

Universität Leipzig
Juristenfakultät
Institut für Völkerrecht, Europarecht
und ausländisches öffentliches Recht,
Prof. Dr. Markus Kotzur, LL.M. (Duke Univ.)

Universität Leipzig, Juristenfakultät
Otto-Schill-Str. 2, 04109 Leipzig, PSF 920, 04009 Leipzig

„We, the Citizens of Europe“ – European Union Citizenship in a Global Context

by Prof. Dr. Markus Kotzur, LL.M.(Duke Univ.), University of Leipzig

I. Introduction

The decision of the American people “to form a more perfect Union” was, as *Hamilton* and others – trusting in Age-of-Enlightenment rationality – clearly stated, an “act of choice and reflection”.¹ The decision to “mark a new stage in the process of European Integration”, as outlined in the Preamble of the EU-Treaty, is also held to be an “act of choice and reflection” – however, made by (inter-)gouvernemental actors and political elites, not, at least not first and foremost, by a European People desiring constitutional unity.² Nevertheless, since enshrined in and formalized by the EU-Treaty of Maastricht (1992)³, the concept of European Union Citizenship forms a focal point regarding the more than symbolic move from the European *Economic* to the European *Political* Community⁴ and thus stands for the *constitutional quality* of the post-

¹ *A. N. Holcombe*, Our More Perfect Union. From Eighteenth-Century Principles to Twentieth-Century Praxis, 1967, p. 4.

² As to the concept, the existence and imagination of a European people *A. Augustin*, Das Volk in der Europäischen Union, 2000; *M. La Torre*, Citizenship: A European Wager, in: *Ration Juris* 8 (1995), pp. 113; id. (ed.), *European Citizenship: An Institutional Challenge*, 1998.

³ The idea of European Citizenship was introduced by Spanish Prime Minister *Felipe Gonzáles* in May 1990, see *Agence Europe* No. 5252, 11 May 1990, 3; furthermore *E. A. Marias*, From Market Citizen to Union Citizen, in: id. (ed.), *European Citizenship*, 1994, pp. 1, 1.

⁴ *P. Häberle*, Europäische Verfassungslehre, 5th ed. 2008, pp. 353; *Th. Oppermann*, Europarecht, 3rd ed. 2005, pp. 496; *C. Closa*, The Concept of the Citizenship in the Treaty on European Union (1992) 29 *CMLRev*.1137; *S. Magiera*, Das Europa der Bürger in einer Gemeinschaft ohne Binnengrenzen, 1990.

Maastricht integration process.⁵ One should again pay attention to the Union Treaty's Preamble provisions. "Resolved to establish a citizenship common to the nationals of their countries", the Member States conceptualized Union citizenship as based upon and complementary to Member State nationality. They furthermore contextualized the *constitutional* dynamic of citizenship with the *constitutional* "principles of liberty, democracy and respect for human rights", with fundamental freedoms and the rule of law and finally with "social rights" and "solidarity between peoples".

The letter phrase, though, refers to one of the fundamental tensions within the Union citizenship concept, especially if read in the light of Europe's political confession of faith as encapsulated since more than fifty years in the first Preamble clause to the Treaty of Rome. Not the creation of *one* European people, but "an ever closer union of the *peoples* of Europe" is the traditional foundation of the Community.⁶ In that aspect, the Union not being and not aimed to become a sovereign state, is different from all the well known federal systems in the USA or Germany, in Australia or India. There is not a single people at the pre-federal Union level. There is not one *demos* but a multiplicity of *demoi* at the very heart of European democracy. Closely linked to this missing "We, the People of Europe"-constitutional scheme⁷ and political self-understanding, a second question arises: What might amount to an "added value" of Union citizenship, if the rights and duties, chances and responsibilities associated with it do not sustainably go beyond the status which the nationals of the member states also did enjoy in the past?

These crucial questions led to controversial debates.⁸ Some doubt that the legacy of the market citizen can be transformed into political citizenship which is more than ambitious but vague symbolism. Others, relying on the tradition of the American and French Revolution, qualify

⁵ For an early ECJ-decision see Case 294/83, *Les Verts* (1986) ECR 1339. The literature as to the European constitutional debate is abundant. For some of the most significant positions see *P. Häberle*, *Europäische Verfassungslehre*, 5th ed. 2008, pp. 632 et passim; *id.*, *Europa als werdende Verfassungsgemeinschaft*, in: *Deutsches Verwaltungsblatt* 2000, pp. 840; *id.*, *Gemeineuropäisches Verfassungsrecht*, in: *Europäische Grundrechte Zeitschrift* 1991, pp. 261 ff.; *I. Pernice*, *Europäisches und nationales Verfassungsrecht*, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 60 (2001), pp. 148; *id.*, *The European Constitution*, in: *Sinclair House Debates* 16, *Europe's Constitution – a Framework for the Future of the Union*, 2001, pp. 18; *id.*, *Multilevel Constitutionalism in the European Union*, 27 *European Law Review* (2002), pp. 511; *A. Peters*, *Elemente einer Theorie der Verfassung Europas*, 2001; *id.*, *Global Constitutionalism Revisited*, in: *International Legal Theory* 11 (2005), pp. 39; *J. H. H. Weiler*, *The Transformation of Europe*, *Yale Law Journal* 100 (1991), pp. 2403; *id.*, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision*, *European Law Journal* 1 (1995), pp. 219; *id.* *European Neo-constitutionalism: In Search of Foundations for the European Constitutional Order*, *Political Studies* 44 (1996), pp. 517; *id.*, *The Constitution of Europe. "Do the New Clothes have an Emperor?" and Other Essays on European Integration*, 1999; *id.*/M. Wind (eds.), *European Constitutionalism Beyond the State*, 2003.

