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**A positive example of international legalisation?
European Basic Rights, Citizenship Politics and the building of
international norms**

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A positive example for international legalisation?

European basic rights, citizenship politics and the building of international norms

Abstract:

This paper argues that EU citizenship and basic rights policies represent a positive example of international legalisation. Both have led to a relatively broad range of rights that are relatively successfully implemented and enforced. In this sense there is no “politicisation of the law” in the EU to be noticed. But EU citizenship and basic rights policies also indicate problems that can ensue from a mere legalisation of politics. Law-making alone is not enough. It has to be accompanied or followed by the development of sufficient cultural and social recognition and democratic practice. Otherwise it could in the worst case tend to de-politicise and de-legitimise democratic politics.

Introduction

The politics around European Citizenship and EU basic rights represent a positive counter-example to the theses on the politicisation of international law outlined in the description of this workshop. To be in breach with EU citizenship law, as with EU law in general, cannot be judged to be increasingly legitimate, given that 'good' reasons are provided. It is rather the contrary that takes place. Within the EU in general, and in the policy areas of citizenship and basic rights in particular, norms are successfully shaped by legal procedures. Political leaders also can be lead to accept these norms by legal procedures like infringement proceedings. These take time, but prove to be law-enforcing. Over time the EU developed an impressive citizenship and basic rights catalogue. Can this be truly judged as a positive supranational norm-building process? And if so, to what extent this is the case?

In the following I will discuss the development in the policy area of European Citizenship and basic rights. The paper will be based on my Ph.D. thesis which was published in May. This work is settled in the subdisciplines of Political Theory and European Integration Studies. I analysed the policy area of European Citizenship with an analytical background in normative democratic theory.

In the first part I will present my methodological and normative framework. In the second, key steps and events in the area of EU citizenship and basic rights policy will be sketched. In the third part, I will discuss the development of EU citizenship and basic rights from a normative point of view and with regard to their social recognition and cultural validity. The fourth part presents my conclusions.

1. Definitions and normative assumptions

1.1. Definitions and methodological categories

Following classical definitions of Marshall (1950, 10–27) and Tilly (1975, 32) I understand citizenship to be the formalised as well as the practical relationship between a political entity and its members.

Furthermore, I distinguish four different aspects of citizenship:

- the *conditions* of access,
- the legal consequences of citizenship in the sense of citizens *rights* and *duties*,
- and the *active* content of citizenship (see also Turner 1997 and Kymlicka 2002).

In the analysis of European Citizenship development I used two more categories:

Citizenship policy defines all acts of legislative, executive and judicative institutions in a polity that define and shape citizenship top-down.

Citizenship practice contains the practice resulting from the implementation of the formal citizenship rules – this means it contains the practical realisation of the citizenship rights, and therefore active citizenship: citizenship practice is thus referring to acts on the same hierarchical level (among citizens) as well as to bottom-up-processes of the development of active citizenship.

1.2. The normative framework: the relationship of citizenship and democracy

There is a basic normative assumption at the heart of my argument: Democracy, no matter if it is conceptualised following a republican, communitarian or liberal ideal, needs to consist not only in election or citizenship rights, but also in democratic practice. Democratic institutions and procedures therefore must be carried and, at least to a certain extent, also actively filled by a democratic subject, a *demos*. The *demos* must identify itself to a minimum extent as such. And it must also identify to a minimum extent with the polity in question.

I will skip a broad discussion of *demos*-building in the EU and just sum up the most important results concerning the role of citizenship: There can be distinguished two opposite approaches regarding the process of *demos*-building. They both agree that a *demos*, from a normative point of view is constituted by democratic practice and the development of a democratic identity, a civil society, and a public space (see for example Habermas 1997, Scharpf 1998, Kielmannsegg 1996, 2003). But they disagree on how it will develop. The *no-demos-thesis* (Weiler 1995, 4) which is particularly dominant in the German debate claims *demos*-building to be a normative condition for the development of a) democratic institutions, and b) democratic practice in the EU: there has to exist a *demos* in the first place, then the EU may be democratised. Since the argument declares that the EU lacks a *demos*, its defenders also conclude that it should not be democratized, at least not concerning

institutions and procedures on EU level like the European Parliament (see for example Scharpf 1998 and Kielmannsegg 1996, 2003).

