EUROPEAN INTEGRATION AND THE GIFT OF THE SECOND CLASS CITIZENSHIP

The Absence of the Tools within the European Legal System to Combat Temporary Discrimination of European Citizens on the Basis of Nationality Institutionalised by the Acts of Accession

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Abstract

The introduction by the recent Acts of Accession (2003 regarding the accession of ten new countries to the EU in May 2004 and 2005 regarding the accession of Romania and Bulgaria to the EU) of the transitional periods suspending the application of the core of the free-movement right to workers coming from the new Member States of the European Union has direct implications on the concept of European citizenship, unduly diminishing citizenship rights of the nationals of the new Member States and introducing a division of European citizens into classes based on their nationality, thus contradicting the spirit of European integration. This note aims at assessing the legal means to challenge the legitimacy of such a treatment of European citizenship. The conclusions are alarming: playing in the legal field nothing can be done to remedy the maltreatment of the European citizenship concept in the course of the latest enlargements and to protect the European citizens coming from the new Member States from the institutionalised discrimination on the basis of nationality.

'he is entitled to say "civis europeus" sum, and to invoke that status in order to oppose any violation of his fundamental rights'.

Advocate General Jacobs[1]

The citizenship of the European Union (European citizenship) has been one of the favorite topics of a number of academics right from the moment of its creation in 1992. The body of literature dealing with its unique nature and the perspectives of its development is very wide.[2] Much less attention has been given to the interrelation between the strengthening of the concept of European citizenship and the process of enlargement of the European Union.[3] Although a number of publications dealt with the transitional periods temporarily limiting the free-movement rights of the workers from the new Member States after enlargement,[4] they usually stopped short of making a link between such limitations and the negative consequences they might potentially have on the citizenship of the European Union. Only recent Dougan's contribution tries

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[1] Opinion of A. G. Jacobs in Case C-168/91 *Christos Konstantinidis* v. *Stadt Altensteig – Standesamt and Landesamt and Landratsamt Calw - Ordnungsamt*, [1993] ECR I-1191 para 46.

[2] See *e.g.* Dougan, Michael and Spaventa, Eleanor, 'Educating Rudy and the (non-)English Patient: A double-bill on Residency Rights under Article 18 EC', in 28 *ELR*, 5, 2003; Reich, Norbert & Harbacevica, Solvita, 'Citizenship and Family on Trial: a Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons', in *CMLRev.* 40, 2003; Vink, Maarten P., 'Limits of European Citizenship: European integration and Domestic Immigration Policies', in *ConWEB*, No 4, 2003, available at <http://www.les1.man.ac.uk/conweb/>; Fischer, Thomas C., 'European "Citizenship": In its Own Right and in Comparison with the United States', 5 *CYbELS*, 2002 – 2003; Castro Oliviera, Á., 'Workers and Other Persons: Step by Step Movement to Citizenship – Case Law 1995 – 2001', in 39 *CMLRev.*, 2002; Reich, Norbert, 'Union Citizenship – Yesterday, Today and Tomorrow!', in *RGSL WP*, 3, Riga, 2001; Román, Ediberto, 'Members and Outsiders: an Examination of the Models of United States Citizenship As Well As Questions Concerning European Union Citizenship', in 9 *U. Miami Int'l & Comp. L. Rev.*, 2000/2001; Schrauwen, Annette, 'Sink or Swim Together? Developments in European Citizenship', in *Fordham Int'l L.J.*, 2000; Kostakopoulou, Thodora, 'Nested "Old" and "New" Citizenships in the European Union: Bringing out the Complexity', in 5 *Columb. J. Eur. L.*, 1999; Wiener, Antje, *'European' Citizenship Practice, Building Institutions of a Non-State*, Oxford: Westview Press, 1998; Weiler, Joseph H. H., 'To be a European Citizen – Eros and Civilization', in *JEPP*, 4, December 1997; Wiener, Antje, 'Assessing the Constructive Potential of Union Citizenship – A Socio-Historical Perspective', in 1 *EIoP*, No 017, 1997, available at <http://www.eiop.or.at/eiop/texte/1997-017a.htm>; O'Leary, Síofra, *The Evolving Concept of Community Citizenship, From Free Movement of Persons to Community Citizenship*, The Hague: Kluwer Law International, 1996; Kostakopoulou, Theodora, 'Towards a Theory of Constructive Citizenship in Europe', in *J. Pol. Phil.* 4, 1996; Preuß, Ulrich K., 'Problems of a Concept of European Citizenship', in 1 *ELJ* 3, 1995; Closa, Carlos, 'Citizenship of the Union and Nationality of the Member States', in 32 *CMLRev.*, 1995; O'Keeffe, David, 'Union Citizenship', in O'Keeffe, David & Twomey, Patrick M., *Legal Issues of the Maastricht Treaty*, London: Wiley Chancery Law, 1994; Closa, Carlos, 'Citizenship of the Union and Nationality of the Member States' in O'Keeffe, David & Twomey, Patrick M. (eds.), *Legal Issues of the Maastricht Treaty*, London: Wiley Chancery Law, 1994; Meehan, Elizabeth, *Citizenship and the European Community*, London: SAGE, 1993; Jessurun d'Oliveira, Hans U., 'European Citizenship: Its Meaning, Its Potential', in Monar, Joerg; Ungerer, Werner & Wessels, Wolfgang (eds.), *The Maastricht Treaty on European Union: Legal Complexity and Political Dynamic*, Brussels: European Interuniversity Press, 1993; Closa, Carlos, 'The Concept of Citizenship in the Treaty of European Union', in 29 *CMLRev.*, 1992;

[3] See Kochenov, Dimitry, 'The European Citizenship Concept and Enlargement of the Union', in 3 *Rom. J. Pol. Sci.*, 2, 2003.