⁶ *J. H. H. Weiler*, *To Be a European Citizen: Eros und Civilization*, in: *id.*, *The Constitution of Europe*, 1999, pp. 324, 327.

⁷ Next to the Preamble of the US Federal Constitution should also be made to the Virginia Bill of Rights (June 12, 1776): „the good People of Virginia“.

⁸ *P. Häberle*, *Europäische Verfassungslehre*, 5th ed. 2008, pp. 353 with manifold reference as to German publications in footnote 265; *J. M. Broekman*, *A Philosophy of European Union Law*, 1999, pp. 294; *J. Shaw*, *The Interpretation of European Union Citizenship*, *MLR* 61 (1998), pp. 293; *S. O'Leary*, *European Union Citizenship. The Options for Reform*, 1996; *H. U. Jessurun d'Oliveira*, *European Citizenship: its Meaning, its potential*, in: R. Dehousse (ed.), *Europe after Maastricht: An ever closer Union?*, 1994, pp. 126.

citizenship as essentially linked to statehood. Some complain about the paucity of rights, the EU Treaty has created. Others emphasize that citizenship is not only constituted by rights but also by duties (taxes, military service etc.) – a feature widely missing on the European level. For some, the potential of Art. 17 EC Treaty and the following Articles outweighs the aforementioned concerns. Others would describe it just the other way around.⁹ Some believe that citizenship requires a preexistent set of *commons* which already have created a *common* identity.¹⁰ Others believe that citizenship can be created by law – that is to say by *legal* means of *political* integration.¹¹ Combined with each other, the two last-mentioned perspectives very well describe the *paradox* of forming a political community. This “forming” is based upon prerequisites which, at least to some extent, are first created during the very process of formation. A political community as such is a *continuing process*. And so are the constitution¹² and the citizenship of the community.¹³ To believe the process would be determined by a *homogenous people* is an illusion. Heterogeneous citizens are the diversified process-actors and participants. The citizen him- or herself qualifies as *nucleus* of a polity – may it be the nation state or a transnational political entity. Since the “constitutional” stage is set for the citizen, the inquiry of European citizenship has to start with the constitutional architecture of the European Union.

II. Some Preliminary Questions as to the Constitutional Foundations and the Legal Framework of Union Citizenship

1. The Constitutional Architecture: Multilevel Constitutionalism

Traditionally, not only the vocabulary, but the very concept of citizenship is one of the State, the Nation and of Peoplehood.¹⁴ It might be anachronistic to introduce it in an age where sovereignty has become fragmented¹⁵ and the formerly closed nation state needs to be open to politi-

⁹ As for the relevant literature see *P. Craig/G. de Búrca*, EU Law, 4th ed. 2008, p. 847; *D. Chalmers/Ch. Hadjiemmanuil/G. Monti/A. Tomkins*, European Union Law, 2006, pp. 561.

¹⁰ Regarding that understanding see *D. Grimm*, Braucht Europa eine Verfassung?, in: *Juristenzeitung* 1995, pp. 581, pp. 587. For the linkage of identity and the Nation State on the one, identity and the Union on the other side see *E. Guild*, The Legal Elements of European Identity, 2004, pp. 9.

¹¹ In that sense e.g. *Ch. Tomuschat/S. Kadelbach*, Staatsbürgerschaft – Unionsbürgerschaft – Weltbürgerschaft, in: *J. Drexl et. al. (eds.)*, Europäische Demokratie, 1999, pp. 73, pp. 84 respectively pp. 89, pp. 104.

¹² The understanding of the „constitution as a public process“ has been developed by *P. Häberle*, Verfassung als öffentlicher Prozess, 1st ed. 1978, 3rd ed. 1998. The theory found widespread international reception, see e.g. *J. Luther*, La Scienza häberliana delle costituzioni, in: *Analisi e diritto 2001* (a cura di *P. Comanducci e R. Gustiano*), 2001, pp. 105; *R. Caciado Amaral*, Peter Häberle e a Hermeneutica Constitucional, 2004.

¹³ *D. O’Keefe*, Union Citizenship, in: *id./P. Twomey (eds.)*, Legal Issues of the Maastricht Treaty, 1994, at 106: the concept of Union citizenship being „a dynamic one, capable of being added to or strengthened, but not diminished“. Furthermore *A. Domaradzka*, Unionsbürger im Übergang, 2006.

