Robert Schuman Centre

A New Social Contract?

EU Citizenship as the Institutional Basis of a New Social Contract: Some Sceptical Remarks

CARLOS CLOSA

RSC No. 96/48

EUI WORKING PAPERS

EUROPEAN UNIVERSITY INSTITUTE

EUI Working Paper RSC No. 96/48

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

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A Working Paper written for the Conference organised by the RSC on *A New Social Contract?* held at the EUI the 5-6 October 1995, directed by Yves Mény and Martin Rhodes

EUI Working Paper **RSC** No. 96/48

BADIA FIESOLANA, SAN DOMENICO (FI)

© Carlos Closa
Printed in Italy in July 1996
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

Carlos Closa

Introduction[1]

The notion of a social contract has been central to concepts of citizenship both in political theory and constitutional practice. Citizenship has been perceived as inclusive of social rights for guaranteeing individuals' autonomy and self-realization as human beings. The neo-liberal assault on the welfare state has questioned this view but, as a reaction, it has also stimulated the search for new ways of reconstructing the classical notion of citizenship. In this context, European Union citizenship appears very appealing. Three developments have fuelled expectations: the severing of the link between rights and nationality within the EU; the development of certain EU social rights and, finally, the recreation of citizenship at the EU level. The linkage of the concept of EU citizenship to the idea of a social contract is thus gaining currency in Europarlance, although at the expense of conceptual clarity: for 'social contract' refers both to the classical imperative of legitimising public power with EU citizens' consent (Neunreither 1995), as well as to an understanding of the Treaty on European Union (TEU) as a pact among individuals as well as states (Weiler 1995: 22).

This paper does not aim to produce a new conception of social pact; rather, it presents a sceptical view of the prospects of using EU citizenship as an instrument for rebuilding the old social contract and, specifically, its welfare dimension. But this scepticism should not be interpreted as a negation of the possibility of, or, even less, the desirability of such development. The link between citizenship and contractualism is referred to in the first section in summary fashion. The contents and limits of EU citizenship are established in section two in order to show, in section three, that EU citizenship has been mainly developed through negative integration and that this facilitates a liberal-inspired form of social contract. As a result, it is argued in section four, the prospects for developing EU social rights are slim. However, it is also argued that EU citizenship must be central to any redefinition of a social contract in Europe.

The aim of this study is not to compare EU citizenship with an ideal type drawn from national citizenships. Rather, its conception of EU citizenship is grounded in the context of current EU legal and political practice, identifying concrete and precise problems lying at the interface of EU politics and national citizenships.

Contractualist Doctrines and the Boundaries of Citizenship

The idea of a social contract is part of the notion of citizenship itself. The first theoretical expression of contractualism, the Hobbesian one, referred to a basic social contract in which individuals were held equal as subjects (Baubock 1994). This conveys an implicit idea of weak citizenship but there is a more important characteristic: the individuals who participate in this social contract play no part in defining it. The contract does not imply a redefinition of the group (although this question is not explicitly addressed in a theoretical way) and is therefore premised on the pre-existence of a community as the basis for consensual change. Later models of the social contract built upon this pattern of a basic pact to make it dependent on guarantees of fundamental civic rights (Locke) or on the individual's self-realization through political participation by exercising political rights (Rousseau). The modern understanding of contractualism, as reflected in constitutional practice, has extended the pact to include a wider guarantee of social rights, based on the belief (in parallel to economic keynesianism) that the self-realization of a member of the community contributes to the improvement of the community as a whole.

Certainly, it could be objected that the latter evolution reflects a rather communitarian understanding of the social contract and that liberal versions of the social contract, theoretically rooted in Locke, differ substantially from this. In the liberal tradition, negative freedoms are predominant and the participation in the public sphere is not an instrument for individual self-realisation. However, a possible similarity between both models can be identified: the absence of theoretical inquiry into the boundaries of the contracting group. Regardless of their liberal or communitarian inspiration, all forms of citizenship relied on the existence of a pre-defined human of group on which the pact is predicated, and, simultaneously, on a bounded and defined public space in which the status of citizenship is guaranteed. This explains why some authors consider that liberal citizenship theories are implicitly communitarian (Bellamy 1994).