But, as it has been put forward among others by Jürgen Habermas (1997) and Rainer Lepsius (1999), democratic identity as well as a European Public Space or a European Civil Society do not need to exist before further EU democratisation from a normative point of view. They will develop within (representative) democratic institutions and through democratic practice. It is democratic citizenship that enables this development.

I regard democratic citizenship therefore as one constitutive element of a *demos*: citizenship is a) the formal framework of a *demos*, because it defines who belongs to a democratic subject. In this sense, citizenship rights build b) the legal framework of a *demos*, because they define the basic rights of the citizens and the conditions for their political activity. And citizenship in a democracy is, or should be, c) also active citizenship, which develops democratic practice. Active citizenship also leads to the development of a public space, a civil society and a democratic identity. Therefore citizenship can be said to be the core of a *demos*.

This implies two decisive normative conditions: if citizenship shall be true democratic citizenship, it must also contain or lead to active citizenship. And if citizenship development shall be part of a *demos*-development, it must be linked to or followed by the development of the three other *demos*-elements: a democratic identity, a civil society, and a public space.

2. The development of EU citizenship: an overview

In the European Union a continual process of norm-building and norm implementation in the areas of basic rights and European citizenship took place.

The Treaty of Rome already defined several rights concerning the free circulation of persons and other rights concerning the economy and the inner-EU market – among them for example the right of men and women to equal pay, which was established at a time when measures against salary discrimination were not known in most member states. This right resulted from a French initiative to eliminate discriminating measures in the common market, and not out of the European governments persuasion of the equal rights of men and women. Several other rights that are related to the economic and market aspect of citizenship have been added into the European Treaties later on. The application of these rights was controlled and facilitated by the Commission and the European Court of Justice, and there has been achieved a considerable success in their realisation, even if there still exist many barriers today. But these rights are not citizenship rights in the proper sense, because they only apply to market participants. Thus they can be categorized as creating an *economic or market citizenship* – a citizenship that only concerns persons who contribute to the EU common market, be it as customers, producers, workers or providers.

The Maastricht Treaty brought a decisive change. As it defined the new Union Citizenship, it established for the first time clearly distinguished elements of a citizenship that was not only related to the status of a participant in the market – it defined political citizenship rights. EU citizens now had the right to vote in municipal elections in the country where they lived (and whose nationality they did not possess), and they got the option to vote in the EP elections in their host country. With the right to free circulation and settlement a liberal citizenship right was now enlarged to all EU citizens – albeit hindered by the condition that persons settling in another EU state must be able to earn their living. Additionally there were defined some protection rights: the right to petition to the EP, the right to consult the EP ombudsman and the right to diplomatic and consular protection in non-EU-countries for EU citizens by all EU embassies.

One main characteristic of Union Citizenship is that it does not – and the treaties underline that it shall not – endanger the respective member state citizenships. EU citizenship is derived from the possession of the nationality of an EU member state. In consequence this means that there is no proper EU nationality. In particular this is meaningful for third country nationals, as they do not have the possibility to achieve an independent Union Citizenship. Therefore, there exist different categories or levels of “foreignership” in the EU: first, there are the nationals of the respective member states, second, there are EU citizens, who are no “simple” but privileged foreigners, third, there are simple foreigners or “Third Country nationals” who visit the EU on legal grounds, and fourth there are foreigners being in a precarious or illegal situation, be it as asylum seekers or illegal immigrants. The rights resulting from Union Citizenship are applicable only to citizens of EU member states.

The next step was the European Charter of Basic Rights. The charter accomplished – after the market citizenship – the framework of *legal EU-citizenship*. It established for the first time basic rights of every EU citizen, and moreover rights that are considered as binding for all EU institutions. It has to be said, though, that in particular some social rights that have been gained in the member states, like the right to have work, have not been included. And the legal status of the charter was deliberately left undefined – malevolent commentators said that the British would never have agreed to it if it had been defined legally binding at once. The interesting thing is that the charter was nevertheless declared *politically* binding at once by all relevant institutions, in particular the European Court of Justice, who in his judgements acts as according to the charter since.

