The European Citizenship Concept and Enlargement of the Union

by Dimitry Kochenov *

Abstract: *The development of the EU citizenship concept within the current boundaries of the Union is incompatible with some of the terms of enlargement, namely the policy of transition periods, outlined in the Act of Accession. While the ECJ has tried to interpret EU citizenship as a 'fundamental status', the 2003 Act of Accession introduces limitations on the freedom of movement – a core citizenship right – thus undermining the European citizenship concept and the idea of equality for all Europeans. Unfortunately, this situation is made possible by the wording of Article 18 EC itself, which allows for conditions, thus opening the door for the creation of 'second class' citizens. This paper argues that the most recent enlargement offered an opportunity to bring about a new understanding of equality at the European level and give real meaning to the European citizenship concept, completing rather than undermining the achievements of the ECJ, and taking into account the lessons of previous enlargements. In light of this, the Articles of Accession represent a missed opportunity.*

Keywords: European Union; enlargement; citizenship; equality; transition periods; rights; European Court of Justice.

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* LL.M. (CEU Budapest), Ph.D. candidate, Rijksuniversiteit Groningen, Faculteit Rechten, Sectie Europees en Economisch Recht. I would like to thank Prof. Dr. Laurence W. Gormley and Dr. Fabian Amtenbrink for their comments on the first draft and Claudia-Silviana Muresan for her invaluable assistance.

Neuzheli, messir, v prazdnichnuju noch' gostej za stolom razdeliajut na dva sorta? Odni - pervoj, a drugije, kak vyrazhajetsia etot gnustnyj skuperdiaj-bufetchik, vtoroj svezhesti?

Mikhail Bulgakov[1]

The treatment of European citizenship, both in the TEU itself and, subsequently, by the institutions and the Member States of the Union, is an embarrassment.

Joseph Weiler [2]

Introduction

It is, of course, possible to argue that European citizenship is not 'real'; the European Union is not a state; there is no European 'people';[3] and, political representation at the European level is only a myth.[4] At the same time, the notion of European citizenship, which is sometimes seen as 'accidental and arbitrary'[5] in national policy debates, has considerable potential as the basis for the guarantee of important rights and for the future of European integration.[6] Some scholars have even gone as far as to suggest that 'the notion of European citizenship may become a truly transformative concept, for the region and perhaps the world.'[7]

At the same time, legal developments since the formal

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1 'Surely you don't divide your guests into two grades on a festive night like this, do you? First-grade and second-grade fresh, in the words of that miserable cheeseparing barman?' Mikhail Bulgakov, *Master and Margarita*, translation by Michael Glenny, London: Collins and Harvill Press, 1967.

2 Weiler, Joseph H. H., To be a European Citizen - Eros and Civilization', in JEPP, 4, December 1997, at 499.

3 See *e.g.* Weiler, Joseph H. H., 'The Reformation of European Constitutionalism', in *JCMS* 35, 1997; Grimm, Dieter, 'Does Europe Need a Constitution?', in 1 ELJ 3, 1995.

4 Weiler, Joseph H. H., 'European Democracy and Its Critique', in 2 *West-European Politics*, 1995. On European party system see Hix, Simon, 'Parties at the European Level and the Legitimacy of EU Socio-Economic Policy', in 33 JCMS 4, 1995.

5 Vink, Maarten P., 'Limits of European Citizenship: European integration and Domestic Immigration Policies', in *ConWEB*, No 4, 2003, available at <www.les1.man.ac.uk/conweb/>.

6 See *e.g.* O'Keeffe, David, 'Union Citizenship', in O'Keeffe, David and Twomey, Patrick M., *Legal Issues of the Maastricht Treaty,* London: Wiley Chancery Law, 1994; Meehan, Elizabeth, *Citizenship and the European Community*, London: SAGE, 1993; Kostakopoulou, Theodora, 'Towards a Theory of Constructive Citizenship in Europe', in *J. Pol. Phil.* 4, 1996; Kostakopoulou, Thodora, 'Nested "Old" and "New" Citizenships in the European Union: Bringing out the Complexity', in 5 *Columb. J. Eur. L.*, 1999.

7 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, at 82.

acknowledgement of this concept in the Maastricht Treaty[8] (now incorporated as Part II of the EC Treaty), and especially the recent jurisprudence of the European Court of Justice, demonstrate that the concept is constantly growing in importance. It has even been argued that, because of the activist approach of the ECJ, a legal status of *'citoyen pur'* has already been created.[9]

However, from the 'enlargement' perspective one sees a concept of EU citizenship that does not correspond at all to the one created by ECJ jurisprudence. Itself silent on the concept of citizenship, the 2003 Act of Accession imposes limitations on the free movement rights outlined in Article 39 EC, thus implicitly rejecting the *'citoyen pur'* concept and creating a body of 'second class' citizens of Europe: i.e., nationals of the new Member States to whom the list of EU citizenship rights does not apply in full.[10] The origins of such an understanding of European citizenship can be found in the wording of Article 18 EC, which allows for limitations and conditions on the right to free movement, as well as in the fears of some present Member States that granting free movement to the nationals of new Member States, immediately as of May 1, 2004, might cause harm to their labor markets.

That neither politicians nor scholars in accession countries invoked the concept of European citizenship during the enlargement process shows that they either dismissed the citizenship discourse as irrelevant in light of enlargement, or were naïve enough to expect the automatic application of the full scope of citizenship rights to the new citizens of the Union. Otherwise, it is also possible that they were simply resigned to the inevitability of transition periods, and preferred to remain silent rather than call attention to limitations on the rights to be enjoyed by their constituencies.

The aim of the present article is to clarify the relationship between the evolution of the concept of the European citizenship and the process of Union enlargement. Does the enlargement process strengthen or weaken the citizenship concept? I will discuss the meaning of the concept in general, taking into account the 'citizenship jurisprudence' of

8 See Wiener, Antje, 'Assessing the Constructive Potential of Union Citizenship - A Socio-Historical Perspective', in 1 EIoP, No 017, 1997, available at <www.eiop.or.at/eiop/texte/1997-017a.htm>. For a more detailed account of incorporation of the citizenship ideas into the *acquis communautaire*, see also Wiener, Antje, *'European' Citizenship Practice, Building Institutions of a Non-State,* Oxford: Westview Press, 1998.

9 Reich, Norbert and 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, at 628.

10 The terms 'Candidate Countries' and 'New Member States', for the purposes of this article, refer only to the countries of Central and Eastern Europe, and not Malta and Cyprus, since the application of EU law in these last two countries is different from that in the other eight.

the ECJ, and demonstrate its growing legal significance. I will briefly discuss the experience of the previous enlargement process, and, finally, analyze the Accession Treaty and the Act of Accession, with its numerous annexes.

1. Silence (The Problem)

If for current Member States, to agree with Joseph Weiler's assertion, the concept of European citizenship is 'one of the least successful of Maastricht, trivial and empty, and hence irrelevant'[11] and is nothing but an 'embarrassment'[12], for new Member States, the concept is marked only by silence. Surprisingly, the relation between European enlargement and citizenship has not been discussed, either in the scholarly literature[13] or by politicians from the new Member States. Wim Kok has been equally silent, saying nothing about citizenship in his recent report to the Commission.[14]

There are several possible explanations for this reluctance to talk about European citizenship in the context of enlargement. The most obvious reason is the hope that EU citizenship will simply be implemented, along with other parts of the acquis, after the actual accession – meaning that all the citizens of the new Member States will automatically become citizens of the Union, and receive the full complement of citizenship rights as outlined in Article 17 EC.[15] A second reason follows from the assumption that there is no clear link between EU citizenship and enlargement, and thus that enlargement has no consequences for the concept of the citizenship. Only now, after the signing of the Accession Treaty, has it become clear that neither of these two positions has any basis in reality.