[4] Adinolfi, Adelina, 'Free Movement and Access to Work of Citizens of the New Member States: The Transitional Measures', 42 *CMLRev.*, 2005; Farkas, Orsolya and Rymkevitch, Olga, 'Immigration and the Free Movement of Workers after Enlargement: Contrasting Choices', *IJCLLIR*, 2004.

to bridge this gap.[5] This paper tries to assess the transitional periods from the European citizenship point of view, thus building on the Dougan's approach.

The experience of the last EU enlargement rounds demonstrates that the treatment of European citizenship by the Member States and the Community institutions as well as by the candidate countries, is still an embarrassment,[6] as a 'second class' European citizenship[7] was created by the 2003 Act of Accession[8] and recently confirmed by the 2005 Act of Accession.[9] This development might lead to terrible consequences for the future of the European citizenship concept as such. It is not among the goals of the present paper to explain the importance of the European citizenship concept and its meaningfulness: such information is readily available in scholarly literature.[10] Instead, it will focus on the citizenship rights of the nationals of the new Member States and on the practical consequences of enlargement for the legal status of the nationals of both the countries of Central and Eastern Europe that entered the European Union on May 1 2004, and of the nationals of Romania and Bulgaria to enter the EU in the nearest future. A special emphasis will be made on the right to move and reside freely and the implications of the recent developments in free-movement on the development of the European citizenship concept.

Theoretically, citizenship is understood by many as a monolithic concept, which cannot be applied differently to different groups in society. The status of a citizen is a sign of belonging to a community, which confers on the individual a set of rights and obligations.[11] Even taking into account a specific derivative nature of the European Union citizenship,[12] it is clear that the core meaning of the concept has been shaped by now and should not be neglected. Citizenship is a sign of equality, thus the rights of one citizen should be the same as the rights of any other.

It is equality that is undermined (although temporarily) by the 2003 and 2005 Acts of Accession. Both Acts stipulate the establishment of transition periods for certain core rights enjoyed by the nationals of the Member States *i. e.* by the European citizens. The result of the introduction of such transitional periods is the creation of two (or more) classes of European citizens enjoying different rights based on their nationality. Such a division of citizens undermines the very foundation of the concept.

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[5] Dougan, Michael, 'A Spectre Is Haunting Europe… Free Movement of Persons and the Eastern Enlargement', in Hillion, Christoph (ed.), *EU Enlargement: A Legal Approach*, Oxford /Portland: Hart, 2004.
[6] As it was in 1997: See Weiler, Joseph H. H., 'To Be a European Citizen – Eros and Civilization', in *JEPP* 4, 1997, at 499.
[7] Kochenov (2003).
[8] *OJ* L 236, 2003. For analysis see Inglis, Kirstyn and Ott, Andrea, 'EU-uitbreiding en Toetreidingsverdrag: verzoening van droom en werkelijkheid', 52 (20) *SEW* 4, 2004. The legal status of the citizens of Malta and Cyprus is considerably different from that of the nationals of other new Member States, that is why the present article only focuses on the eight new Member States form Central and Eastern Europe.
[9] *OJ* L 157, 2005.
[10] See note 2 *supra*.
[11] For a 'classical' account of citizenship see *e.g.* Shklar, Judith N., *American Citizenship: The Quest for Inclusion*, Cambridge MA: Harvard University Press, 1991; Heater, Derek, *Citizenship: The Civic Ideal in World History, Politics and Education*, 1990; and Waltzer, Michael, 'Citizenship in Political Innovation and Conceptual Change', in Terrence Ball *et al.* (eds.), *Political Innovation and Conceptual Change*, Cambridge: Cambridge University Press, 1989.
[12] Art 17(1) EC, Closa (1995), at 510.

The note will proceed addressing the following questions: Firstly, a brief outline of the nature of European citizenship (which, being a citizenship of an entity *sui generis* – the European Union[13] – is quite different from the state citizenship lawyers and political scientists are used to dealing with) and the scope of rights enjoyed by the European citizens will be given (**I.**). Secondly, the Annexes to the 2003 and 2005 Acts of Accession will be analyzed with a view to demonstrate the implications they have in the European citizenship domain (**II.**). Thirdly, the legality of the provisions of the Annexes will be assessed in order to answer the question whether European law prohibits the temporary suspension of the core citizenship rights of Europeans, *de facto* amounting to disregarding the European citizenship concept. Possibilities of legal action aimed at combating the transitional periods will also be assessed (**III.**). Fourthly, based on the experience of the previous enlargements, the paper will dismiss any comparisons with the existing tradition of transitional periods, *i. e.* the transitional measures applied during the previous enlargement rounds. Since previous free-movement right suspensions were effectuated before the European citizenship made it into the Treaties, they only used to limit the workers' rights, having no implications on the then non-existent European citizenship concept. Once free-movement right became a core element of European citizenship, the reference to the previous pre-citizenship experience seems legally incorrect (**IV.**).

The conclusions are alarming: playing in the legal field nothing can be done to remedy the maltreatment of the European citizenship concept in the course of the latest enlargements. Moreover, all the actors in the enlargement process tend to behave in a way as if European citizenship were non-existent. The bitter consequences of the way enlargements are regulated amounts to a blow to the European citizenship concept, legalizing discrimination and departing from the main values of European integration. In other words, the equality ideal inherent in the process of European integration has fallen a victim of political games and 'intense nervousness'[14] surrounding the free-movement issue and there seems to be no legal means available to change the situation.

I.

