area between Britain and Ireland as well as their right to exercise frontier controls on persons at their borders. Interestingly, although Britain and Ireland have opted out from the provisions of the Title, Articles 3 and 4 of the *Protocol on the position of the UK and Ireland* provide for the possibility of *opting in* during or after decision-making in the Council should they decide so. Apart from rules on visas, similar provisions apply to Denmark which has dogmatically resisted any possibility of *opting in*. As a party to the Schengen Convention, Denmark may, of course, decide to implement in its national law Council decisions taken under Title IIIa that build upon the Schengen *acquis*, but this will create only international law obligations, and not Community law ones.

These Protocols are accompanied by the *Protocol on Integrating the Schengen Acquis* into the EU institutional framework. The conversion of the Schengen *acquis* into Community law depends on its identification by the Council and the

determination of the correct legal basis for each of the provisions and decisions constituting the *acquis* in accordance with their subject matter (i.e., either the first pillar for free movement matters or the third pillar for police matters).[6] Until such determination is made, the Schengen measures will be regarded as acts adopted on the basis of the third pillar (Article 2(1) of the Protocol). Given the important issues at stake, the NGO grouping 'Justice and the Meijers Committee' (aka Justice and the Standing Committee 1998) have recommended that draft decisions concerning the determination of the legal bases should be transmitted to the national Parliaments, and that there should be a six week period between a decision being tabled and its adoption in the Council of the European Union (Justice and the Standing Committee 1998: 10).

Although the compatibility of the EC *acquis* and the Schengen *acquis* remains to be seen, the overall picture remain favourable. It is a truly remarkable achievement that all matters relating to free movement of persons are placed in the first pillar. However, this should not blind one to the risks and problems entailed by the new developments. The Court has no jurisdiction to review measures or decisions relating to the maintenance of law and order and the safeguarding of internal security. The ECJ will, nevertheless, have jurisdiction to interpret this restrictive provision: a provision that sits uncomfortably with the principle of respect for the rule of law on which the Union is founded. In addition, national delegations have circumscribed the role of the ECJ and pruned its integrative dynamic by restricting requests for preliminary reference rulings to courts of last instance (Article 68(1) (ex Article 73p(1)). National courts and tribunals will not be able to refer cases relating to visa, immigration, asylum and other policies to the Court, and requests for references from last instance courts are discretionary, not mandatory (unless the *acte clair* principle applies). These inhibitions on the ECJ's jurisdiction are likely to undermine legal certainty and the consistent interpretation of Community law throughout the Union. They are also likely to yield undesirable implications for individuals who would have now to pursue their cases through the successive tiers of national jurisdiction. Important as the concern not to overburden the ECJ with asylum and immigration questions may be, it has been convincingly argued that the ECJ's present jurisdiction could be extended to the new Title 'while conferring on the Court itself the power to determine, at a later stage, that requests shall be filtered if the number of references should be great' (Plender and Arnull 1997: 10). The conclusion to be drawn from these limitations on the ECJ's jurisdiction is that the member states are anxious not to relinquish too much control over the shape of the new legal and institutional framework on asylum and immigration.

If this is the case, the question that arises here is whether the new Title and the gains in democratic and judicial accountability will result in substantive changes in the design of immigration and asylum policy. Will they lead, for example, to a questioning of the Schengen convention as a model for the development of a European immigration policy? (Kostakopoulou, forthcoming). Will the new Title prompt national executives, under the guidance of the Community institutions, to move way from the path of national restrictive and law enforcement policies and to respond to the challenge of immigration by elaborating a principled, coherent and forward-looking European immigration policy?

Certainly, one cannot discount the possibility that the gradual democratisation of the decision-making processes in immigration matters will yield a more

legitimate but not necessarily a qualitatively different immigration policy. It may be noted, for example, that the conversion of the Schengen *acquis* into either Community law or third pillar measures is not to be accompanied by further discussion on the substantive merits of each provision or on the more general political implications of the 'Schengenland' vision for Europe. Additionally, the new Title is not distinguished by its rethinking of the issue of immigration and the examination of the normative foundations of membership in the Euro-polity along the lines suggested above. Immigration and asylum policy are conceived of as indispensable flanking measures to the abolition of internal border controls. The desire for market integration and for effectiveness has been put ahead of issues such as fairness to excluded groups, principled policies and equal rights for long-term resident third country nationals. True, the Community has acquired competence in the area of immigration matters concerning third country nationals, but the only specific right conferred on them is freedom to travel within the territory of the member states for a limited period of three months (Article 62(3) EC).

Equally problematic is that the discourse on the 'securitisation' of migration and asylum policy (Huysmans 1995) that has characterised the secretive intergovernmental pattern of cooperation has come to define the terms of the free movement of persons in Community law. Immigration and refugee flows continue to be portrayed as a security problem and the member states' identification of the sources of insecurity and the logic of control has permeated the first pillar. By assuming the protective role of the state, The Union may promise to deliver security for all, but it is the member states who have hegemonically framed the debate on immigration and are still the chief interpreters of security (i.e., freedom from danger and fear). As a consequence,

> the identity of the citizen is constructed through the 'Other', the foreigner who needs to be excluded to make the citizen 'secure'. This is an alternative 'security-oriented' vision of the area of freedom, justice and security which feeds into the profound disquiet on civil liberties grounds which has long been held in some quarters about the implications of the secretive third pillar and Schengen operations. (Shaw 1997: 571)

Notwithstanding these critical observations, it must be said that too much is as yet unsettled for anyone to predict confidently the course or outcome of developments now in train. The dynamic of change may continue despite the above mentioned constraints on the reform of immigration and asylum policy. Perhaps, the improvements in democratic and judicial accountability, due to the transfer of these areas to the Community, will create openings and disrupt the security narrative. Much will also depend on what is made of the Title on an Area of Freedom, Security and Justice in practice.