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11 Weiler (1997) 'Eros and Civilization' op. cit., at 495.

12 Id., at 499.

13 To find nothing on the topic, see e.g. the following books: Ott, Andrea & Inglis Kirstyn (eds.), *Handbook on European Enlargement: a Commentary on the Enlargement Process*, The Hague: T. M. C. Asser Press, 2002; Kellerman, Alfred E.; de Zwaan, Jaap W. & Czuczai, Jenö (eds.), EU *Enlargement: The Constitutional Impact at EU and National Level,* The Hague: T. M. C. Asser Press, 2001; Preston, Christopher, *Enlargement and Integration in the European Union*, London: Routledge, 1997; Grabbe, Heather and Hughes, K., Eastward *Enlargement of the European Union,* London: Royal Institute of International Affairs, 1998; Curzon Price, Victoria; Landau, Alice; Whitman, Richard G. (eds.), *The Enlargement of the European Union, Issues and Strategies*, London/ New York: Routledge, 1999; and many more.

14 Kok, Wim, *Enlarging the European Union, Achievements and Challenges* (Report to the European Commission), European University Institute, Robert Schuman Centre for Advanced Studies, 2003.

15 '[…] every person holding the nationality of a Member State shall be a citizen of the Union'.

However, there is still a third reason for the neglect of citizenship, which applies more to politicians than academics: namely, the desire to avoid generating disaffection with the EU on the part of the populations of new Member States by calling attention to the limitations of their prospective status. It is most likely this third reason that is most responsible for the lacuna in the official documents – neither the Accession Treaty nor the Act of Accession make any mention of European citizenship. This official neglect undermines the force and significance of the concept of EU citizenship.

Following the logic of Article 2 of the Act of Accession,[16] the citizens of new Member States will formally become citizens of the Union starting from May 1, 2004. However there is one 'but': they won't have the right to freedom of movement, since Article 39 and the first paragraph of Article 49 of the EC Treaty apply fully only 'in relation to the freedom of movement of workers and the freedom to provide services involving temporary movement of workers'[17] It is important to mention that several Member States have already announced that they intend to disregard the transitional measures, applying EC law and not national law to the nationals of the new Member States with regard to freedom of movement.

However, even if more than only one third of current Member States agreed to do so, as is in fact the case, this would not change the overarching consequences of this situation for the concept of EU citizenship.[18] Indeed, the Treaty of Accession, together with the Act of Accession and the Annexes, which become part of the Treaties as of May 1, 2004, fundamentally alter the meaning of European citizenship by temporarily creating a body of 'second-class' European citizens whose scope of rights is more limited than those set out in Part II of the EC Treaty.

2. EU Citizenship - What Is It?

As Antje Wiener has successfully demonstrated, European citizenship as an identity generating idea became part of the informal resources of the acquis as early as the 1970s.[19] It took some twenty years

16 'From the date of accession, the provisions of the original Treaties […] before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act'

17 According to Annexes V, VI, VIII, X, XIV Art. 1(1); Annexes IX, XII, XIII Art. 2(1), (which are an integral part of the Act of Accession, according to Art. 60 of the Act) and the reference made to those Annexes in the Article 24 of the Act of Accession.

18 These countries are: Denmark, Sweden, United Kingdom and The Netherlands. **See Bulletin quotidien Europe**, No. 8546 (September 20) 2003, at 10.

19 Wiener (1997) *op. cit.,* at 6.

for the concept to become part of the 'formal resources' of the acquis, through Articles 8a - 8e[20] of the Maastricht (EC) Treaty. It is interesting to note that the first case before the ECJ that was described as a 'citizenship case', and that applied the principle of non-discrimination to nationals of Member States,[21] dates back to 1989,[22] thus anticipating by several years the formal introduction of the concept into the Treaty.

2.1. "Citizen…of a country among countries"

Although the notion of European citizenship has lost much of its force since it first appeared in the 'European discourse',[23] it is still a potentially revolutionary idea – the first attempt to create a citizenship beyond the framework of a state. It has long been considered that '[a citizen] is by definition a citizen among citizens of a country among countries. His rights and duties must be defined and limited, not only by those of his fellow citizens, but also by the boundaries of a territory.'[24] Arendt is not alone in linking citizenship to the nation-state, thus placing in stark relief the difference between citizenship of the EU, which is 'neither a state nor an international organization'[25] and state citizenship.[26] Most scholars of citizenship emphasize that the most important aspect of the citizenship concept is membership in a community,[27] which was initially also the idea behind European citizenship. However, the 'poverty'[28] of the political provisions associated with the rights attaching to European citizenship certainly contribute to undermining any sense of membership in a community.

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20 Now articles 17 - 22 EC.

21 To achieve this, the ECJ applied a line of reasoning similar to that in the *US commerce clause*. I will return to this point later.

22 Davies, Gareth, *Nationality Discrimination and Free Movement Law*, The Hague: Kluwer Law International, 2003, making reference to Case 186/87 *Cowan* v. *Tresor Public* [1989] ECR 195.

23 'Union citizenship appears as a pale reflection of a once powerful idea diminished to a set of minimal political rights', Wiener (1997) op. cit at 4.

24 Arendt, Hannah, *Men in Dark Times*, 1968, at 81.

25 See *e.g.* Burghardt, Guenter, 'The Future of the European Union', in 25 *Fletcher F. World Aff.*, 2001, at 67.

26 For more on a 'classical' account of citizenship see 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.

27 Waltzer (1989) *op. cit.*, at 211.

28 Weiler (1997) 'Eros and Civilization' *op. cit.*, at 496.

2.2 Supranational democracy and the pessimism of today's citizenship discourse

The discourse on citizenship beyond the nation-state is closely related to that of democracy beyond the nation-state – the latter of which was the subject of the most heated scholarly debates around European integration.[29] The European citizenship concept should gain importance in proportion to that of the supranational democracy discourse, since democracy and citizenship are closely interrelated concepts.[30]

At the same time, it should be noted that the general optimism in academic circles, which marked the Laeken declaration and the start of the work on the Convention of the Future of Europe, is long gone. It is true that the Declaration placed considerable emphasis on citizens, stating, for example, 'European institutions should be brought closer to its citizens,' and that 'citizens [should be brought] closer to the European design.'[31] However, the Convention that followed it did not meet the expectations of the European public. Based on the statements of the president of the Convention, V. Giscard d'Estaing – which can be characterized by the lament, 'citizens are not interested in the way EU works'[32] – it is obvious that the work of the Convention marked the end of this period of optimism on the question of democracy and citizenship in the EU. Indeed, democracy was referred to as 'a black hole of the Convention,'[33] while the subject of citizenship reform was completely neglected – the Convention did not even have a Working Group on citizenship.[34]

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29 For the summary of the debate see Höreth, Marcus, 'The Trilemma of Legitimacy - Multilevel Governance in the EU and the Problem of Democracy', in *ZEI Discussion Papers* C11, Bonn: Zentrum für Europäische Integrationsforschung, Rheinische Freidrich Wilhelms-Universität Bonn, 1998, available at <http://www.zei.de/zei_english/f_publ.html>.