While the European citizenship concept was only included into the European Community Treaty in 1992 in the form of Part II of the EC Treaty, its roots go back to the 1970s.[15] Already, European citizenship became part of the so-called 'informal' resources of the *aquis communautaire*, as Wiener has demonstrated.[16] Even having such a rich history, formally the citizenship story only started from the EC Treaty as amended at Maastricht. Moreover, until recently the European citizenship provisions have been treated as purely declarative, before the European Court of Justice (ECJ)

[13] Caporaso, James A., 'Does the European Union Represent and *n* of 1?', 10 *ECSA Review* 3, 1997.
[14] White, Robin C. A., 'The Citizen's Right to Free Movement', *EBLRev.*, 2005, at 551.
[15] See *e.g.* van den Berghe, Guido & Huber, Christian H., 'European Citizenship', in Bieber, Roland & Niekel, Dietmar, *Das Europa der zweiten Generation, Gedächtnisschrift für Christoph Sasse*, Band II, Kehl am Rein: N.P. Engel Verlag, 1981; Plender, Richard, 'An Incipient Form of European Citizenship', in Jacobs, Francis G. (ed.), *European Law and the Individual*, Amsterdam /New York /Oxford: North Holland, 1976.
[16] Wiener (1997), at 6.

has changed the situation in a seminal line of case-law from *Sala* to *Grzelczyk* and *Baumbast*.[17]

Initially, both the ECJ[18] and the Court of the First Instance (CFI)[19] were extremely reluctant to give legal meaning to the citizenship provisions of the EC Treaty, which generated a great deal of disappointment among the scholars. Gormley, for example, characterised European citizenship as 'a flag which fails to cover its cargo'.[20] Alongside with upsetting the academics, this reluctance was undoubtedly generating much uncertainty, ultimately making one of the Member States' courts to draft a preliminary ruling asking ECJ to clarify, *inter alia*, whether European citizenship had any legal meaning at all.[21] In other words, whether European citizenship meant anything was quite uncertain, the future of the concept being also far from bright. The only persons to believe in the great potential of the European Citizenship as a direct source of rights, apart from the academics of course were the Advocates General of the ECJ, seizing every opportunity to argue in favor of a strong and legally meaningful European citizenship.[22]

The reasons for such a situation are easily explainable. At the moment of its creation, the European Union was not ready to digest a 'true' citizenship, not to mention that self-standing European citizenship would have been contrary to the wishes of a number of its Member States. This situation resulted in the invention of something unknown before – a citizenship of derivative nature. Fearing that the concept would have gained importance unwanted by many, the Treaty made a firm connection between European citizenship and nationality of a Member State. Thus the only way to become a European Union citizen is either to be a national of one of the Member States,[23] or to be a citizen of a country that joins the Union,[24] since according to the EC law as it stands to date the Union is not empowered to influence the Member States' citizenship policies.[25] At the same time, it should be noted that the derivative nature of European citizenship does not necessarily mean the derivative nature of

[17] Case C-86/96 *Martínez Sala* v. *Freistaat Bayern* [1998] ECR I-2691; Case C-184/99 *Rudy Grzelczyk* v. *le Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-413/99 *Baumbast and R.* v. *Secretary of State for Employment*, [2002] ECR I-7091. Cf.: Dougan and Spaventa (2003); Reich and Harbacevica (2003); Kochenov (2003); Castro Oliviera (2002).
[18] See *e.g.* Case C-192/94 *Skanavi* v. *Chryssanthakopoulos* [1996] ECR I-929; Joined cases C-64/96 & C-65/96 *Land Nordrhein-Westfalen* v. *Uecker & Jacquet* [1997] ECR I-3171; Case C-348/96 *Criminal proceedings against Donatella Calfa* [1999] ECR I-11 (commented by Costello: 37 *CMLRev.*, 2000, at 817); Case C-378/97 *Criminal proceedings against Florius Ariel Wijsenbeek* [1999], ECR I-6207.
[19] Case T-66/95 *Hedwig Kuchlenz-Winter* v. *Commission* [1997] ECR II-637.
[20] Kaptein, P. J. G. and VerLoren van Themaat, P. (Gormley, L. W. (ed.)), *Introduction to the Law of the European Communities*, IIIrd ed., London /The Hague /Boston: Kluwer Law International, 1998, at 174.
[21] Konstakopoulou (1999), note 92.
[22] See *e.g.* Opinion of A. G. Jacobs in Case C-168/91 *Christos Konstantinidis* [1993] ECR I-1191, para 46; opinion of A. G. Léger in Case C-214/94 *Boukhalfa* v. *Bundesrepublik Deutsland* [1996] ECR I-2253, para 63; opinion of A. G. Ruis-Jarabo Colomer in Joined cases C-65 & C-111/95 *The Queen* v. *Secretary for the Home Department ex parte Shingara and Radiom* [1997] ECR I-3343, para 34.
[23] It is up to domestic law of the Member States to define who their citizens are for the purposes of the European law: Case 192/99 *The Queen* v. *Secretary of State for the Home Department*, ex parte *Manjit Kaur* [2001] ECR I-1237. Although such definition should be made with 'due regard of Community law': Case C-369/90 *Micheletti* v. *Delegación del Gobierno en Cantabria* [1993] ECR I-4239.
[24] Art. 17 EC.
[25] At the same time, the Union has a possibility to influence the citizenship policies of the candidate countries in the course of the pre-accession exercise. See Kochenov, Dimitry, 'Pre-Accession, Naturalisation, and "Due Regard to Community Law"', 4 *Rom. J. Pol. Sci.* 2, 2004.

rights stemming from it. As Fischer rightly emphasises, these rights are quite unique, since they include the rights 'no signatory Member State [alone] could possibly confer: […] no single Member State could give its nationals permission to work, reside, or offer services in the territory of another state without its permission'.[26]

Even if the anecdote attributing to señor Gonsalez the inventive initiative to hurriedly insert Part II (dealing with European citizenship) into the EC Treaty without any thought about actual European identity were true,[27] it is nevertheless hard to believe that citizenship made its way to the primary law of the European Community with no reason at all. However, even if at first glance this impression might seem unjustified it might very well have been the case. If only we compare the scope of the rights that the Member States' nationals enjoy under the European citizenship provisions with the rights they enjoy based on the provisions to be found elsewhere in the Treaties, it is clear that citizenship does not provide nationals of the Member States with any 'new' rights. The story is, however, not as simple as this.