It is noteworthy here that the Commission (European Commission 1997) has already taken an initiative that creates scope for optimism; it has proposed a Decision on Establishing a Convention on rules for the Admission of Third Country Nationals to the member states of the Union (COM(97) 387). Perhaps the most distinguishing feature of the draft convention is that it establishes a principled framework for the admission of third country nationals for a period exceeding three months, and seeks to equalise by the 'back door' the status of long-term resident third country nationals to that of EU member state nationals. Although the legal basis of the draft convention has been the third pillar, the Commission has made clear its intention to present the convention as a directive

to be adopted under the provisions of the new Title as soon as the Treaty of Amsterdam comes into force.

It is clear from the above that the process of the formation of a Euro-polity is incremental, unsettled and politically contested. However, neither the incremental nature of this process nor the contradictions and silences identified above should make one lose sight of the new prospects opened up by the Amsterdam Treaty. The concerns of ethnic migrants and other excluded groups have been made visible, and serious shortcomings in the EU's internal market – such as the lack of democratic accountability, the absence of a Community immigration and asylum policy, the need to step up social protection and empower European citizens – have been addressed. Hopefully, these developments will sustain efforts to continue the project of European democracy and to improve the legal status of third country nationals legally resident in the Community. After all, existing institutional limitations are almost never simply barriers; they are invitations to further institutional reform.

Acknowledgements

I am very grateful to Adrian Favell for stimulating communications and comments. I would like to thank participants at the European Forum workshop on Migrants, Minorities and New Forms of Citizenship in the EU, held in March 1998 at the European University Institute, particularly Percy Lehning, Elspeth Guild, Andrew Geddes, Carol Harlow, Rey Koslowski and Antje Wiener. I must thank also Robert E. Goodin, Simon Goulding and David Fox for their helpful comments and suggestions. An earlier version of the paper on which this article is based was presented at the SPTL European Law session in February 1998 hosted by Queen Mary and Westfield College, London.

Notes

1 EU nationals have the rights of free movement and residence (Article 8a EC, now Article 18); the right to vote and to stand for election in European Parliament and local elections in the member state in which they reside (Article 8b EC, now Article 19); the right to protection by diplomatic and consular authorities of any member states in a third country where the citizen's own member states is not represented (Article 8c EC, now Article 20); and the right to petition to the European Parliament and to apply to the Ombudsman (Article 8d EC, now Article 21).

2 To date, the European Court of Justice has used Union citizenship in its case law in order to consolidate existing Community law (e.g. Joined Cases 4/95 and 5/95 *Stober and Pereira* [1997] 2 CMLR 213; Joined Cases C64–65/96 *Uecker and Jacquet v Land Nordrheim* [1997] 3 CMLR 963). However, the court may not be content with the 'minimalist' interpretation of Union citizenship; see the opinion of Advocate General Leger in Boukhalfa (Case C–1214/94 *Boukhalfa v Federal Republic of Germany* [1996] ECR I–2253). In *Martinez Sala*, the Court held that the prohibition of discrimination on the ground of nationality laid down in Article 6 precludes a member state from requiring Union citizens residing in its territory to produce a formal residence permit for the grant of child-raising allowance, when the state's own nationals are only required to be permanently or ordinarily resident in that member state (Case C–85/96 *Maria Martinez Sala v Freistaat Bayern*, Judgement of the Court of 12 May 1998).

3 This refers to the 'no demos' thesis adopted by the German Constitutional Court (Bundesverfassungsgericht, 89, judgement of 12 October 1993), that is, the EU is democratically deficient because there is and cannot be a European demos. For an excellent discussion of the Court's decision, see Weiler 1995.

4 Policy instruments such as the Dublin Convention (1990, in force as per 1 November 1996), the Resolution on Minimum Guarantees for Asylum Procedures, the Joint Position on the Harmonised Application of the Term 'Refugee', the Convention on Simplified Extradition Procedures

and so on, have been criticised for lacking adequate protection of human rights, equality of treatment and non-discrimination, and for their uneasy relationship with the Geneva Convention as amended by the 1967 New York Protocol. For a review of these criticisms, see Spencer (1995).

5 A report of the House of Lords Select Committee on the European Communities (1997–1998) recommends the introduction of a similar UK parliamentary scrutiny reserve.

6 The Schengen *acquis* consists of the 1985 Schengen Agreement; the 1990 Schengen Implementing Convention; the Accession Protocols with related Final Acts and Declarations; decisions and declarations adopted by the Schengen Executive Committee; and acts adopted by the organs upon which the Executive Committee has conferred decision-making powers.

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