Obviously the factor that has altered current perceptions of citizenship - mass migration - was not an issue when these theoretical models were developed. In practical terms, nation-states served to define these boundaries, both in a communitarian as much as a liberal perspective. It is not just that the nation-state provided the framework for free individual and collective action; but also that the new political role of individuals demanded a deeper degree of personal commitment, even to the point of self-sacrifice and, at this juncture, nationalism served to foster people's identification with this role: nationalism and republicanism combined in the necessity to fight and, if necessary, to die for

one's country, a transcendent entity which took the place of personal allegiance to the sovereign. As Habermas argues, there was a symbiosis between nationalism and republicanism in this respect (Habermas 1994: 23). The social contract was not unlimited; citizenship was established within bounded and defined communities, and this automatically created a criterion for exclusion. Exclusion was based on the understanding of the State as an entity whose telos is to express the will and further the interests of distinctive and bounded nations, and whose legitimacy depends on their doing so, or at least appearing to do so (Brubaker 1992: 28). Nationality became the essential attribute for determining an individual's entitlement to citizenship rights.

This theoretical reasoning does not lead to an automatic deduction of a practical distinction between the status of citizens and aliens. It is true that constitutional texts, independent of their liberal or communitarian inspiration, and beginning with the Declaration of the Rights of Man and Citizen, establish a difference between human rights (granted to everybody within the territory of a state) and citizenship rights (reserved only for certain individuals). But it is also true that State practice through the progressive granting of civil, social and even political rights to formerly excluded individuals or groups has steadily eroded the juridical and conceptual distinction between citizens and non-citizens within most Western states. The distinction has been kept only at a conceptual level and regarding certain limited rights: fundamental rights (whatever their content) are granted in general on an equal footing to citizens and non-citizens alike (Hammar 1990: 83). Accordingly, some authors have revitalize the Lockean concept of "denizen", which means a lawfully resident alien with the same primary rights of political participation as native or naturalized citizens (Layton-Henry 1990; Meehan 1993: 18), while "metic" would be a resident alien with legal status but enjoying only a limited number of the rights of citizenship.

This severing of the link between citizenship and nationality has required a redefinition of communitarian perspectives on citizenship, since from a purely liberal standpoint it is not, *a priori*, conceptually problematic to give aliens citizenship status. Communitarian views have also evolved to encompass the increasing permeability and inclusiveness of the respective communities as part of their own self-identity. Identity is not only based on historical continuity but is also constructed through an understanding of the morally acceptable current status of other individuals within the community. The horrors of nazism and totalitarianism and the various forms of dictatorship world-wide have led to a reformulation of the ways in which democratic communities define themselves: widely guaranteed fundamental rights are a normative pre-requisite for the

constitution of a democratic community. Thus, an extensive granting of rights to non-citizens has become regular practice in western states.

To recapitulate, social contract doctrines inspired the creation of status of rights guaranteed within the boundaries of the nation state; these rights were progressively enlarged and generalized. The creation of the concept of EU citizenship can be understood as part of the process described above: from a liberal standpoint, there is no contradiction in granting certain rights (such as the right to free movement) to nationals from EU Member States as a precondition for the operation of the single market. The acceptance which this redefinition of the privileges of national citizenship requires from the communitarian standpoint is based on the subordination of EU citizenship rights to respect for *national* identities (Closa 1994), thereby easing anxieties about the dilution of communitarian citizenships within the Member States.

Premises and Limits of EU citizenship

Essentially, EU citizenship is a legal status consisting of a set of positive rights - freedom of movement and residence, voting rights in local and European Parliament (EP) elections, the right of petition to the EP; the right to appeal to the ombudsman and the right to diplomatic protection. Most of these are already present (albeit in an imperfect way) in EC law, to which some add implicit rights and duties. The fundamental characteristic of this status is that it is not an alternative to or substitute for national citizenship; but, rather, it adds a second layer of new rights enjoyed in any Member State to the first layer of nationality rights enjoyed *within* a Member State (Closa 1992; O'Keefe 1994). At the moment, the rights embodied in the notion of citizenship of the Union are strictly limited, even though there is provision for their further enlargement. This limitation creates a clear distinction from national citizenship: Union citizenship is a specific status whose scope is reduced to the effects expressly mentioned in the Treaty and, which is therefore, distinct from the more generic character of national citizenships (Ruzie 1994: 10). Citizenship of the Union, as enshrined in the Treaty on European Union (TEU) and at its current stage of development, is a guarantee for the enjoyment of certain rights regardless of which Member State nationality an individual may possess. Moreover, EU citizenship reflects an indirect link between an individual and the Union, mediated by nationality of a Member State.