Indeed, according to Part II of the EC Treaty, European citizens have the rights, including (but not limited to) to:

1. move and reside freely within the territory of the Union;[28]
2. participate in municipal elections[29] and the elections of the European Parliament;[30]
3. petition the EP;[31]
4. access to the Commission, Council and EP documents;[32]
5. apply to the European Ombudsman;[33]
6. enjoy diplomatic protection of any other Member State in the territory of a third country.[34]

Almost every right included in the list of Part II EC, with probably the sole exception of the right to enjoy the diplomatic protection of another Member State in the territory of a third country, has its 'twin-right' elsewhere in the text of the Treaty, like the right to free movement of Article 39 EC, for example. Moreover, some 'citizenship' rights are by nature not exclusively reserved to European citizens, but to all those who legally reside in the EU, as follows from the language of Articles 194 and 255 EC, for example. So the right to petition the EP, for instance, belongs to 'any citizen of the Union and any natural or legal person residing or having a registered office in a Member State'.[35]

[26] Fischer (2002 - 2003), at 362.
[27] Weiler (1997 'Eros and Civilisation'), at 499.
[28] Art. 18(1) EC. Cf.: White (2005).
[29] Art. 19(1) EC.
[30] Art. 19(2) EC.
[31] Arts. 21 and 194 EC.
[32] Arts. 21 and 255 EC.
[33] Arts. 21 and 195 EC.
[34] Art. 20 EC.
[35] Art. 194 EC.

Thus it was probably the absence of any *nouveautés* from this list that made the courts as well as the citizens themselves wonder whether Part II of the Treaty actually had any legal meaning.

At the same time, the scope of application of the two almost identical lists of rights in question – the European citizenship rights and the rights stemming from other Parts of the Treaty – differs to a great extent. It is this difference that is of importance. While the rights to be found in Part II of the EC Treaty apply to 'European citizens', *i. e.* all the nationals of all the Member States, the rights to be found elsewhere in the Treaty only apply to specific categories of the Member States' nationals. These categories cover almost all the population of the European Union, but there are nevertheless certain exceptions.

What are those categories? Firstly, and most importantly, these are the workers, as understood under European law,[36] students,[37] persons with independent means[38] and retired persons.[39] It is clear that however broad those categories might be understood, there is still room for 'others', those who are outside of the scope of all those categories. These are those 'others' for whom the legal meaning of the European citizenship concept is essential.

Some scholars make a terminological division of all Member States' nationals to *bourgeois* (economically active citizens, covered by both Part II of the EC Treaty and other provisions) and *citoyens pur* (those, who can only rely on Part II of the EC Treaty, being neither workers, nor students nor falling within the scope of any other category named above).[40] Be European citizenship only declaratory, the *citoyens pur* would not be able to benefit from any rights stemming from the Treaties,

Initially the Court was reluctant to assist the creation of a legally enforceable set of rights for a *citoyen pur* in Europe. The latest case-law, however, clearly demonstrates that Part II of the EC Treaty became a powerful legal instrument of protection of European citizens' rights. Relying on Part II EC it is now possible not to be discriminated against in getting childcare allowance,[41] give your children the names you want,[42] and even get a limited financial assistance from a host state while studying at a university,[43] let alone the residence rights in the Member State other than your

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[36] Case 75/63 *Hoekstra, née Unger* v. *Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177; Case 36/74 *Walrave & Koch* v. *Association Union Cycliste Interbationale et al.* [1974] ECR 1405, [1975] 1 CMLR 320; Case 53/81 *Levin* v. *Staatssecretaris van Justitie* [1982] ECR 1035; Joined cases 115 and 116/81 *Adoui and Cornuaille* v. *Belgian State et al.* [1982] ECR 1665, [1982] 3 CMLR 631; Case 66/85 *Lawrie-Blum* v. *Land Baden-Württemburg* [1986] ECR 2121; Case 39/86 *Lair* v. *Universität Hannover* [1988] ECR 3161, [1989] 3 CMLR 545; Case 196/87 *Steymann* v. *Staatssecretaris van Justitie* [1988] ECR 6159; Case 171/88 *Rinner-Kühn* v. *FWW Spezial-Gebäudereinigung GmbH & Co. KG* [1989] ECR 2743, [1993] 2 CMLR 932; Case 344/87 *Bettray* v. *Staatssecretaris van Justitie* [1989] ECR 1621; Case C-292/89 *R.* v. *The Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745; etc.
[37] Directive 93/96 [1993] *OJ* L317/59.
[38] Directive 90/364 [1990] *OJ* L180/26.
[39] Directive 90/365 [1990] *OJ* L180/28.
[40] Reich *et al.* (2003), at 628; O'Leary (1996), at 524.
[41] Case C-86/96 *Martínez Sala* v. *Freistaat Bayern* [1998] ECR I-2691.
[42] Case C-148/02 *Garcia Avello* v. *Belgian State* [2003] judgement of 2 October 2003.
[43] Case C-184/99 *Rudy Grzelczyk* v. *le Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, commented by Iliopoulou and Toner in 39 *CMLRev.*, 2001.

own (for people not falling within the *bourgeois* free-movement categories).[44] Even with a view of the latest citizenship case-law, however, some scholars hold that the introduction of the citizenship of the Union did not, legally speaking, bring much change[45] – a point contested by others, showing, with the legitimate reference to the recent citizenship case-law of the ECJ, that 'the citizens of the European Union now have a constitutional right to move and reside in Member States of their choice which flows from [European] citizenship'.[46] All this allowed Dougan to observe that 'enlargement is taking place in a particularly exciting point of the evolution of free movement law'.[47]

It is not the goal of this paper to follow the evolution of the citizenship case-law of the ECJ,[48] which can be found elsewhere.[49] Its task is to further elaborate on the interrelation between the two sets of rights: those of a *citoyen pur* and of a *bourgeois*, as well as to show some harmful effects the Acts of Accession have on the development of the European citizenship concept. Given the active approach of the ECJ to the equalizing of the two it becomes unclear how long the distinction between them will survive.