The charter – by way of indirect and political relations – is thus also relevant for third country nationals for the first time: since it is binding for all EU institutions, and since it does not differentiate in most of its articles between EU citizens and others, but defines that “all institutions of the EU as well as the member states, while applying EU law” must act as

according to the charter, it is clear that the basic rights must also be applied to third country nationals as well.

The next decisive step was the text of the Constitutional Treaty. It made the Charter its integral part II. Moreover, the Treaty defined some more new political citizenship rights, like the right to initiate EU-wide referenda. After the ratification process got stuck with the negative French and Dutch referenda, the Council concluded in June 2007 that most of the changes the Constitutional Treaty included shall be integrated into the new reform treaty. The council defined a narrow mandate for an intergovernmental conference to negotiate the details of the new treaty (Council of the European Union 2007). It is therefore already clear that most of the progresses in the area of citizenship and democratic rights will be kept. But in Brussels the British resistances have been met again – the charter is no longer a direct part of the new treaty. But it has finally become a legally binding document even though only by means of a reference in the new text.

European citizenship rights therefore have been continuously increasing over the years. But the existence of rights does not necessarily mean they are also socially recognised and practised by all relevant actors. Concerning the citizenship rights, in the first years of their existence several practical breaches became evident. Commission and ECJ tried to counteract them. The Commission made reports and then new draft laws, it issued explicit warnings to member states breaking laws, and finally started infringement procedures. The ECJ pursued infringement procedures, and built law by its judgements.

The example of the area of free circulation illustrates these policy processes. Once the laws on free circulation in the EU had been passed, several problems showed concerning their realisation. A report the commission issued in 1997, the Veil report (European Commission 1997), named them: It showed that there were areas that were not regulated by the laws, there were laws which were not clear enough, there were problems when transferring EU laws into national law, and there existed problems with the national and local authorities who had to apply the laws.

Whereas the first two aspects concern law-making processes themselves and their perfection or imperfection, the latter two problems concern the social recognition and practical validity of these laws. It showed that in several areas laws simply were not accepted: people had to hand in proofs of income or support to local authorities in cases where the EU law said a simple declaration would be enough, people waited months for essential documents where the EU law said they should be issued quickly and without problems, and sometimes, because they had no clear legal status due to problems like these, people did not even have access to essential public services like water, electricity, or

telecommunication. In particular, the situation of family members of EU citizens was complicated.

In reaction to the Veil report which named a broad range of examples of these problems, the commission issued several new law proposals. They aimed in particular at creating a new and consistent law of free circulation of all EU citizens and their families (European Union 2001d). The commission also started infringement procedures against several member states (European Union 2005). Most of these law proposals have been successfully voted upon since. In particular the directive 2004/38/EG (European Union 2005b) marks a decisive step. It defines, like the Veil-report had claimed, a standardized regulation of rights of residence of EU citizens and their family members. It interdicts member states and their authorities to hinder the free circulation of EU citizens by claiming Visa or not issuing travel documents and fixes the possession of a valid EU travel document as sufficient. EU citizens can stay in another member state for three months without any obligations. If they stay longer, the directive fixes exactly which documents they have to show to local authorities. In particular it states that local authorities have to accept a declaration on the means of subsistence, and may not claim other proof. The member states have been obliged to inform EU citizens on their rights and had to apply the directive by April 30th, 2006.

The commission, therefore, acted as quickly as it could after the Veil-report had shown the practical problems. But the law-making process has been advancing like law-making processes in most of the other EU policy areas do: The principal actors until very recently have been the Commission and the ECJ. The role of the Commission has been to collect information, make reports and White Papers, and then later issue warnings to member states which did not comply, to finally start some infringement procedures. The role of the ECJ has been to pursue infringement procedures, and to build law by its judgements. What the commission could not change was the social recognition of the laws – it simply made it more complicated to disobey them, because laws were formulated more clearly now.