30 See e.g. Beetham, David *Democracy and Human Rights,* Cambridge: Polity Press, 2000.

31 European Council Meeting in Laeken, 14 and 15 December 2001, *The Laeken Declaration,* document SN 273/01; for more on the Laeken Declaration and the Convention history see e. g. Miller, Vaughne, 'The Laeken Declaration and the Convention on the Future of Europe', *House of Commons Library Research Paper* No. 02/14, 2002, available at <http://www.parliament.uk/commons/lib/research/rp2002/rp02-014.pdf>.

32 Tillack, Hans-Martin, (unpublished) *Democracy - the Black Hole in the Convention*, lecture at the seminar 'The Convention on the Future of Europe: Drafting a Constitution for the European Union', ERA Congress Centre, Trier, 10-11 April 2003.

33 *Id.*

34 However, citizenship issues have been touched upon in the reports of Working Group II, on the Incorporation of the European Charter of Fundamental Rights and Accession to the ECHR (CONV 352/02, 22 October 2002) and Working Group IX on Social Europe (CONV 516/1/03, 4 February 2003). The Convention's influence on the concept of EU citizenship has been recently taken up by Usher: Usher, John A. (unpublished), *Citizenship under the Constitution: Old Wine in New Bottles?*, lecture at the seminar 'The Convention on the Future of Europe: Drafting a Constitution for the European Union', ERA Congress Centre, Trier, 10-11 April 2003.

2.3 European citizenship rights

So, what is the nature of EU citizenship? To begin with, European citizenship is different from that of nation-states but, according to Vink, 'does not (yet) have an autonomous definition.'[35] Most scholars tend to understand European citizenship through an enumeration of rights, as in Part II of the EC Treaty, while insisting, at the same time, on the unitary character of the institution.[36] The supranational aspect of citizenship is predicated on the supranational nature of those rights:[37] '[t]he fact that rights, however limited these may be at present, are granted at the supranational level shows that citizenship can no longer be confined within the framework of national-statist communities.'[38]

No discussion of European citizenship can avoid enumerating the rights attached thereto, as listed in Part II of the EC Treaty. These rights can be broken down into two distinct categories:[39] first, the right to move and reside freely within the territory of the Community;[40] and second, individual democratic rights like the right to participate in municipal[41] and European elections,[42] the right to petition the European Parliament,[43] the right to access European Parliament, Council and Commission documents,[44] the right to apply to the European Ombudsman,[45] and the right to the diplomatic protection of any other Member State in the territory of a third country 'in which the Member State of which he is the national is not represented.'[46] Obviously the rights listed in Part II of

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35 Vink (2003) *op. cit.*, at 2.

36 See *e.g.* O'Keeffe (1994), *op. cit*; Closa, Carlos, 'The Concept of Citizenship in the Treaty of European Union', in 29 *CMLRev.*, 1992; Closa, Carlos, 'Citizenship of the Union and Nationality of the Member States' in O'Keeffe, David and Twomey, Patrick M. (eds.), *Legal Issues of the Maastricht Treaty,* London: Wiley Chancery Law, 1994; O'Leary, Síofra, *The Evolving Concept of Community Citizenship*, *From Free Movement of Persons to Community Citizenship*, The Hague: Kluwer Law International, 1996.

37 It is not my intention to discuss the element of 'belongingness' that is obviously present in the concept of European citizenship. In the present paper I will concentrate on an 'approach to citizenship as rights'.

38 Kostakopoulou (1999), *op. cit.*, at 391.

39 Some authors maintain a distinction between 'individual procedural democratic rights' and 'the right to invoke fundamental human rights'. See Román (2001), op.cit, at 108.

40 Art. 18.1 EC.

41 Art. 19.1 EC.

42 Art. 19.2 EC.

43 Arts. 21 and 194 EC. Note that this right is not granted exclusively to the citizens of the Union, since 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State' enjoys the same right (Art. 194 EC).

44 Art. 255 EC. The scope of application of the Article is the same as of Article 194.

45 Arts. 21 and 195 EC, note that, according to the third paragraph of Art. 21 EC such an application, or petition to the Ombudsman can be done in any of the Community languages, listed in Art. 7 EC.

46 Art. 20 EC.

the EC Treaty are not new. They each have different histories:[47] some of them can be traced back to the Treaty of Paris,[48] while others are newly introduced in Maastricht.[49] Indeed, since the very adoption of Maastricht, many have insisted that the textual enumeration of Community citizenship rights does not *de facto* add anything to the scope of rights that citizens of Member States enjoyed before the signing of the Treaty.[50] At the same time, recent developments in ECJ jurisprudence amply demonstrate that Part II of the EC Treaty is not redundant or superfluous.

Theodora Kostakopoulou argues that national and European citizenships in the Union 'do not merely overlap, but are nested within each other and interlock',[51] reflecting the overlapping identities of every European. Her position is supported by the insistence in EU law itself that 'citizenship of the Union shall complement and not replace national citizenship.'[52]

2.4 Who is invited?

According to Article 17(1) of the EC Treaty, 'every person holding the nationality of a Member State shall be a citizen of the Union.' This clearly suggests that the status of Union citizenship is a derivative one.[53]According to EU law, the conditions for acquisition and loss of nationality are laid down by each Member State.[54] However, according to Micheletti, it should be done with 'due regard for Community law.'[55] The

47 For the history of the appearance of these rights in the Treaties see e. g. O'Leary (1996) op. cit.

48 For instance, the right to freedom of movement, which was initially limited to workers in the coal and steel industry.

49 Such as the right to vote in municipal elections in another Member State (Article 19.1 EC); although, it is worth mentioning, this right was not new for all Member States. According to Vink, for example, in Sweden and The Netherlands, long-term resident aliens already enjoyed this right prior to 1991. See Vink (2003), *op.cit*, at 7.

50 Schrauwen, Annette, 'Sink or Swim Together? Developments in European Citizenship', in *Fordham Int'l L.J.*, 2000, at 779, cites this point of view to disagree with it.

51 Kostakopoulou (1999) *op. cit.*, at 393; see also Meehan (1993), *op. cit.*

52 Art. 17.1 EC, second sentence. It is worth mentioning that this provision was introduced into the Treaty because of the fears of Member State representatives over 'losing control' of national citizenship. See also the Danish declaration on this matter: Denmark and the TEU, Annex 3: Unilateral Declarations of Denmark, 1994 O.J. (C 348) 1.

53 Closa, Carlos, 'Citizenship of the Union and Nationality of the Member States', in 32 *CMLRev.*, 1995, at 510.

54 Declaration No. 2, Final Act of the Treaty on European Union, O.J. (C 340), 1997, at 145 - 172, which goes in line with international law, see the ICJ *Nottebohm Case Liechtenstein* v. *Guatemala*, 1955 I.C.J. 4 (Judgement of April 6, 1955).

55 Case C-369/90 *Micheletti v. Delegación del Gobierno en Cantabria*, [1993] ECR I-4239, para 4262.

same case makes it clear that Member States are not in a position 'to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty'.[56] At the same time, situations may arise in which nationality for the purposes of the Treaty is *de fact*o different from nationality for other purposes.[57]

Many scholars have severely criticized the exclusionary character of EU citizenship:[58] long-term residents who are third country nationals can only obtain EU citizenship by becoming citizens of one of the Member States. The European Parliament is also preoccupied with this issue.[59] The relationship between EU residents, who are third country nationals, and European citizenship is very interesting indeed. However, it lies beyond the scope of this paper.