In the beginning of its citizenship case-law line, the ECJ tried by all means to demonstrate that there is no need for recurrence to the provisions of Part II of the EC Treaty as soon as the rights can be protected by the broadening of the *bourgeoisie* concept, by making it more and more inclusive.[50] Of course it would have been possible to continue moving in this direction; it seemed not logical to do so however, especially having the European citizenship concept at hand, linking the rights of a person solely to her European citizenship status, without paying any attention to her social status, wealth or occupation. It is thus quite reasonable to predict that the link between the activity/occupation and the enjoyment of the rights under European law will soon cease to exist and all the rights will only be derived from the citizenship status alone.[51]

To summarise, the ECJ jurisprudence has known significant developments since the European citizenship concept became part of the Treaty in 1992. At present, European citizenship rights are not only of great importance, but are on the way to becoming the sole basis for enjoyment of a number of rights in Community law, without further reference to a person's status as a *bourgeois*.

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[44] Case C-413/99 *Baumbast and R.* v. *Secretary of State for Employment*, [2002] ECR I-7091.
[45] Amtenbrink, Fabian and Vedder, Hans H. B., *Recht van de Europese Unie*, The Hague: Boom Juridische uitgevers, 2005, at 316.
[46] White (2005), at 547.
[47] Dougan (2004), at 116.
[48] Case C-86/96 *Sala* [1998] ECR I-2691; Case C-274/96, *Criminal proceedings against H. O. Bickel and U. Franz*, [1998] ECR I-7637; commented by Bulterman in 36 *CMLRev.*, 1999, at 1325; Case C-224/98 *Marie-Nathalie D'Hoop* v. *Office national d'emploi*, [2002] ECR I-1691; Case C-184/99 *Grzelczyk* [2001] ECR I-6193;, discussed by Reich *et al.* (2003), at 624; Case C-148/02 *Garcia Avello* v. *Belgian State* [2003] judgement of 2 October 2003, *etc.*
[49] Dougan *et al.* (2003); Reich *et al.* (2003); Kochenov (2003); Castro Oliviera (2002); Reich (2001); O'Leary (1996), *etc.*
[50] Case 186/87 *Cowan* v. *Tresor Public* [1989] ECR 195; Case C-60/00, *Mary Carpenter* v. *Secretary of State of the Home Department* [2002] ECR I-6279; Case C-348/96 *Criminal proceedings against Donatella Calfa*, [1999] ECR I-11; commented by Costello: 37 *CMLRev.,* 2000, at 817, *etc.*
[51] See *e.g.* Reich (2001).

II.

One should not be surprised not finding any limitations of the European citizenship rights mentioned expressly in the text of 2003 and 2005 Acts of Accession. Indeed, at first glance there are none. Even the word 'citizenship' as such is never to be found in the text of the Act. No reference is made to any provision of Part II EC in either. It would be naïve to state, however (as a scholar did),[52] that Article 18 EC is not subject to any derogation. Although unseen, the limitations to citizenship rights are there.

In order to find them, it is worth restating the two parallel lines of rights that exist in the Treaty – the rights of *citoyens* and those of *bourgeois*. Since the lists of rights are basically mirroring each other, it is enough to suspend a right using the provisions of one list, to make the same right based on the provisions of the second list non-operational. The main question is which set of rights gets priority in such a case. Since we already know that no rights of the citizenship list were suspended, the other list of rights should get priority over the rights in Part II EC Treaty in order for the limitations to these rights to be operational.

Unfortunately for the advocates of the European citizenship concept, the possibility to limit citizens' free movement right is built right into the text of the Treaty: Article 18 EC states in the second part of the first paragraph that the content of the article is: 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. This wording made some scholars to actually characterise the article as 'half-hearted'. Davies, for instance, opined that '[a]rticle 18 is, famously and strangely, a piece of higher legislation that is subject to lower legislation',[53] going on to add that it is without legal function.[54]

As recent case-law of the ECJ demonstrates, the importance of the article is growing steadily and thus to state that it is without legal function would probably be overpessimistic. At the same time, the wording of the article only allows for one possible reading: it is possible to limit the scope of the citizenship free movement right by means of virtually any piece of Community legislation – and of course by the Acts of Accession,[55] from which it follows that in order to limit citizenship rights of the newcomers it is not even necessary to mention such limitations in the Acts. The limitation can be performed by restricting the rights of the *bourgeois*. As soon as those are limited, the European citizenship rights will be limited as well.

The drafters of the Acts of Accession used this loophole (which was however intentionally built into the Treaty text by the Member States' very cautious treatment of supranational citizenship) in order to limit the rights of the new Member States

[52] Adinolfi (2005), at 481.
[53] Davies, Gareth, *Nationality Discrimination and Free Movement Law*, The Hague: Kluwer Law International, 2003, at 188.
[54] *Id.*, making reference to Joined Cases C-64 &65/96 *Land Nordrhein-Westfalen* v. *Uecker and Jacquet* [1997] ECR I-3171 para 23; See also Appeldoorn, Johen F. and Davies, Gareth, *Vier vrijheden: Een inleiding tot het recht van de Europese interne markt*, Den Haag: Boom Juridische uitgevers, 2003, at 92.
[55] Such Acts enjoy Treaty status, being integral parts of the Treaties of Accession.

nationals after accession – or, indeed, in order to put a limitation on the citizenship rights of a fraction of European citizens. It was a really secret *démarche*, as no discussion of the limitation of EU citizenship whatsoever preceded this move.[56] It is now reasonable to have a look at how far the limitation goes and how it was technically achieved.