Not surprisingly, then, there are clear limits to the legal status created by EU citizenship. Whilst it seems possible create an EU citizenship status based on

individual rights, the development of certain other citizenship rights is made more difficult by the absence of a community at the EU level that is equivalent, for the citizen, to the nation-state. Political participation in national elections is the example of this: their restriction to the community of nationals (in contrast with voting rights in EP and local elections) reinforces a fundamentally non-communitarian understanding of EU citizenship. It is on these grounds that, some 20 years ago, Raymond Aron argued that multinational citizenship was impossible. For him, the development of a fully-fledged status of rights attached to the notion of citizenship would not be possible if disconnected from a sovereign nation (Aron 1974). The development of a supranational status of rights has proved him wrong to some extent; but what remains to be seen is whether certain rights which are central to national understandings of social contract can be developed at the supranational level on the basis of an implicitly liberal model. And, here, Aron would appear to be right.

It has been argued above that the extension of citizenship rights has depended on redefining national assumptions and perceptions of citizenship. Indeed, the prospects for a 'new' social contract are pre-determined by this. The prevalence of negative integration in the EU (which, in its original economic formulation, refers to the removal of national restraints on trade and distortions of competition) (Tinbergen 1965: 76) means that the only foreseeable contract will, in any case, have a very liberal profile. The move towards a richer contract in terms of social rights at the EU level is made difficult because the process whereby it would have to be achieved - positive integration (the creation of new social and political institutions and instruments in order to shape the operating conditions of the internal market) - would need to embrace a degree of communitarianism which would be incompatible with the current direction taken by the EU.

Creating Citizenship through Negative Integration: The Principle of Equality in a Formal Dimension

The legal status of citizenship serves the primary purpose of establishing equality among individuals; citizenship serves to overcome inequalities created by cleavages such as sex, age and beliefs. Within the framework of the EU, these cleavages (sex, race, age etc.) are redressed by the catalogue of rights included in national citizenships and/or in constitutionally guaranteed fundamental rights, which the European Court of Justice (ECJ) has incorporated as principles of EC law. Therefore, the only meaningful cleavage which justifies the existence of EU citizenship is the one created by nationality (Garcia 1993:15). Thus, in the

context of EU citizenship, equality has to be understood as equality among nationalities.

Under EC law, the principle of equality is incorporated into the principle of non-discrimination on the grounds of nationality.[2] Surprisingly, in formal terms, citizenship of the Union is not explicitly grounded in the principle of non-discrimination operating in other areas of Community law. It could be argued that, in practical terms, ECJ judicial activism renders this unnecessary, since a generalized right to equality of treatment of Community citizens can be deduced from it (Lenaerts 1991: 25-32). The prohibition of non-discrimination, as developed by the ECJ case law, covers three situations: all direct or overt discrimination (rules which specifically provide for a different treatment of non-nationals); indirect or disguised discrimination (rules which, although based on a criterion which appears to be neutral in practice, lead to discrimination[3]); reverse discrimination which occurs in situations where a Member State discriminates against its own citizens in favour of foreign nationals.

The limitations on constructing a general principle of equality through negative integration can be summarized in three points which presuppose a certain model of contract. Firstly, despite its progressive and flexible interpretation, as manifested in the Cowan case,[4] the ECJ finds a constitutional limit to the prohibition of non-discrimination because of the lack of a precise base of a general character: non-discrimination is applied only within the scope of the EC Treaty. Therefore, an individual claiming equal treatment must establish that he/she is in an area covered by the Treaty (Schockweiler 1991: 16); and this undermines the general character which the principle of equality among citizens should have. The absence of a provision on non-discrimination on the grounds of nationality as one of the elements of EU citizenship of the union derives from the interpretation that the Treaty framers had of it: in other words, that it should regulate the functioning of the EC Treaty, particularly its economic dimension, rather than being part of the personal status of individuals. This questions the apparent inspiration behind EU citizenship: severing the link between economic activity and rights within the EU (Closa 1995: 494).