3. ECJ Case Law - Supranational Citizenship in the Making

In my view, it is incorrect or even impossible to formulate a workable hierarchy of citizenship rights, since, once citizenship is understood as conferring a set of rights, these cannot be granted selectively without degrading the very concept of citizenship itself. If it were intended otherwise, the enumeration of rights in the Treaty would not be meaningful. But it is not only the enumeration of citizenship rights that matters here. I tend to agree with ECJ Advocate General Cosmas, who argues in Wijsenbeek (his opinion is based on an assessment of the free movement right) that the nature of citizenship rights – 'stemming from the status as a citizen of the Union, which is not subsidiary in relation to European unification, whether economic or not'[60] – is different from

56 *Id.*

57 Declarations on this matter were made by Germany (Attached to the EEC Treaty) and by the United Kingdom (first attached to the 1972 Treaty of Accession by the United Kingdom to the European Communities; later, in the light of a new Nationality Act, the UK made a new declaration on the definition of the term 'nationals' on January 28, 1983). See also Case C-192/99 *The Queen v. Secretary of State for the Home Department ex parte Kaur* [2001] ECR I-1237, commenter by Hall, Stephen, 'Determining the Scope *ratione personae* of European Citizenship: Customary International Law Prevails for Now', in 28(3) LIEI, 2001, at 355.

58 See e. g. Gormley, Lawrence W. et al. (eds.), *Introduction to the Law of the European Communities*, 3rd ed., London / The Hague / Boston: Kluwer Law International, 1998, at 175 for a short overview of the problem. See also Jessurun d'Oliveira, Hans U., 'European Citizenship: Its Meaning, Its Potential', in Monar, Joerg; Ungerer, Werner and Wessels, Wolfgang (eds.), *The Maastricht Treaty on European Union: Legal Complexity and Political Dynamic*, Brussels: European Interuniversity Press, 1993, at 100.

59 See *e. g.* European Parliament, Resolution of March 13, 1996, in *O.J.* C 96/77, 1996.

60 Case C-378/97 *Criminal proceedings against Florius Ariel Wijsenbeek*, [1999], ECR I-6207, A.G. Cosmas' opinion at para 85.

that of other rights protected by the Treaty. We will now turn to the case law of the ECJ on the subject of European citizenship. In recent years, the Court has completely changed its position, recovering from a seeming reluctance to make use of the citizenship clause immediately after its insertion into the Treaty.[61]

3.1 Limitations on new Member State citizens

Since the present article attempts to analyze the relation between European citizenship and enlargement, I will focus on the Court's understanding of the free movement right of Article 18 EC, which is 'the core and origin of European citizenship'.[62] This right has been the most controversial, as is it closely related to the rights protected by Articles 39 and 49 (1) EC, and the Act of Accession expressly blocks its application upon accession,[63] through Annexes V, VI, VIII, IX, X, XII, XIII, XIV. Interestingly, the Accession Treaty does not expressly abridge Article 18 EC, making no mention of it whatsoever.

By limiting the free movement provisions of the Treaty and related secondary Community legislation, the Treaty of Accession effectively suspends the two aspects of the right to freedom of movement: the non-discrimination principle and the right to move to another Member State of the Union in order to look for or take up employment there.[64] It is clear that the Treaty of Accession is specifically aimed at preventing citizens of new Member States who are active members of the workforce from benefiting from the right after May 1, 2004. This is clear from the fact that free movement rights protected by the directives covering students,[65] retired persons,[66] and persons with independent means[67] – which link residence rights to the possession of health insurance and means of financial support, in order not to become a burden on the social security system of the host state – are not mentioned in the Annexes to the Treaty.

I will now try to answer the question of what kind of rights, if any, are protected by Article 18 EC, the application of which to the citizens

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61 See *e. g.* Case C-192/94 Skanavi v. Chryssanthakopoulos, [1996] ECR I-929.
62 Jessurun d'Oliveira (1993), *op. cit.*, at 88.
63 See Art. 24 of the Act.
64 Non-discrimination can be found elsewhere in the European Agreements, but becomes meaningless if one cannot access the labor market.
65 Council Directive 93/96, 1993 *O.J.* (L 317) 59.
66 Council Directive 90/365, 1990 *O.J.* (L 180) 28
67 Council Directive 90/364, 1990 *O.J.* (L 180) 26.

of the new Member States is not expressly blocked by the Accession Treaty.

3.2 Does the 'half-hearted' article have any legal significance?

Many scholars are skeptical about the legal significance of Article 18, doubting that it can have any direct effect. Since the language of the article is precise enough, what diminishes its importance is the second part of the first paragraph, which states 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.' Gareth Davies characterizes the article as 'half-hearted' – 'article 18 is, famously and strangely, a piece of higher legislation that is subject to lower legislation. It is, in that sense, half-hearted'[68] – going on to say that it is without legal force.[69] However, such a view of Article 18 is overly pessimistic.

As has already been noted, the Court was initially reluctant to make use of Article 18 to widen the scope of rights enjoyed by European citizens. In *Scanavi* [70] the court did not apply the citizenship article (at that time, Article 8), considering it to be residual.[71] There are several possible explanations for the Court's position. The first is historical-from the very beginning, the idea of European Community was linked to economic integration. Consequently, the Treaties and secondary community legislation were intended to pertain primarily to economic agents[72] – i.e. workers, service providers, etc. – and the Court did not want to change this established practice.

Furthermore, the Court's understanding of economic activity is so broad that the category of economic agent threatens to overshadow all others. This is perfectly exemplified in the *Cowan* case, which is considered the 'first case on citizenship' despite the fact that it was

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68 Davies (2003) *op. cit.*, at 188.

69 Davies (2003) *op. cit.*, at 189, 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.

70 Case C-192/94 *Skanavi* [1996] ECR I-929.

71 Reich, Norbert, 'Union Citizenship - Yesterday, Today and Tomorrow!', in RGSL *(Riga Graduate School of Law) Working Papers*, 3, Riga, 2001, at 14. An earlier version of the paper was published in 7 *ELJ,* 2001.

72 As opposed to citizens, not necessarily playing any economic role. See e.g. O'Leary (1996) *op. cit.*, at 524; 'Community tends to intervene to protect market-related objectives, rather than the individual *per se', id.,* at 538.

decided before the incorporation of citizenship language into the Treaty.[73] In *Cowan*, equal protection was granted to British tourists in France on the basis that they were 'recipients of services'. An even broader interpretation still, of the scope *ratione personae* of EU law, comes out of *Carpenter*,[74] where a self-employed British citizen who had spent his entire life in the UK, but was theoretically capable of providing services to consumers in other member states, brought his wife, a non-citizen, to Britain under Community law.[75]

Another possible explanation might derive from the conviction of the Court that sufficient protection is granted to Member State citizens, by the provisions of the Treaty, as economic agents, which, especially taken together with the *Cowan* interpretation of the scope of community law, makes any reference to the *lex generalis* – citizenship articles, in this case – unnecessary. Such an approach was adopted by the Court, for example, in the *Calfa* case,[76] where the ECJ cited Cowan in finding that an Italian drug dealer arrested in Greece was a recipient of services.[77]

However, the aforementioned approaches have not prevented the Court from gradually increasing the significance of the EU citizenship concept in a very important series of cases. This case law becomes all the more interesting in light of the fact that citizenship 'was not intended to make much of a difference [in the field of free movement].'[78] It is undoubtedly the case, however, that it has.