The limitations contained in the 2003 Act of Accession target the 'the core and origin of European citizenship'[57] – the free movement right.[58]

According to the Annexes V, VI, VIII, IX, X, XII, XIII and XIV to the 2003 Act of Accession, and Annexes VI and VII to the 2005 Act of Accession the application of Articles 39 and 49(1) EC to the new Member States nationals is suspended, as part of the transitional measures.[59] A certain 'free movement' only exists for the new Member States nationals, willing to work temporarily, as defined in Article 1 of Directive 96/71/EC.[60] As far as the full-scale free movement of workers goes, the Annexes state that

> By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 and until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by [new Member States] nationals.[61]

The initial time for the application of the national measures is two years, this period, however, can be extended up to seven years. The formula provided by the Annexes is

$$2 + 3 + 2.$$

Right after the date of accession (May 1) the first two-year term for the suspension of the free-movement begins. Once two years are over, the Council will review the situation in the field of free movement on the basis of a report from the Commission, and the Member States 'shall notify the Commission whether they will continue applying national measures or measures resulting from bilateral agreements, or whether they will apply Articles 1 to 6 of Regulation (EEC) No 1612/68'.[62] It is important that in the absence of such notification the Regulation starts to apply automatically, marking the end of the limitations imposed on free-movement.

In case a notification on application of the national measures is submitted to the Commission, the second (three years long) stage of the transitional period starts to apply. Upon expiry of the five year (2 + 3) transitional period the Member States still have the ability to extend the application of the national measures and not to start applying Regulation 1612/68, by submitting a notification to the Commission, which is to be similar to that submitted after the expiration of the first two year period.[63] In such

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[56] Cf.: Kochenov (2003).
[57] Jessurun d'Oliviera (1993), at 88.
[58] On the importance of the place free-movement right occupies among other citizenship rights in the EU legal system see *e. g.* White (2005).
[59] On the more detailed analysis of the transitional measures related to the free-movement of workers included in the 2003 Act of Accession see Adinolfi (2005) and Farkas and Rymkevitch (2004).
[60] 2003 Act of Accession, Annexes V, VI, VIII, X, XIV – Art. 1(1); Annexes IX, XII, XIII – Art. 2(1).
[61] 2003 Act of Accession, Annexes V, VI, VIII, X, XIV – Art. 1(2); Annexes IX, XII, XIII – Art. 2(2).
[62] 2003 Act of Accession, Annexes V, VI, VIII, X, XIV – Art. 1(3); Annexes IX, XII, XIII – Art. 2(3).
[63] 2003 Act of Accession, Annexes V, VI, VIII, X, XIV – Art. 1(5); Annexes IX, XII, XIII – Art. 2(5).

a case, the transitional period extends to seven years. In the absence of such notification, Articles 1 to 6 of Regulation 1612/68 will apply.

Concerning the second notification, the Annexes state that it may be submitted 'in case of serious disturbances of [the Member State's] labour market or a threat thereof'.[64] However, there is no obligation for the Member States to substantiate the claim that the threat of disturbance of their labour market is real.

The Member States have even more rights as far as the suspension of free movement of the new Member States' nationals is concerned:

> When a Member State […] undergoes or foresees disturbances on its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation, that Member State shall inform the Commission and the other Member States thereof and shall supply them with all relevant particulars. On the basis of this information, the Member State may request the Commission to state that the application of Articles 1 to 6 of Regulation (EEC) No 1612/68 be wholly or partially suspended in order to restore to normal the situation in that region or occupation.[65]

The Annexes proceed stating that the suspension can be effectuated with an *ex-post* notification of the Commission.[66] Interestingly, by leaving it totally to the Member States to regulate the application or non-application of EC law to the European citizens holding a nationality of the new Member States, the Acts seem to contradict the idea behind the nascent Community immigration policy.[67]

To summarise, the Annexes to the 2003 Act of Accession contain provisions enabling the Member States to suspend free movement of the new Member States' citizens (*i.e.* dozens of millions of European Union citizens) preventing them from exercising their Treaty rights to move and reside freely, thus introducing a division of the body of the Union citizens into two very distinct classes, *de facto* discriminating on the basis of nationality and rendering the European citizenship concept partially meaningless for the nationals of the new Member States. The next section will address the question of possibility to challenge the Annexes.

III.

Ideally speaking it is clear that the introduction of transitional periods for the implementation of the foundational concepts of the EC law and the dividing of citizens into classes is contrary the spirit of Unity underlying the whole integration exercise. It is therefore reasonable to try to find legal means to change this situation.

In principle, one can think of two possibilities to annul the transitional measures regarding free movement that encroach on the equality of European Union citizens. On the one hand, it is possible to attack the legality of the Annexes to the Act of Accession that suspend the application of Article 39 EC to the citizens of the new Member States, thus effectively blocking the application of Article 18 EC to these

[64] *Id.*
[65] 2003 Act of Accession, Annexes V, VI, VIII, X, XIV – Art. 1(7)(2); Annexes IX, XII, XIII – Art. 2(7)(2).
[66] 2003 Act of Accession, Annexes V, VI, VIII, X, XIV – Art. 1(7)(3); Annexes IX, XII, XIII – Art. 2(7)(3).
[67] Farkas and Rymkevitch (2004), at 371.

people as well. On the other hand, it might be possible to consider the possibilities of establishing that the free movement rule of Article 18(1) EC (*citoyens*' free movement) prevails over free movement of Article 39 EC (*bourgeois*' free movement) and not vice versa. Since the Annexes only limit the free movement under Article 39 EC, once Article 18 EC is proven to take precedent over 39 EC, the Annexes will not apply to 18 EC any more. And since the scope of application of Article 18 EC covers all citizens with no regard to occupation, thus including free movement of workers also, the Annexes will not have any legal meaning at all in this case.

Let us start the analysis with the assessment of the possibility to annul the Annexes as contradicting the principles of EU law and the spirit of the Treaty. In case the present exercise is successful, there will be no need to discuss the hierarchy between the two free movement articles.