Secondly, since EU citizenship relies on Member States nationality, the completion of negative integration would have to advance logically towards the creation of a legal regime which removes the inequalities among EU citizens created by conditions to acquire nationality in each Member State. This raises two interlinked questions. On the one hand, Member States still remain gatekeepers for national citizenship privileges (whatever they are) via nationality laws. The heterogeneity of regimes puts EU citizens in unequal positions according to the country in which they may become naturalized. While the

introduction of some harmonization measures seems to be possible, more comprehensive (and radical) solutions, such as multiple or dual citizenship appear to lack legitimacy. Furthermore, EU citizens may be in a situation of inequality *vis-a-vis* third country nationals: some Member States soften naturalization requirements with countries or group of countries with which particular solidarity links are assumed; and only Italy has reacted to the creation of a EU citizenship by softening naturalization requirements for nationals from EU States. On the other hand, would-be EU citizens are faced with different requirements for gaining access to EU citizenship because of divergent national legislation. In the opinion of Evans, a general extension of the equality principle would require a reduction of the exclusivity of nationality as a condition for access to equality and to allow for the operation of alternative conditions, notably that of residence (Evans 1995: 110).

Thirdly, there are explicit Treaty derogations to the application of this principle which seek to preserve the inner core of the communitarian perception of national citizenship from the logic of the market. Thus, the principle is not applicable to those situations where nationality is a prerequisite for the exercise of certain rights or functions from which Member States may legitimately exclude Union citizens other than their own. These are the situations covered in particular by Articles 48 (4) and 55 of the EC Treaty. The Court has repeatedly confirmed that certain functions with the objective of safeguarding State's general interest imply the existence of a particular relationship of solidarity with the State, as well as the reciprocity of rights and duties which are the foundation of nationality.[5] The TEU has not modified this situation and the aforementioned articles remain unchanged. Any change derived from the qualitatively different nature of the Citizenship of the Union will, therefore, have to be brought about by ECJ case law, and, in this respect, some authors argue optimistically that it seems reasonable to expect that the Court will further narrow the scope of articles 48 (4) and 55 now that the provisions on citizenship have given a clear political dimension to the EC Treaty (Wouters 1994: 49).
These objection notwithstanding, it may be asked whether advances in the field of negative integration (which establish some basis for a liberal form of social contract) provide any margin for the reconstruction of the welfare dimension of social contractualism.

Substantial Social Entitlements: the Case for EU Social Rights

Normative as well as theoretical arguments suggest alternatively the desirability or the logical possibility of achieving a positive integration of citizenship rights:

in other words, the development of social rights that would influence the allocation functions of the market. From the normative point of view, it is evident that the market-led logic behind the European integration process is bound to deepen existing, or even worse, create new intra-societal inequalities. Social rights have the function of removing the (material) inequalities among individuals created by the market. Therefore, the possible impact of the single market on citizens' material status - for instance, an increase in unemployment (Cinneide 1994), might justify the development of redistributive EU social rights. Moreover, if the question of inequality is raised in the framework of the EU, a new horizontal dimension appears: as the result of the functioning of the internal market, individuals and groups of individuals may see inequalities within the EU -and even within their own communities - grow larger. Winners and losers are identified along national lines and not as individuals. Put bluntly, the backwardness of the Southern Member States, either in terms of comparatively underdeveloped forms of social citizenship (Garcia 1993: 21-22) or unequal access to economic activity (Magone 1994), erodes the basic equality of citizenship in material terms, while, at the same time, the constraints on fiscal policy created by convergence programmes makes it harder for certain Member States to provide social rights at the highest EU standards. It can therefore be argued that if the process of Europeanization is itself creating additional disparities, then there are clears ground for seeking a remedy to this problem at the EU level (Kleinman and Piachaud 1993). This argument underpins the principle of economic and social cohesion which, as understood by some of its most authoritative interpreters, refers to the status of individuals: in other words, it is a political concept that establishes the maximum socially acceptable divergence among citizens of the Union (Elorza Cavengt 1992). The underlying thinking is that responsibility for the reduction of economic disparities has to be assumed by the Union as a prerequisite of its legitimacy.