The case law discussed in what follows demonstrates the scope of the application and effect of Article 18 EC – the only free movement article whose application to new Member States is not explicitly blocked by the Accession Treaty. It should be pointed out, however, that Article 18 EC can hardly be relied upon by the new Member States citizens to guarantee free movement rights expressly blocked by the Annexes to the Accession Treaty. Since it explicitly allows for limitations, the Article is an insufficient instrument for pressing for the rights of European citizenship, when certain of these rights are suspended in application, as in the case of enlargement and free movement.

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73 Davies (2003) *op. cit.*, at 190.

74 Case C-60/00, *Mary Carpenter v. Secretary of State of the Home Department* [2002] ECR I-6279.

75 See Reich & Harbacevica (2003) *op. cit.*, at 621.

76 Case C-348/96 *Criminal proceedings against Donatella Calfa*, [1999] ECR I-11; commented by Costello: 37 *CMLRev.*, 2000 at 817.

77 *Calfa* is not the only case where the Court demonstrated reluctance in relying directly on the citizenship provisions. For example see also *Uecker & Jacquet* and *Wijsenbeek* (Joined cases C-64/96 & C-65/96, Uecker & Jacquet, [1997] ECR I-3171; Case C-378/97 *Criminal proceedings against Florius Ariel Wijsenbeek,* [1999], ECR I-6207);

78 Castro Oliviera, Á., 'Workers and Other Persons: Step by Step Movement to Citizenship - Case Law 1995 - 2001', in 39 *CMLRev.*, 2002, at 78.

3.3 EU citizenship before Sala (1): dream of the Advocates General

To a certain extent it is still a rule that 'the Member States are prepared to accept Community nationals only if they are economically active or, […] economically independent.'[79] The first to challenge the established practice (after the academics, of course) were the Advocates General of the European Court of Justice. More than ten years has passed since the opinion of A.G. Jacobs was delivered in *Konstantinidis*.[80] The learned A. G. elaborated the powerful potential of the European citizenship concept: '[As a national of a Member State] he is entitled to say 'Civis Europeus Sum', and to invoke that status in order to oppose any violation of his fundamental rights.'[81] Following this example, A. G. Léger invoked the Community citizenship concept in the *Boukhalfa* case.[82] Calling it a 'consolidation of existing Community law' he continued,

> it is for the Court to ensure that its full scope is attained. If all the conclusions inherent in that concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations.[83]

Finally, A.G. Ruiz-Jarabo Colomer summarized the hopeful remarks of the Advocates General in *Shingara and Radiom* as follows:[84]

> The creation of citizenship of the Union, with the corollary described above of freedom of movement for citizens throughout the territory of the Member States […] separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union.[85]

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79 Kostakopoulou (1999) op. cit., at 407.
80 Case C-168/91 *Christos Konstantinidis,* [1993] ECR I-1191.
81 Opinion of A. G. Jacobs in *Konstantinidis*, para 46.
82 Case C-214/94 *Boukhalfa v. Bndesrepublik Deutschland* [1996] ECR I-2253.
83 Opinion of A. G. Léger in *Boukhalfa*, para 63.
84 Joined Cases C-65&111/95 *The Queen v. Secretary for the Home Department ex parte Shingara and Radiom, [1997] ECR I-3343.*
85 Opinion of A.G. Ruiz-Jarabo Colomer in *Shingara and Radiom*, para 34.

Unfortunately, these remarks by Advocates General were made *obiter dictum*, since the question of citizenship was not at issue in these cases. However, the opinion delivered in *Shingara and Radiom* strikingly prefigures current developments in the case law of the Court on citizenship, which began with the first 'real' citizenship case: *Martínez Sala.*[86]

3.4 Martínez Sala

Ideally, the Court needed a case where it would be impossible (or very difficult) to draw on any of the provisions of the Treaty covering free movement of workers, Regulation 1612/68, or the three free movement directives. However, for rather obvious reasons, the case must also be within the scope of application of Community law.[87] In short, the application of the Citizenship provisions of the Treaty required the existence of grounds not covered by any other norms. The aim was to demonstrate its effectiveness – an application of *lex generalis* in the absence of *lex specialis.*

Sala provided just such a case.[88] It concerned a Spanish national who had been living in Germany for 25 years, and applied for a child-raising allowance. In order to be granted the allowance, a foreigner was required to provide a residence permit, which Martínez Sala did not have. Possessing only a document certifying that she had applied for a residence permit, she was refused the allowance. Since she could not be deported from Germany, [89] the Court did not address the question of whether the right of residence followed directly from the Citizenship rights of Part II of the EC Treaty. However, the Court found that she was entitled to the allowance under the non-discrimination provision of Article 12 of the Treaty. It ruled that Sala came under the personal scope of the Treaty as a national of a Member State lawfully residing in a Member State other than her own and that the allowance fell under the material scope of EU law. As a EU citizen, Martínez Sala enjoyed the

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86 Case C-86/96 *Martínez Sala v. Freistaat Bayern*, [1998] ECR I-2691.

87 The court takes advantage of any opportunity to avoid ruling on art 18, as in the recent case C-92/01 **Stylianakis** v. **Greece** [2003] ECR 00, (para 20) where the court referred to *Skanavi* and Case C-100/01 Oteiza Olazabal [2002] ECR I-10981.

88 For comments on this judgement see Castro Oliveira (2002) *op. cit.*, at 78; Davies (2003) *op. cit.*, 192; Kostakopoulou (1999) *op. cit.*, at 408; Reich (2001) *op. cit.*, at 15; Schrauwen (2000) *op. cit.*, at 782; O'Leary, Síofra, 'Flesh and Bones of EU Citizenship' (note on Case C-184/99 *Martínez Sala*), in 24 *ELRev.*, 1999.

89 Protected by international law, namely the European Convention on Medical Assistance, Art. 6a.

rights granted by the Treaty-in this case, the right not to be discriminated against under Article 12. The Court did not resolve the question of whether she was a worker in the eyes of community law, since it was not relevant to the ruling in the case.

Many commentators have suggested that the Court applied a very specific type of reasoning in this case, with some even calling it 'bizarre.'[90] In any case, the implications of the judgment are obvious: the scope of application of the Treaty was widened, since now being a citizen is sufficient for one to fall within the personal scope of application of the Treaty. In this sense, Sala is the first citoyen of the European Union, and the benefits formerly reserved for economic agents in the sense of the Regulation 1612/68, et seq. become applicable to *citoyen pur*.[91] Thus, the Sala case 'exploded the linkages'[92] and 'abandon[ed] fictitious connections'[93] that were deemed necessary to apply the non-discrimination rule of Article 12 (*ex* Article 6 EC) in C*owan*.

Annette Schrauwen has made an interesting observation concerning the seemingly paradoxical outcome of the *Sala* case: that the jobseekers and non-economic *citizens* of the European Union have inverted sets of rights after *Sala*. The former enjoy the right to freedom of movement[94] but have only limited rights to equal treatment, which is limited to access to work, while non – economic citizens do not (yet) have a right to *de facto* freedom of movement – unless covered by the three free movement directives-but have rights to social security once they are legally residents in a Member State other than their own.[95] The Court's quest for effective and directly applicable citizenship rights, through further development of its case law on the subject, continues.