In principle it could be possible to raise a question of legality of the transitional measures before the ECJ. However, it is highly problematic because of the very nature of the documents regulating EU enlargements.[68] The overall enlargement process is more a political, than a legal exercise. The right to join the Union does not exist: Article 49 EU, responsible for the enlargement procedure, does not refer to such a right. The wording of the Article is 'may apply'. It is a clear indication that the question whether to admit any new Member State and on which conditions to do so lies within absolute discretion of the Union and its Member States.[69] It follows that the opinions of politicians from the early days of integration talking about 'legal and political obligation on the EEC to accept new members'[70] are legally unfounded. Thus from the nature of the enlargement negotiations and the character of the acts resulting from it, as well as from the absence of a right to join the Union it follows, that, able to disregard the demands stemming from the Community Institutions,[71] the countries willing to join are however unable to challenge the decisions taken by the Community Institutions or by the Member States of the Union in relation to the membership application before the ECJ.[72] Even at a preparatory stage, before the Accession Treaty is signed, the ECJ cannot be asked to rule on the conditions of accession. The Court was explicit on this matter. While referring to Article 237(2) EEC (now Art. 49 EU) it found that 'the legal conditions of […] accession remain to be defined in the context of that [237(2) EEC] procedure without its being possible to determine the content judicially […]'.[73] In the

[68] On the legal regulation of the EU enlargements see, with further references, Kochenov, Dimitry, 'EU Enlargement Law: History and Recent Developments: Treaty – Custom Concubinage?', 9 *EIoP* 6, 2005, available at <http://eiop.ar.at/eiop/texte/2005-006a.htm>.
[69] Soldatos and Vandersanden, 'L'admission dans la CEE – Essai d'interprétation juridique', in *CDE*, 1968, at 691; Hoffmeister, Frank, 'Changing Requirements', in Ott, Andrea and Inglis, Kirstyn (eds.), *Handbook on European Enlargement*, The Hague: T. M. C. Asser Press, 2002, at 101.
[70] See *e. g.* Nicholson and East (1987), at 50, referring to the speech of the Belgian Foreign Minister Pierre Harmel at the Council meeting in Brussels on June 26 – 27, 1967.
[71] Kochenov, Dimitry, 'EU Enlargement: Flexible Compliance with the Commission's Pre-Accession Demands and Schnittke's Ideas on Music', *CSEPS Working Paper*, Ben Gurion University of the Negev, Centre for the Study of European Politics and Society, 2005, also available at <http://hsf.bgu.ac.il/europe/csepspdk.aspx>.
[72] Hoffmeister (2002, 'Changing Requirements'), at 101; Becker, Ulrich, 'EU-Enlargements and Limits to Amendments of the EC Treaty', *JMWP* 15/01, 2001, at 13 *et seq.* Although, arguably, it is possible to ask the ECJ to cancel it in case it was taken contrary to the procedure of Article 49 EC, when the assent of the EP was not given or the Commission was not consulted. See also Soldatos *et al.* (1968), at 694.
[73] Case 93/78 *Lothar Mattheus* v. *Doego Fruchtimport und Tiefkuhlkost eG* [1978] ECR 2203, para 7.

case in question, however, the limitations are already a law, which does not, unfortunately, improve the chances to challenge them in Court.

If the Court cannot intervene into the drafting process of the accession acts, it might theoretically be possible to try to challenge the Acts already in force. It is clear that the Treaty of Accession itself cannot be challenged, making part of the primary law of the Community. The limitations at issue are, however, introduced by the Annexes to the Act of Accession, which opens a possibility to ask the Court whether these Annexes are part of the primary law or not. In case they are not, it would open the way to ask the court to annul the provisions of the Annexes which are contrary to the principles of the EC law. The question of a possibility to challenge the Annexes to the Act of Accession was at issue in joined cases 31 and 35/86 *Levantina Agricola Industrial SA (LAISA) and CPC España* v. *Council*. The Court found, that all the body of accession acts, including the Act of Accession and Annexes to it, represents an integral part of the Accession Treaty, thus being a part of the primary law of the Communities, legality of which cannot be questioned. The Court stated:

> the contested provision [Annex I to the Act of Accession of Spain and Portugal to the Communities], which forms an integral part of the act of accession of the Kingdom of Spain and the Portuguese republic, do not constitute an act of the Council within the meaning of [Article 230 EC (ex. Article 173EEC)] and that consequently the Court has no jurisdiction to consider the legality of such provisions. Consequently, the actions for annulment are inadmissible.[74]

That is to say the Court can only interpret the provisions of the Acts of Accession and the Accession Treaties,[75] which can also give rise to infringement procedures under Articles 226 and 227 EC.[76]

The regulation of accession thus remains mainly political in nature and leaves no room to changing the situation with the controversial Annexes limiting EU citizens' free movement rights, as the wording of the Annexes is precise enough and a possibility that the Court would read any respect to Article 18 EC into them during an interpretation exercise is virtually non-existent.

The second possibility to annul the limitations on European citizens' free movement contained in the Annexes to the Act of Accession is to try to change the order of priority between the two lines of rights. This is a very difficult task, since Article 18 EC itself, as has been mentioned above, allows for the limitations of the right. Theoretically, it is possible to argue that the recent case-law of the ECJ, starting from *Sala,* introduced a totally new understanding of the second part of the EC Treaty, which leads to a shift in priorities between the articles and the importance of Article 39 EC is fading away. Legally speaking, however, it seems to be virtually impossible, due to the language of Article 18 EC allowing for limitations.

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[74] Joined cases 31 and 35/86 *Levantina Agricola Industrial SA (LAISA) and CPC España* v. *Council* [1988], *ECR* 2285.