Part of this normative argument underlies the more general theoretical analysis of rights. In a continuing debate with Marshall, the sociological tradition has linked the process of rights acquisition with the development of the market. If civic and political rights were the logical correlate of individual equality created by the market, social rights - and specifically redistributive rights - were created as an instrument for modifying the logic of the market. There seems little doubt that the market is central to the development of citizenship rights within the EC, which justifies the definition of such rights as 'market citizenship; (Marias 1994) or 'functionalist' or 'segmented' citizenship (Neunreither 1995). The most highly developed rights - the freedom of movement and residence -are closely linked to the creation of the single market; indeed, they guarantee its efficiency and this secures a wide consensus for such rights. Following the sociological logic, some reputed scholars, inspired by the catalogue of rights developed previous to the

Maastricht Treaty, argue that European citizenship is a possible case of reverse citizenship formation (inverting, that is, the order in which these rights are acquired)(Meehan 1993). In formal terms, Article 8e of the Treaty provides legal grounds for the development of social rights explicitly linked to the citizenship of the Union even without the necessity of a constitutional revision.

Thus, it seems that a case for EU social rights can be constructed on both theoretical and normative grounds. However, EU citizenship does not explicitly provide specific entitlements for the removal of inequalities provoked by the Union itself, and this creates a certain inconsistency in the legal construction. Certainly, it is increasingly becoming common opinion that EU citizenship rights should not be limited simply to those referred to as such by the Treaty (La Torre 1995: 117; O'Leary 1995). In fact, a number of entitlements that can be interpreted as social rights - for instance, the entitlement to receive social benefits - may be identified in EC law. However, since they have not been expressly formulated as citizenship rights, their legitimacy (*raison d'être*) is grounded in the economic activity of individuals. They lack, therefore, the universal character of other citizenship rights. Entitlement to social benefits still varies according to the role played by the claimant in the process of Community economic integration, be it as a worker, a dependant, or an economically inactive individual (O'Leary 1995). The fact that certain social rights (mainly linked to labour market participation) have been explicitly included in the Social Protocol and Agreement - an annex to the TEU based on an intergovernmental agreement that is not strictly subject to EC law and ECJ jurisdiction - does little to improve this state of affairs. As has been correctly noted, the Social Charter and Action programme that preceded it were not concerned with social rights *for citizens* but with fundamental social rights for workers (Kleinman and Piachaud 1993); and this remains the case under the Protocol (see Introduction).

The difficulties in constructing EU social rights as part of EU citizenship are due to their specific nature. The classical Marshallian distinction merely contrasts them to political and civic rights but it fails to capture more subtle questions. One solution to this is to modify the Marshallian distinction between civil, political and social rights. Ferrajoli (1994) has proposed a different taxonomy of rights, combining two different criteria. The first is the logical structure of rights. According to this criteria, I propose a categorization of social rights as follows: rights to personal autonomy (for instance, right to family reunification following right of establishment); secondly, entitlements can be redefined as rights of personal autonomy (for instance, the rights to education or work may be understood as guarantee of non-intervention or as an active obligation of the state to promote them); and thirdly, material provisions designed to realise

entitlements formulated as social objectives. The second criterion proposed by Ferrajoli is to identify the status of the recipient of rights, distinguishing fundamental (attached to legal personality) and citizenship rights.

The importance of both criteria derives from the fact that, in combination, they produce a new conception of rights in practice where social rights are not linked to the status of citizenship. The extension of social rights to 'denizens', for example, has been premised on a socioeconomic situation that has permitted two successive processes: firstly, the transformation of 'expectation rights' into effective entitlements. What permits social rights - understood as a social objectives - to become 'effective entitlements' is the presence of a certain level of socioeconomic development linked to a political programme. Secondly, given the contemporary normative self-understanding of the nation-state as an area for effective solidarity, these entitlements have been extended to non-citizens. At this point, the essential element in deciding entitlement is the existence of boundaries which distinguish between members and non-members of the community (Freeman 1986; Kleinman and Piachaud 1993). However, the boundaries are not traced between citizens (nationals) and non-citizens (non-nationals) but they separate those 'within city walls' (Faist 1994: 7) from outsiders. The principle of redistributive justice is applied not only to fellow nationals but to any person within the boundaries of the community.