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90 Davies (2003) *op. cit.,* at 192, making reference to O'Leary (1999), *op. cit*., at 77-78. The allowance was understood by the Court as a social advantage and a family benefit in the sense of the Article 7(2) of Regulation 1612/68 and Article 4(1)(h) of Regulation 1408/71. Sala, while not a worker, was deemed to have been discriminated against because she was asked to produce a residence permit in order to qualify for the benefit.

91 In the terms of Reich & Harbacevica (2003) *op. cit.*, at 628.

92 Craig, Paul and de Búrca, Gránne (eds.) *EU Law, Text, Cases, and Materials* (IIId ed.), Oxford: Oxford University Publishing, 2003, at 758 making reference to O'Leary (1999) *op. cit.*

93 Reich (2001) *op. cit.*, at 16.

94 Case C-292/89 *R. v. Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745.

95 Schrauwen (2000) *op. cit.,* at 780.

3.5 Following in the path of Sala

In the Bickel and Franz case,[96] the Court pursued the path of the Sala judgement, granting European citizens the right to use their native language in court proceedings in Member States where the use of this foreign language is officially used. Article 12 EC was again put to the test. The case concerned German and Austrian nationals facing criminal charges in the Italian province of Bolzano, where German is commonly used by the local authorities. Based on the fact that Bickel and Franz were European citizens exercising their free movement right, the Court found a violation of Article 12 in the fact that they were not allowed to use German, while it is permitted for German-speaking Italians. Interestingly, the Court did not follow its previous jurisprudence on the matter, where it could easily have followed *Cowan* and found that Bickel and Franz were recipients of services.[97] Instead, the Court understood the use of one's own language as a social advantage within the meaning of Article 7 (2) of Regulation 1612/68,[98] thus promoting the citizenship concept.

In *Grzelczyk*,[99] the Court again chose to follow *Sala,* while A. G. Alber wanted to rely on the free movement of workers provisions. In this case, a French student studying in Belgium applied for a 'minimex' allowance-*de facto* financial assistance from the Belgian state. Thus Grzelczyk's request could be interpreted as violating Council Directive 93/96 on the right of residence of students. The Court could have followed the opinion of A. G. Alber and granted the 'minimex' allowance to Grzelczyk even without recourse to the citizenship provisions of the Treaty, given that Grzelczyk worked part-time during the first three years of his studies abroad, and, therefore, as a worker fell within the scope of Regulation 1612/68. Instead, the Court based its judgment on Articles 12 and 17 EC, thus widening the scope of citizenship rights. The Court further deepened the meaning of the Union citizenship concept, ruling that 'Union citizenship is destined to be fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their

96 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; see also Castro Oliveira (2002) *op. cit.*, at 81; Reich (2001) op. cit., at 16.

97 Some scholars are disappointed with the 'logical flaws of the judgement': see *e. g.* Davies (2003) *op. cit.,* at 191.

98 Case 137/84 *Ministère publique* v. *Mutsch,* [1985] ECR 2681, paras 14 - 17; the difference between 'old' and 'new' case law on language usage is highlighted by Castro Oliveira (2002) *op. cit.*, at 81.

99 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.

nationality, subject to such exceptions as are expressly provided for'.[100] However, it must be noted that, as in Sala, the case dealt with citizenship rights not directly related to residence, and the facts of the case were very specific: 'minimex' is a one-time benefit, and thus different from 'real' social security entitlements. In relation to the still missing link between citizenship and right of residence in a Member State other than your own, it is clear that, as Castro Oliveira puts it, 'the Court is not ready to cross the final frontier: the recognition of the right to migrate if only to benefit from social security in another Member State.'[101] However, the most recent case law can be interpreted in such a way as to call this assumption into question.

3.6 Coming home after school: D'Hoop

Further developments in ECJ case law on citizenship support the claim that the citizenship concept should be expanded and undermines, to a certain extent, the distinctions made in European law between different groups of persons. The Court continued to pursue the line of argument from *Sala* and *Grzelczyk* in the *D'Hoop* case.[102] Marie-Natalie D'Hoop, a Belgian citizen, received her baccaloréat in France and, upon return to Belgium, was refused the tideover allowance provided by Belgian legislation. The provisions on free movement of workers and providers of services were clearly not applicable in this case, since Ms. D'Hoop's parents resided in Belgium during her studies in France. Hence, the Court relied on the citizenship provisions of the Treaty: as a Community citizen, Ms. D'Hoop could not to be discriminated against. The Court stated:

> it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to the freedom of movement.[103]

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100 *Grzelczyk*, para 31.
101 Castro Oliveira (2002) *op. cit.*, at 84.
102 Case C-224/98 *Marie-Nathalie D'Hoop v. Office national d'emploi,* [2002] ECR I-1691.
103 *D'Hoop*, para 30.

3.7 A citizens right of residence

Finally, the most far-reaching citizenship case to date is *Baumbast*.[104] The family of Mr. Baumbast, a German national working in Lesotho, was refused indefinite residence permits by the United Kingdom. Mrs. Baumbast (a Colombian national) and her husband appealed the decision to the Immigration Appeal Tribunal, which referred the question to the ECJ. The case presented an opportunity for a Community citizen to invoke Article 18(1) EC in support of his/her residence rights in another Member State. As has already been pointed out, the Court's previous case law concerning the Community citizenship concept focused primarily on non-discrimination, never directly addressing the right of residence. Thus *Baumbast* provided the Court's first opportunity to assess the relationship between the right of residence and Union citizenship.

Although the UK and German governments argued that the right of residence can not be derived directly from Article 18(1) EC, the Court disagreed with this position. It noted that EC law does not require that Union citizens pursue a professional or trade activity in order to enjoy the rights provided in Part II of the EC Treaty, ruling that Article 18 (1) confers this right directly:

> As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr. Baumbast therefore has the right to rely on Article 18(1) EC. [105]

The Court also found that any limitations referred to in the Article were subject to judicial review.[106] Thus, the residence right is here finally derived directly from Article 18 EC, putting into force the position announced by A. G. Cosmas in *Wijsenbeek*, when he declared that citizenship bestows a 'right of different kind,' a 'true right, […] stemming from the status of the citizen of the Union, which is not subsidiary in relation to European unification, whether economic or not.'[107]

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104 Case C-413/99 *Baumbast and R. v. Secretary of State for Employment,* [2002] ECR I-7091, discussed by Reich & Harbacevica (2003) op. cit., at 624.
105 *Baumbast*, para 84.
106 Baumbast, para 86.
107 Opinion of A. G. Cosmas in *Wijsenbeek*, para 85.

3.8 ECJ – the founder of Community citizenship

As a result of these developments in the case law on EU citizenship, Part II of the EC Treaty has moved from being a purely rhetorical part of the Treaty to a directly applicable instrument of Community citizens' rights. According to Davies' prediction, 'if this is the direction of the future, and citizenship is to be interpreted so purposefully and independently, then specific rights for economic actors are indeed on their last legs.'[108]

Of course the aforementioned cases are not yet 'hard law'. It may take years before an established citizenship concept, enjoying rights distinct from those of active economic agents, will be created. The recent *Baumbast* case, together with *Sala* and *Grzelczyk*, are milestones in this emerging conception of rights and European citizenship. The future jurisprudence of the court will have to answer many questions: What if Sala were not a resident of Germany under international law? What if Bickel and Franz were Swedish citizens with a rudimentary knowledge of German but no knowledge of Italian? What if Ms. D'Hoop were going to Italy, for example, and not returning to her native country of Belgium? *Etc.*

However, even without knowing the answers to these questions, it is possible to say that Part II of the EC Treaty and especially Article 18 have become meaningful due to recent ECJ jurisprudence, following, to a certain extent, the historical trajectory of the establishment of the American fundamental right to travel. In light of this, it is all the more strange that the Accession Treaty should simply disregard Article 18 in limiting the right to free movement of the citizens of new Member States.