[75] See *e. g.* Case C-355/97 *Landesgrundverkehrsreferent der Tiroler Landesregierung* v. *Beck Liegenschaftsverwaltung mbH* [1999], I-4977.

[76] Joined cases 194 and 241/85 *Commission* v. *Greece* [1988], ECR 1037.

Thus Community law does not provide any possibility to successfully challenge the Annexes. Now, it would be truer than ever to state that citizenship of the European Union lies in the hands of the Member States.

IV.

It is possible to trace the roots of the free-movement suspension to the previous enlargements and especially to the one to accommodate the Iberian states. A more or less similar pattern was applied back then, including the length of the transitional measures and the application of the national measures of labour market regulation by the Member States. No parallels can be drawn with the accession of Finland, Austria and Sweden, since workers from those states already enjoyed full free movement rights under the EEA Agreement.

However, notwithstanding the claims of some scholars,[77] the experience of the previous enlargements in the area of transitional measures covering free movement is not relevant to the last enlargement round including 8 States from Central and Eastern Europe.[78]

The pattern of introduction of the transitional measures in free movement is the following:[79] the first enlargement of the Communities did not introduce any transitional measures in the area; Greek workers only became entitled to exercise free movement rights after a transitional period of 7 years,[80] the same length of the transitional period was introduced for the Iberian states as well (although it was only in force for 6 years).[81] The accession of the EEA members did not limit free movement at all.

The advocates of the transitional periods usually refer to the practice implemented during the accession of Spain and Portugal. At the same time they seem to forget, that in 1985, when the actual accession took place, the concept of the European citizenship did not exist in the Treaty text at all. Thus the temporary suspension of free-movement right could only concern the *bourgeois* free movement, since there was simply no other. The only enlargement which took place before the current round and at the same time after the entry into force of the Treaty of Maastricht did not impose any transitional measures for free movement. Of course, the explanation to that is the EEA membership of the acceding states. However, there is another aspect of the absence of the free movement transitional measures: the enlargement to accommodate Finland, Sweden and Austria went in line with the concept of European citizenship and Part II of the EC Treaty. No rights being

[77] See *e. g.* Adinolfi (2005), at 470.
[78] Malta and Cyprus are not mentioned here since the Acts of Accession did not contain any limitations to the free movement of their nationals.
[79] For a short overview of the main events concerning every enlargement as well as the duration of the transitional measures see Hoffmeister, Frank, 'Earlier enlargements', in Ott, Andrea and Inglis, Kirstyn (eds.), *Handbook on European Enlargement*, The Hague: T. M. C. Asser Press, 2002, at 87 *et seq.*
[80] *Bull. EC* 5-1979, at 11 – 14.
[81] *Bull. EC* 3-1985, at 7 – 9.

suspended, the Union succeeded in preserving the equality among all the citizens, with no regard of their nationality.

Thus the only relevant example for the present enlargement as far as transitional measures in citizenship-sensitive areas are concerned is not that to accommodate the Iberian states, but a more recent one – the fourth enlargement.

Against the background of the growing importance of the EU citizenship concept, any analogies with the pre-Maastricht enlargement practices are misleading since citizenship did not legally exist back then.

Concluding remarks

The consequences of a total disregard of the EU citizenship concept, especially at the present stage of its development, can be drastic. Not only does the present enlargement practice undermine the efforts of the ECJ aimed at the creation of a citizenship status as a basis for enjoyment of the rights granted by the Treaty, but it is also likely to change the attitude of the citizens of the new Member States to the integration exercise.

In fact, by suspending the application of the key citizenship right to the nationals of the new Member States, the Act of Accession does not only create two classes of citizens: the number of nationality related legal statuses will grow considerably from the moment when any of the old Member States will decide to stop the application of the national measures and switch to Regulation 1612/68 (the United Kingdom, Sweden and Ireland, for example, decided not to limit new Member States' citizens free movement rights). The Annexes do not make any link between the status of the nationals of different new Member States, meaning that a situation might arise when one of the present Member States decides to apply Regulation 1612/68 not to all the new Member States' nationals, but to the nationals of a fraction of the new Member States. In such a case the number of legal statuses of the European Union citizens is likely to grow in a geometrical progression. To continue this line of thought, imagine different applications of free movement rules by each of the 15 present member states: the result would be a total chaos in free movement regulation. While allowing for such a possibility, the Act of Accession has even provided an example already: the transitional measures concerning the free movement of workers do not apply to the nationals of Malta and Cyprus, who enjoy the European citizenship rights in full from the very moment of accession.

In such a situation of a difference in status of the nationals of the new Member States, which will presumably multiply in the course of the years following the accession, the Union will contribute to prejudice-building and division of the body of European citizens. Moreover, the European Court of Justice will probably have to reassess its understanding of Article 18 EC, which will mean a step back from the established case-law lines related to the European citizenship rights.

Keeping all this in mind, it becomes clear that the latest enlargement rounds together with a positive momentum of integration, also brought to life enormous

destructive potential, which can harm European integration in the long run and undermine the bonds of trust between the Union and its citizens.

ABBREVIATIONS

CDE	Cahiers de droit européen
CMLRev.	Common Market Law Review
Columb. J. Eur. L.	Columbia Journal of European Law
ConWEB	Constitutionalism Web Papers
CYbELS	Cambridge Yearbook of European Legal Studies
EBLRev.	European Business Law Review
EIoP	European Integration on-line Papers
ELJ	European Law Journal
ELR	European Law Review
EPL.	European Public Law
Fordham Int'l L.J.	Fordham International Law Journal
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
JEPP	Journal of European Public Policy
JMWP	Jean Monnet Working Papers
J. Pol. Phil.	Journal of Political Philosophy
RGSL WP	Riga Graduate School of Law Working Papers
Rom. J.Pol. Sci.	Romanian Journal of Political Science
SEW	Sociaal-economische wetgeving
U. Miami Int'l & Comp. L.Rev.	University of Miami International and Comparative Law Review