There are several obstacles to a similar development at the EU level. Firstly, the lack of commonality across the EU presents a problem of identification. Apart from a vague agreement on basic human rights, EU Member States present a heterogeneous regime of fundamental rights. There are differences in the way different societies attach social rights to the concept of citizenship or even in their tendency towards to add or detract from theme. The frameworks for creating or eliminating social rights are still very much national cultures and, specifically, the degree to which economic welfare in each Member State allows for the material provision which underpins them.

The lack of commonality is obstructed by the lack of channels for the formulation of new values. Whilst social conflict has often characterized the development of systems of rights, the behaviour of social actors has not led to a similar development at the EU level. Rather, the EU has become an additional arena for defending privileged *national* forms of citizenship on the eve of enhanced market competition (Breuer et al. 1994). This is related to the still primarily national character of the social actors and, for instance, the interest of certain 'clubs' (such as German trade unions) has been essential for the development of industrial or labour rights within the EU.

Alternatively, the activism of the ECJ has been decisive, for instance, in enshrining certain rights in the EU's constitution. But those commentators who have enthusiastically championed ECJ judicial activism in the area of social rights seem to ignore that while rights of personal autonomy in the social field may be judicially guaranteed, social *entitlements* require policy to be implemented. Some social rights (and certainly those with a redistributive content), conform to a type of 'expectation rights' that presupposes government action. In the absence of EU policies, social rights judicially guaranteed might constrain national governments to follow policies which imply substantial financial commitments. Therefore, Member States may be willing to resist moves in such direction.

A second, related, question refers to the obstacles for operationalizing social rights. In policy terms, social entitlements can be justified through political programmes based on efficiency, equality or solidarity arguments (Kleinman and Piachaud 1993). What is important, though, is that the kind of social rights inspired by each of these principles is different. Whilst certain social rights can be satisfied through what Majone calls 'social regulation' (ie. intervention whose purpose is to solve problems created by specific types of market failure), substantial provisions necessarily require the development of social policy, based on moral or political reasons (and not in the search for market efficiency) (Majone 1993:157). In practical terms, the lack of an EU-wide macro-economic policy, let alone budgetary or fiscal resources to alter the effects of the single market, limit the possible development of 'social entitlements' provided for by the EU (not to mention the kind of transnational social policy predicated by De Swaan) (de Swaan 1994).

The prevalence of *efficiency* considerations in the emergence of social entitlements at the European level seems to be clear. The policy logic behind European social standards is based on fears of 'social dumping' and, following an old opinion by Advocate General Dutheillet de Lamtothe, aims to assist the establishment of a system by ensuring that competition is not distorted in the framework of the Common Market.[6] The objective of social policy as embedded in the Rome Treaty was not the correction of market outcomes in line with political ideas of social justice, but rather enabling the European labour market to function efficiently (Streeck 1995: 40). The principle of *equality*, on the other hand, seems to play a role in alleviating horizontal inequality (between Member States and their regions), particularly throughout its development of regional and cohesion policies. However, the equalizing concept which underlies the principle of social and economic cohesion is not the provision of individual rights in the forms of entitlements (which would be opposed, in nay case, since it would

erode competitiveness) but rather interregional redistribution (Leibfried and Pierson 1992: 346). Moreover, the strategic interpretation of cohesion by some beneficiary governments has moved the locus of interpretation of this principle to a higher level, in an effort to restrict the number of participating countries as well as the possible role for regions (Closa 1995b).