The example of the policy process in the area of free circulation can stand as an example for similar developments in the other areas of EU citizenship and basic rights. In all of them, the Commission and the ECJ have been the main actors for several years. The role of member states governments has been increasing: in the first place it was them who voted on the Commissions proposals in the Council, of late the member states governments have helped to push forward the development in some areas, like the implementation of a network of specialists on basic rights which regularly reports on the situation in the EU and its member states. It has become the EU agency on basic rights since January 2007. The role of the parliament has been increasing over the years, too: not only does it have the right of co-decision in the area of Union Citizenship, which is part of the Common Market policies, but it is also the Parliament which is responsible for the EU ombudsman and for the right to

petition. Both rights have experienced a growing use in the last years. Moreover, the petition committee in several cases of environmental problems acted as a political actor on site. It came to hold hearings, speak to activists, and create public attention – as well for the environmental problems in question and the respective activists as for the EP and its petition committee.

This overview allows a positive conclusion first: in the fifteen years following 1992 the elements that constitute EU citizenship have been enlarged in a considerable degree. While before Maastricht, EU citizens rights were limited to the ones directly related to participation in the common market, today not only the rights concerning the Union Citizenship are defined, but also a comprehensive catalogue of basic rights. EU citizenship laws today offer a considerable range of the classical citizenship *acquis* to EU citizens all over the EU.

EU citizenship thus is not a static thing, but must rather be understood as a process. Laws have been accompanied by enforcement measures, and they evolve quickly if need is, following a rhythm of “report – white paper development – law project – new law”. The decisive actors in shaping both that process and EU citizenship have been the EU commission, the European court of justice, and (later) the EU heads of state. The parliament also expanded its role.

The development of EU citizenship and basic rights in this sense can be termed a positive example of international legalisation. There are no tendencies of a politicisation of the law in the sense of non-acceptance of rules, or a political and/or opportunistic definition of individual reasons for law-breaking. Rather the contrary is true: Law in the area of EU citizenship and basic rights is successfully built through decision making and law enforcement procedures. The results only 15 years after the introduction of Union Citizenship are quite impressive.

3. Discussion

Concerning merely the successful supranational law-making process this result is of course very impressive. But what is it about social recognition and cultural validity of these rights? What about their link to *demos*-building? Regarding *what* EU citizenship contains, *how* it has developed, and *who* were the decisive actors in influencing and pushing forward this development, my central result relativises the positive first conclusion and can be summed up in one sentence:

In the moment, EU citizenship is a derived, passive, sectoral multi-level legal citizenship without proper disciplinary institutions.

What does this mean regarding the social and cultural recognition as well as the link between citizenship rights and the development of democratic practice?

1) The EU has no proper nationality, instead the status of EU citizenship is derived from the member states nationality. From a normative point of view, this has no direct negative consequences, because EU citizenship still defines a citizenship that can be active. But probably it makes the citizens identification with the EU more difficult, and therefore the cultural and social recognition of the rights.

2) EU citizenship is passive. This conclusion is crucial with regard to the normative criteria: Currently citizenship policies that are led top-down by the EU and nation states institutions are dominant in the EU. Bottom-up citizenship practice seldom goes further than participating in EU referenda or voting for the European Parliament. This means that in the EU the passive use of rights by citizens in the moment is more important than their active use. The social and cultural meaning of EU citizenship currently is poorly developed. The normative condition named in the beginning is barely fulfilled, since EU citizenship today does not consist in much democratic practice. But active citizenship and EU civil society get stronger – lately there have been growing NGO activities, petitions to the EP, and even several EU-wide demonstrations.

3) EU citizenship is sectoral citizenship:

Following T.H. Marshall's (1950, 10–27) classical distinction, one can differentiate several kinds of rights in the western citizenship *acquis*. They also correspond to historical phases: first rights of protection through the state, then civil liberties or rights of protection from the state, after that the political rights and finally social and cultural rights.

Looking at the EU with that distinction in mind, one notices a decisive difference to the nation states: In a nation state, a person that acquires a nationality also acquires the whole range of protection and liberties guaranteed by that *acquis*, whereas in the EU currently the range and the strength of the rights ensuing from EU citizenship differ in different policy areas or sectors.