Having outlined the current state of the Community citizenship concept for nationals of the current Member States, let us now turn to the new Member States and see how many of those rights their nationals will enjoy upon enlargement on May 1, 2004.

4. The New Meaning of Citizenship: Second Class Guests at the Table

In principle, the Treaty of Accession does not contain any explicit limitations on Part II of the EC Treaty. This means, on the one hand, that

108 Davies (2003) *op. cit.*, at 195.

citizens of new Member States will be entitled to take part in European elections and enjoy the diplomatic protection of other Member States in third countries where they do not have their own missions, according to Articles 19 (2) and 20 of the EC Treaty, respectively. The citizens of new Member States will also be entitled to apply to the European Ombudsman and petition the European Parliament. However, these rights are not exclusively linked to citizenship of the Union.

On the other hand, since the economic free-movement rights do not apply to citizens of new Member States, they are largely prevented from participating in local elections of Member States other than their own and are largely excluded from the benefits of Article 18 (1, 2), since the restrictions introduced by the Treaty of Accession concerning Articles 39 and 49 (1), together with restrictions on the application of the secondary community legislation regulating economic free movement, have a necessary effect on the application of Article 18 of the EC Treaty.

4.1 What is granted to the citizens of new Member States?

It follows that, applied to the nationals of new Member States, the EU free movement *acquis* looks rather anemic. Everything dear to the EU is prohibited to them. An economic agent from a new Member State is deprived of almost all economic rights, and even Norbert Reich and Solvita Horbacevica's 'discovery of a 'market citizen' from accession countries'[109] does not change the essential situation, since the direct effect of the establishment and non-discrimination provisions of the Europe Agreements is undoubtedly not as significant in the legal environment, where the free movement itself is prohibited. Of course, the Accession Treaty does not diminish the scope of rights the citizens of new Member States enjoy under the Europe Agreements.[110] However, the accession of these states to the Union will not bring any immediate increase in the scope of the free movement right.

According to the Annexes V, VI, VIII, IX, X, XII, XIII and XIV to the Treaty of Accession some freedom of movement does exist immediately, since 'freedom of movement of workers and the freedom to provide services involving temporary movement of workers as defined in Article 1

109 Reich, Norbert and Harbacevica, Solvita, 'The Stony Road to Brussels - The Many Ways of EA Nationals and Residents into Union Citizenship - And the Many Attempts to Keep Them Out', 5 *Europarättslig Tidskrift*, 2002.

110 See *e. g.* the Chapter on Europe Agreements in Ott & Inglis (2002) op. cit.

111 Annexes V, VI, VIII, X, XIV Art. 1(1); Annexes IX, XII, XIII Art. 2(1)

of Directive 96/71/EC'[111] is allowed. However, the a full right to freedom of movement will be introduced only after a transition period of from two to seven years, subject to the discretion of the individual Member State: for the first two years, current Member States[112] will be allowed to continue to apply national measures;[113] current Member States are free to continue the non-application of the free movement acquis for an additional three years if they notify the European Commission of their intention;[114] current Member States may then extend this period of non-application for an additional two years, with the same notification requirement. [115]

In addition to these transition periods, Annexes also contain safeguard clauses, which allows a current Member State to ask the Commission to suspend the application of the *acquis* in the event that it 'undergo or foresee disturbances on its labor market which could seriously threaten the standard of living or level of employment in a given region or occupation.'[116] At the same time, any Member State is free to appeal to the Council to amend or annul a decision taken by the Commission. This is a reasonable safeguard measure, since the Council acts on a qualified majority, which prevents the Member State interested in the suspension from blocking the proceedings.

At the same time the Annexes also provide for the possibility 'in urgent and exceptional cases' of a unilateral suspension of the free movement *acquis* by a Member State 'followed by a reasoned ex-post notification of the Commission.' [117]

Measures not involving the free movement right, per se, can also be found in the Annexes: for example, every new Member State national who has been admitted to the labor market of one of the present Member States for an uninterrupted period of 12 months or longer, is entitled to continued access to the labor market of this Member State. However, such a worker has no right to move to another Member State, which is expressly stated in the Annexes. [118]

Thus, the application of the free movement right to new Member States nationals is fully controlled by the current Member States, at least for the first seven years. Considering the number of new Member States, situations may arise where free movement will be *de facto* established between the majority of the new and current Member States, except for the most cautious among the latter. This would certainly create problems

112 In the terminology of Article 1(2) of the Act of Accession.
113 Annexes V, VI, VIII, X, XIV Art. 1(2), Annexes IX, XII, XIII Art. 2(2)
114 Annexes V, VI, VIII, X, XIV Art. 1(3), Annexes IX, XII, XIII Art. 2(3)
115 Annexes V, VI, VIII, X, XIV Art. 1(5), Annexes IX, XII, XIII Art. 2(5)
116 Annexes V, VI, VIII, X, XIV Art. 1(7)(2), Annexes IX, XII, XIII Art. 2(7)(2)
117 Annexes V, VI, VIII, X, XIV Art. 1(7)(3), Annexes IX, XII, XIII Art. 2(7)(3)
118 Annexes V, VI, VIII, X, XIV Art. 1(2)(2), Annexes IX, XII, XIII Art. 2(2)(2)

for the uniform and effective application of EU law.

4.2 Different freedom of movement for different citizens

It is very important to take into account the fact that it is not by chance that the identical provisions, referred to in Article 24 of the Act of Accession, are not concentrated in one Annex, but spread over 8 Annexes. The free movement of citizens of each of the new Member States, then, is regulated by a separate set of provisions. As a result, during the transition periods, the scope of free movement rights, as applied to the nationals of different new Member States, will vary considerably. It is likely that small and prosperous states like Estonia and Slovenia will only be subjected to the initial two-year transition period, while countries like Poland and Latvia risk waiting for the full seven years for free movement rights. This kind of inequality is contrary to the notion of a 'return to Europe together', widespread among scholars and politicians, and cherished by nationals of the new Member States.

This state of affairs may have drastic consequences for the promotion of the European citizenship concept, since the status of a European citizen will no longer be uniform, after May 1, 2004. Small differences in legal status among the nationals of the new Member States, together with a fundamental gulf between the legal positions of the nationals of new and current Member States, will undercut the establishment of a robust and coherent concept. Of course, the drafters of the Act of Accession fully understood that the creation of numerous legal statuses in the field of free movement could hamper the functioning of the internal market. Certain steps have been taken in order to avoid such consequences. Article 40 of the Act of Accession, for example, expressly prohibits the creation of border controls between Member States, during the periods of transition.

It is difficult to disagree with Reich that the suspension of the acquis runs contrary to the European Constitution itself.[119] Even the Commission's note seems to be critical of the non-application of the *acquis*.[120] In addition, the European Charter of Fundamental Rights protects the equality of EU citizens,[121] leaving no room for the creation of a 'second-class' citizenship. For Member States, both current and new, free movement is a powerful political symbol[122] of what integration is all about.

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119 Reich (2001) *op. cit.*, at 38.

120 The European Commission, *The Free Movement of Workers in the Context of Enlargement, information note*, 6 March 2001, at 24 and 10.