Finally, *solidarity* is frequently invoked in EU rhetoric. In fact, Article A §3 of the TEU states that (the Union) task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples. However, policies promoting solidarity are not listed as Union objectives in Article B. These are the objectives for whose fulfilment the provision of adequate resources is foreseen by Article F(3). The conclusion, therefore, is that the promotion of solidarity, although a declarative principle, is not an objective for EU policies. This line of reasoning has been taken a step further by the German constitutional court. The Court has ruled that the development of policy to achieve this objective is beyond the reach of current Treaty provisions and, therefore, the Union cannot provide itself with the financial means and other resources that it might consider necessary for the fulfilment of its objectives. Following its line of interpreting the Member States as the Masters of the Treaty, the Court argues that Article F(3) merely makes a statement of intent to the effect that the Member States wish to provide it with adequate resources under whichever particular procedure is necessary.[7] The interpretation that might be drawn from this ruling is that the creation of rights according to a logic of solidarity is not perceived as implicit in the nature of the Union.

Citizenship and solidarity are truly interrelated and address similar concerns when citizenship is understood as an institution for the development of social bonds and the obligation of each person towards society. In this context, welfare provision is produced through a process of social cohesion while also producing greater cohesion through the establishment of a particular set of relationships (Spicker 1991). Although some authors have argued that the development of a Union social policy (and, specifically, redistributive rights) can help to produce greater solidarity (Cinneide 1994) and, in this sense, to create a community, it seems, in fact, that solidarity is rather a prerequisite for developing redistributive social rights. While they underpin and structure systems of solidarity, redistributive rights also seem to be part of a community's self-perception and identity (Preuss 1991). The delicate value judgements about the appropriate balance of efficiency and equity, which social policy expresses, can only be made legitimately and efficiently within homogeneous communities (Majone 1993). It must be recalled that the development of national welfare states in

Europe was promoted by a relatively strong perception of a common (mostly male-constructed) citizenship, moulded by identity-shaping experiences such as wars and grounded in an underlying social homogeneity (Leibfried and Pierson 1992). Redistributive social rights (and a hypothetical 'state of revenue sharing') would imply parallel duties (ie. taxes directly raised from citizens) (Leibfried 1994: 15), accepted either as part of Union citizenship or as a non-discretional duty of Member State nationality. Whatever option, the grounds for such developments seem, at present, to be non-existent.

Alternatives to EU Citizenship as a Framework for Social Contract

Despite the sceptical argument presented above, EU citizenship remains the most meaningful basis for reconstructing a social contract at the EU level. If by citizenship is meant merely a commitment to the shared values of the Union as expressed in its constituent documents - ie., a commitment to the duties and rights of a civic society covering discrete areas of public life (Weiler 1995) - then the concept of EU citizenship is, of course, unnecessary. These commitments are already implicit in the acceptance of EC law which is directly applicable for nationals. Rather, the value of EU citizenship depends on its ability to protect individuals, via legal status, against the challenges that the EU legal order poses to values incorporated in *national* concepts of citizenship and contract, such as solidarity, cohesion and redistribution.

Critical commentaries on the implications of Union citizenship, however, warn against the exclusionist character which is intrinsic to the notion of citizenship itself (d'Oliveira 1995: 77-82), claiming even that the European integration process poses a challenge to the established distinction between fundamental rights of general availability and fundamental rights available to individuals in relation to nationality (Evans 1995: 104). This objection seems to be based on a mechanistic identification of national citizenship with EU citizenship and misses a fundamental difference between the two: the gatekeeper of citizenship privileges is nationhood (and its legal repository, nationality). No European nationality matches European citizenship and, therefore, whatever entitlements are included under European citizenship, Member States retain full discretion in determining who their nationals are even for the purposes of EC law. Therefore, regarding EU citizenship as a new banner for privilege is untenable, as long as it depends on nationality, the real banner for citizenship privileges.
A priori, there is no reason why Member States should not generalize EU citizenship rights to all individuals.

A more subtle line of reasoning seeks to subsume the question of EU citizenship rights under the broader question of human rights. In short, it is assumed that individual rights are better served through fundamental rights, and that human rights are a superior normative entitlement. In this argument, the juridical analysis reacts to the sociological tradition which, from Marshall onwards, has referred the whole ensemble of rights (civil, political, social and others) to the status of citizenship. Although the evidence of the process of rights acquisition justifies sociological postulates, the latter identify citizenship, in reductionist fashion, as the main and almost only channel for individual entitlements to rights. From a juridical point of view, the concept of legal personality offers an alternative status for entitlement to fundamental rights (Ferrajoli: 1993), in which all civil rights and some social rights are included. State practice confirms that these are granted to all individuals within the boundaries of a political community.