The first sector is the market or economic citizenship which merely is valid for participants in the Common Market. But in that limited sector, from the beginning of European integration citizenship had the character of a clearly defined relationship between individuals and the EU. Like in the nation-states rights can be claimed. But whereas in the construction process of nation states liberal rights came first and social rights developed later, economic citizenship from the beginning contained liberal and social rights. But these are not universal civil rights, they only concern the limited policy area of the inner market. Moreover, they mostly consist in liberal rights like free market access, non-discrimination etc.. The part social rights have is much smaller. There are some which have the character of non-discrimination rights or set minimum standards.

The Maastricht Treaty introduced Union Citizenship, which contained a first but very rudimentary bunch of citizenship rights that were applicable to all citizens irrespective of their

participation in the market: Union Citizenship defined political and liberal citizens rights on the EU level. This catalogue was much enlarged by the charter of basic rights. The charter contains a complete catalogue covering most of the classical categories of citizenship and basic rights.

The development that was begun with the Maastricht treaty and accomplished with the charter can be defined as the step from EU economic to EU legal citizenship. I would argue thus despite several possible criticisms: the status of the charter until June was not clearly defined, the rights that are included can be judged insufficient, and the legal citizenship remains incomplete concerning the resulting laws and their implementation.

Despite all changes, EU citizenship still is sectoral. This makes social and cultural recognition more difficult, because rights get less visible. But it is not a problem in itself from a normative point of view - even if it can become one in combination with the fact that EU citizenship is multilevel-citizenship:

4) Citizenship rights in the EU are spread on different levels.

This means that there still exist essential differences concerning the density of rights, laws, and the means of their application, when comparing nation states and the EU. Economic as well as political EU-citizenship fixed only parts of the classical citizenship rights *acquis* on the EU level, whereas the other parts stayed on the national level.

While for several economic questions the EU level is the decisive one, social rights remain nearly entirely on the national level. I would suggest to call the economic part of EU citizenship „thick“, whereas its other parts concerning basic political and social rights are „thin“, and still other classical parts of citizenship are not even existing on the EU level.

This is of course a consequence of an integration process centring on economic integration and a common market. It will complicate the social and cultural recognition of the rights. Presuming that democracy also necessitates basic social rights, this also means that the quality of democracy in the EU will depend on their being guaranteed on the national level.

5) EU citizenship is legal citizenship with a passive character. It broadened the range of rights EU citizens can profit from in members states that are not their home countries, and it contains a range of modern citizenship rights that widen the classical *acquis* in particular in the areas of antidiscrimination and equal treatment. This means that in the EU a new layer of citizenship rights has developed. The range of citizenship rights the EU provides in some areas is broader than those of the nation states. But it is important to note that the formal legal situation is further advanced than the practice.

The current passive character of the legal citizenship as well as the discrepancy between formal and practical rights must be judged as problems as well for the social and cultural recognition of the rights as from a normative point of view. But the development of modern

citizenship rights as well as the fact that EU citizens profit from their rights in all 27 EU member states has to be valued as an important gain.

6) There do not exist EU citizen's duties.

This is directly related to the fact that the EU does not have its own disciplinary institutions (like a compulsory EU army). From a normative point of view, this is a positive sign: as EU citizenship comes along without compulsory duties, it fits better into the normative democratic ideal of freedom of access and mutual consent. But disciplinary institutions also enable the top-down creation of identification. Therefore, the EU also lacks a possibility to create the social recognition it needs.

7) Social recognition and cultural validity of European citizenship and basic rights in sum still are poorly developed. Many European Citizens do not know about all of their new rights. European citizenship and basic rights in the moment can be judged as being distant from those they affect.

4. Conclusions

Which lessons can be learned from the politics in the area of European citizenship and basic rights? What do the results indicate with regard to international legal norms in general? Is it possible to have the positive effects of a successful international legislative process without the dangers it presents?

First, the EU laws, compared to other international laws, despite the criticism that has been discussed, can be judged as being relatively successful. The EU has succeeded in creating international citizenship norms as well as in implementing them by legal procedures. This can be judged as an indicator for the fact that it takes more than just legal procedures to build norms. In particular the strong supranational institutional EU system seems to be a decisive factor for the relatively successful law-making and implementation process. The commission is the guardian of the Treaties and disposes of law enforcement means. On the contrary, the fact that in international law no similarly strong institutional systems exist can be assumed to be one of the reasons for an increasing number of law breaches. Probably it would improve the respect for international law if it got an institutional backing similar to the one in the EU.