121See *e. g.* Article 15 (2) of the Charter.

122 Castro Oliveira (2002), *op. cit.*, at 77.

4.3 'Byzantine diplomacy' was not the only option

It is essential to emphasize that the Community had policy options other than to 'freeze' the application of the free movement *acquis* for new Member States, as it did in the Accession Treaty. The Commission's information note of 6 March 2001 described five possible alternatives, ranging from immediate application to complete non-application of the free movement *acquis*:

1. Full and immediate application of the *acquis*;
2. Safeguard clauses (permits the Member States to intervene in full implementation of the *acquis* when labor markets become disrupted);
3. Flexible system of transitional arrangements;
4. Establishment of a fixed quota system, managing access to labor markets. (Some Member States already operate bilateral quota systems with candidate countries);
5. General non-application of the *acquis* [123]

In fact, nobody expected the fifth option to be exercised. The non-application of the free movement *acquis* to new Member States caused considerable disappointment both in the new Member States and in Western, pro-European academic circles. According to Norbert Reich, the decision 'does not go along with the spirit of creating a greater Europe after the fall of Soviet regime.'[124] Scholars in new Member States are even more critical:

> [This is a] solution that resembles an intra-European geopolitics of transforming the would-be accession countries into restricted-exit homelands or reservations […]. How exactly would that qualify as implementation of the idea of organizing a union 'in a coherent manner and on the basis of solidarity […] is, let's just say, somewhat unclear.' [125]

These expressions of disappointment are nothing new to the Community. The Union has been widely criticized for its 'neo-Byzantine'

123 See The European Commission (2001) *op. cit.*, at 18.
124 Reich (2001) *op. cit.*, at 35.
125 Böröcz, József, 'Introduction: Empire and Coloniality in the "Eastern Enlargement" of the European Union', in Böröcz, József and Dancsi, Katalin (eds.), *Empire's New Clothes, Unveiling EU Enlargement*, Telford: Central Europe Review, 2001, at 27.
126 See Engelbrekt, Kjell, 'Multiple Asymmetries: The European Union's Neo-Byzantine Approach to Eastern Enlargement', in 39 *Int'l Politics,* 2002.

approach to enlargement.[126] Some scholars have declared that, with the implementation of the policy of conditionality, 'the end of Europe' is very close, since 'the Community does not think of itself as a community anymore.'[127] Non-application of the free movement acquis to the new Member States can thus be understood as an example of Byzantine diplomacy.

4.4 History of transitional arrangements

In order to understand the origins of the notion of transition periods, it is necessary to turn to the history of previous enlargements. A seven-year transition period for the right to free movement was imposed when Spain and Portugal joined the EC. During that transition period, Member States maintained individual national provisions to regulate access to their labor markets. Distinctions were made between workers and their families, as well as between those employed in the EC before the enlargement and those seeking employment only later. For the new arrivals, a work permit from the Member State of employment was required. These workers enjoyed the right to equal treatment regarding all conditions of work and employment. No new restrictions could be introduced (according to the declaration of all Member States attached to the accession Treaties).[128] The transition regimes included a clause requiring that the situation be reviewed after five years. In 1991, the Council examined the situation and decided to shorten the transition period by one year.

During each year of the transition period, 1,000 Spanish and 6,000 Portuguese workers received permits in other Member States. In addition, 15,000 EU workers migrated to Portugal and Spain each year.[129] Thus, the impact of enlargement on labor migration was marginal in terms of the total population of the Union. And, more importantly, the predictions of a tidal wave of migrants from the two countries were obviously grossly exaggerated. [130]

A crucial difference, however, between the present enlargement and that which incorporated Portugal and Spain into the Union, is that the

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127 Klabbers, Jan, 'On Babies, Bathwater and the Three Musketeers, or the Beginning of the End of European Integration', in Heiskanen, Veijo and Kulovesi, Kati (eds.) *Function and Future of European Law,* Helsinki: Institute of International and Economic Law, 1999, at 278.

128 Thus the rights of Spanish and Portuguese workers were almost the same as those of workers of the Europe Agreement states for seven years after accession.

129 The European Commission (2001) *op. cit.*, at 15.

130 Landaburu, Eneko, 'The Fifth Enlargement of the European Union: The Power of Example', in *Fordham Int'l L.J.,* 2002, at 10.

latter took place prior to Maastricht, when free movement was still only understood as 'economic free movement' and the category of citizenship could not be applied. Therefore, the present enlargement can only be compared with that of Austria, Finland and Sweden, which took place after the inclusion of Part II into the EC Treaty. No transitional measures were applied in this case, and the Community citizenship concept was not questioned. However, with regard to this enlargement, it is necessary to take into account the fact that the three enlargement countries were already members of the EEA, and so their nationals had been enjoying free movement rights prior to becoming citizens of the Union.

If taken seriously, however, Union citizenship should now entail a uniform status for all citizens – new and old – especially in light of the citizenship rights jurisprudence of the ECJ and, in particular, the recent *Baumbast* judgment, which made Article 18 of the EC Treaty directly applicable. Even before Maastricht, however, Community citizenship had been understood in terms of the equality of all citizens. [131]

5. Conclusion: 'A Symbolic Plaything without Content'

Dimitris Chryssochoou has noted that 'the genesis of the Community constituted a by-product of a creative marriage between political idealism and economic rationalism'.[132] This is undoubtedly true in many respects, but in the context of enlargement there is a third element that intervenes to disrupt the perfect harmony of the 'creative marriage'. Namely, as Jan Klabbers once put it, the fear of 'going to bed with bad guys.'[133] Regrettably, the concept of European citizenship as a uniform status, guaranteeing equal rights to all citizens of the Union, has been sacrificed to this fear. Regardless of the fact that migration from new Member States to the 'old' Union is predicted to be marginal, the choice was made to disregard the significance of European citizenship, as well as its constructive potential.

The ECJ's jurisprudence, aiming to create directly applicable rights based on the status of citizen, as such, and not on economic categories, will be meaningless for the citizens of new Member States. Thus, instead of an enlarged, democratized Community, which is 'closer to its citizens',

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131 See *e. g.* van den Berghe, Guido and Huber, Christian H., 'European Citizenship', in Bieber, Roland and Niekel, Dietmar, *Das Europa der zweiten Generation, Gedächtnisschrift für Christoph Sasse*, Band II, Kehl am Rein: N.P. Engel Verlag, 1981, at 773.

132 Chryssochoou, Dimitris N., *Democracy in the European Union,* London/ New York: Taurus Academic Studies, 1998.

133 Klabbers (1999) *op. cit.*, at 279.

a hypocritical Union is being created, as alienated from its citizens (especially those in the East) as ever. The creation of 'second class' citizens will undermine the process of integration of the new enlarged Union, giving rise to feelings of disappointment, and once again relegating the European citizenship concept to a 'symbolic plaything without content',[134] rolling back the last 10 years of jurisprudence, to a time before *Sala, Grzelczyk* and *Baumbast.*

The enlargement process can now only be seen as a lost opportunity for expanding Community citizenship. Instead of fostering integration and a policy of real inclusion, two bodies of law have been created: the law for 'real citizens', and that for citizens of new Member States. If the words of A. G. Jacobs in *Konstantinidis* – 'Civis Europeus Sum' – were to be pronounced today, they would no doubt sound like a bitter joke.

134 Jessurun d'Oliveira (1993) op. cit., at 105.