The normative case for incorporating human rights and fundamental freedoms within the EU Treaty is undisputable, as is the case for generalizing social and civil rights to all individuals regardless their citizenship status. But the strength of the normative case is somehow weakened by two possible obstacles to its practical development.

Firstly, human rights are a normative category with no self-evident, precise practical manifestation. Each constitutional order institutionalizes human rights by providing specific contents for fundamental rights listed in declarations and conventions (Bellamy: 1994). Since differences on the understanding of basic human rights are not uncommon among Member States, the creation of fundamental rights at the EU level through a political process of creating common standards would be essentially similar to the process of developing EU citizenship. The conceptual disagreements would be purely nominal; but the obstacles identified above would still be a problem, regarding either fundamental or citizenship rights.

Secondly, this line of argument seems to be unaware of an underlying value-option. This is because the objective is, specifically, the improvement of individual judicial protection *vis-a-vis* community law, particularly in face of the ECJ tendency to balance this protection (provided that the substance of the right is not altered) against Community's objectives. A practical remedy to possible ECJ 'excesses' is posed by national constitutional courts, as the German Court has reminded it in its Maastricht Ruling. Another possible remedy would be an explicit, enforceable and general Treaty provision on the respect of human rights. In this case, substituting the process of rights creation within the sphere

of EU citizenship (whatever its limits) by the institutionalization of human rights would certainly confirm the ECJ as the main actor in the creation of rights and, incidentally, would also open the way to a notion of social contract which is based on negative rights, judicially secured - in essence, a liberal version of the social contract. It would be liberal in a double sense: first, citizenship status would result from market interaction (negative integration and efficiency-oriented social rights) although with a universally high level of protection (the one set by human rights). Second, and in contrast, rights (either political or social) aimed at correcting the functioning of the market would have to be explicitly introduced through political decision. Redistributive rights - which may be 'inefficient' from a market perspective -have as their only possible justification the democratic will of the citizens (Streeck 1995: 35). Therefore, these rights would appear to require the democratic political process as a prerequisite. In this case, though, it would be necessary to overcome the widespread belief that rights associated with various manifestations of that 'over-arching evil' in EU politics - the European super-state - are illegitimate.

Conclusion

The prospects for reconstructing the social content of contemporary European national contracts at the EU level seem to be slim. A market-based form of EU social contract has begun to emerge; but national identities still pose a formidable obstacle to its full development. While using EU citizenship as a means for developing a richer form of social contract are normatively well grounded, it is difficult to put into practice. Alternatives to EU citizenship, however, do rely on the partial liberal contract described above. In this context, the development of a European public sphere in which notions of public good can be discussed and identified, becomes a prerequisite for the institutionalization of any form of social contract.

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Notes

1. Earlier versions of this paper benefited greatly from comments by Giovanna Procacci and Letizia Giamformaggio. As customary, responsibility for its shortcomings is exclusively mine.

2. In the Allué case, the Court designed the principle of non-discrimination on the grounds of nationality as a principle of equality of treatment. Case Pilar Allué et Carmel Mary Coonan contre Universitá degli Studi di Venezia Case 33/88 Rec. 1989 1591.

3. In the Allué case, the Court held that the principle of non-discrimination forbids any disguised forms. The argument was repeated by the ruling in the Italy case. Commission des Communautés européennes contre République italienne Case C 3/88 Rec. 1989 4035.

4. Case C 186/87 Cowan v Trésor Public (1989) ECR 195. The Court interpreted that the prohibition of non discrimination can be extended to the recipients of services such as tourists and nationals from a Member State in another Member State. The plaintiff, Mr. Cowan, was therefore entitled to receive financial compensations established by national law for nationals in the case of assault.

5. Case 149/79 Commission des Communautés européennes contre Royaume de Belgique Rec. (1980) 3881. Case 66/85 Deborah Lawrie-Blum v. Land Baden-Württemberg Rec. (1986) 2121.

6. Case 43/75 *Defrenne v Sabenna* [1976] ECR 485.

7. Brunner v. the European Union Treaty. Cases 2 BvR 2134/92 & 2159/92 [1994] C.M.L.R. 57.

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