Second, regarding the basic normative premise – democracy has to consist not only in formal elements and rights, but also in democratic practice and active citizenship – one main deficit of current EU citizenship has shown: in the moment the active completion of citizenship by active EU citizens is weak. The legal framework of EU citizenship rights has not yet been filled by a considerable degree of democratic practice. This means: a *demos* in the sense of an active democratic citizenry is existing, but it is weak – or one could probably better say: there exists the nucleus, the core of a *demos*, but it needs to gain a more active life.

Therefore the successful example of EU citizenship and basic rights indicates a crucial aspect of a legalisation of politics: the mere development of international law is not enough. Law-making in itself does not make democracy work, it can simply built the framework for it. It has to be completed by social and cultural recognition, and by democratic practice.

But what was said about EU citizenship has been a judgement of the last 15 years development and the current situation. The results indicate only crucial points and potential dangers for the further development – they do not predict its way. What has been happening in 15 years is quite impressive, and the process is continuing. There are legal innovations in view with the new treaty and commission policies going on in areas like antidiscrimination. Of late public interest into the EU and political activities directed to the EU have been increasing. Thus, the crucial question is: will the current flaws of EU citizenship be remedied in its further development process or not?

Third, even if EU citizenship and basic rights can be termed a relatively successful example of supranational law-making, in the moment they still show some flaws. Given the fact that in the EU both the institutional context and the social recognition can be judged to be stronger than on any international or world-wide level, a satisfactory international norm-building will be much more difficult than in the EU.

Fourth, the perspectives for the development of a better social and cultural recognition and more democratic practice do not yet seem clear. To what degree this will happen will probably depend on whether a positive interrelation between top-down citizenship politics and bottom-up citizenship practice develops or not. In the modern western nation states it was for example the use of the right to vote, to free expression of opinion or the founding of parties that developed civil society and a public sphere and therefore a *demos*. Thus, two Scenarios seem possible:

EU citizenship can either keep its weak, passive and legal character in the sense of a citizenry that is not much politically active and interested regarding the EU. This would also mean that the EU would be obliged to go along with a weak *demos*. Weak in this context will mean: weaker than what we experience in representative nation states, because the democratic traditions and foundings of the EU until now are weaker than in the nation states with their long traditions in this respect. Moreover, if there are no impulses coming bottom-up, there is no possibility for a positive interrelation between top-down-citizenship policies and bottom-up citizenship practice, between legal innovations and active citizenship. Probably, in that scenario, the citizenship development would be limited to further steps in top-down citizenship policies like the enlargement of the existing union citizens rights. If social recognition and democratic practice lacked completely, in the worst case the legalisation of politics could enhance a de-politicisation or even de-legitimation of politics.

In another scenario existing NGO activities, citizens initiatives and protests would intensify more and more and fill the legal framework with democratic practice. Since there have been more and more examples of active EU citizenship in the last years, it seems probable that it will strengthen compared to today's situation. This would encourage legal progress as well as the development of a stronger *demos*.

This means that successful international law-making processes do not necessarily bear the dangers of a de-politicisation and de-legitimisation. They do so only if law-making durably lacks to be followed and completed by bottom-up-initiatives, social recognition of the norms, and a related democratic practice.

Regarding the EU, the following years will be decisive. Taking into account the duration of historical processes, one cannot rightfully claim all the exigencies concerning social recognition, cultural validity and democratic practice must be fulfilled today or tomorrow. When comparing the EU development to other democratisation processes, it seems to have been quite quick – for example in the modern nation states democracy took several centuries to develop up to modern standards. Therefore, the EU must be accorded time before one can adequately judge its democratic quality. The way the development of an EU *demos* will go will depend to a large extent on what the *demos*-in-the-making, the EU citizens themselves will do. And it will depend on the interrelation of bottom-up citizenship practice and top-down citizenship policies – or one could also say: on the relation of social struggles, political activity, and government techniques.

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