¹⁴ See *J. J. Weiler*, European Citizenship – Identity and Differentity, in: *M. La Torre (ed.)*, European Citizenship. An Institutional Challenge, 1998, pp. 1, 1; *A. Linklater*, Citizenship and Sovereignty in the Post-Westphalian State, *European Journal of International Relations* 2 (1996), pp. 77.

¹⁵ For an equally critical an innovative in-depth analysis see *P. W. Kahn*, The Question of Sovereignty, *Stanford Journal of International Law* 40 (2004), pp. 259; *U. Haltern*, Was bedeutet Souveränität?, 2007; from a different perspective *N. MacCormick*, On Sovereignty and Post-Sovereignty, in: *id.*, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth, 1999, pp. 123; *G.*

cal integration beyond statehood in order to deal with the challenges of globalization.¹⁶ However, as much as the notion of the *inter-national*, the *trans-national* or the *supra-national* implies the narrative of the *nation*, the narrative of European integration is based upon the common tradition of constitutional statehood (“Verfassungsstaatlichkeit”)¹⁷ encompassing a democratic form of government, rule of law-orientation and human rights guarantees. Thus, the supranational Community and, in the future, the supranational Union is not a replacement of the nation state but a pre-federal integrative mechanism to transform the latter one from a self-contained to a cooperatively open political entity.¹⁸ In the process of this transformation the relevant people – it should be even better to say: the citizens concerned – regain the power of sovereign self-determination and self-organization by giving up sovereign rights – a “win-win-situation”. For sure, due to the auto-dynamics of transformation and integration, the national political entities are not the exclusive “masters of the treaty any more”. Neither is the Community or the Union. “Masters”, if at all the term should be kept alive, are the citizens as nationals *and* citizens of the Union. The *principle of conferral* is the instrument *to master* this double role – restricting both national and “European” sovereignty.

The most commonly used metaphor for this multi-layered structure of overlapping “constitutional regimes” – including their relevant “citoyenneté” – is the one of “multi-level constitutionalism”¹⁹. Others speak of constitutional pluralism.²⁰ Multilevel-constitutionalism delineates an “ongoing process of establishing new structures of government complementary to and building upon – while also changing – existing forms of self-organisation of the people or society”²¹. Among the most important parameters of the so characterized “ongoing process” are the extent of voluntary sovereignty forfeiture to international organisations respectively inter-governmental bodies, the rise and growing influence of non state actors (such as NGOs, transnational enterprises etc.), but also and not the least the continued viability of the national state. Multilevel-constitutionalism is neither giving up nationhood nor statehood but encapsulating the

Agamben, Homo Sacer: Sovereign Power and Bare Life, 1998; furthermore *J. Kokott*, Souveräne Gleichheit und Demokratie im Völkerrecht, *ZaöRV* 64 (2004), pp. 517; *M. Kotzur*, Souveränitätsperspektiven – entwicklungsgeschichtlich, verfassungsstaatlich, staatenübergreifend, *JöR* 52 (2004), pp. 198; *B. Fassbender*, Sovereignty and Constitutionalism in International Law, in: N. Walker (Hrsg.), *Sovereignty in Transition*, 2003, pp. 115. For classical writings see e.g. *H. Kelsen*, Keyword „Souveränität“, in: Strupp (ed.), *Wörterbuch des Völkerrechts*, vol. II, 1925, pp. 554; moreover *H. Heller*, Die Souveränität, in: id., *Gesammelte Schriften*, vol. 2, 1971, pp. 31; *C. Schmitt*, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, 5th ed. (reprint of the 2nd ed.), 1990.

¹⁶

¹⁷ *P. Häberle*, *Verfassungslehre als Kulturwissenschaft*, 2nd ed. 1998, pp. 28

¹⁸ *A. v. Bogdandy*, The European Union as Supranational Federation, in: *Columbia Journal of European Law* 6 (2000), pp. 27.

¹⁹ *I. Pernice*, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?, *Common Market Law Review* 36 (1999), pp. 703.

²⁰ *N. Walker*, The Idea of Constitutional Pluralism, 65 *MLR* 2002, pp. 317; *M. Maduro*, Contrapunctual Law: Europe’s Constitutional Pluralism in Action, in: N. Walker (ed.), *Sovereignty in Transition*, 2001, ch. 21.

²¹ *I. Pernice*, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?, *Common Market Law Review* 36 (1999), pp. 703; *id.*, The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation, in: P.M. Dupuy/B. Fassbender/ M. N. Shaw/K.-P. Sommermann (Hrsg./Editors), *Völkerrecht als Wertordnung. Common Values in International Law, Festschrift für / Essays in Honour of Christian Tomuschat*, 2006, pp. 973.

essential element of *belongingness* both stand for: affinity, empathy, loyalty, shared fate, and common history. The *belongingness*, however, has different facets: the individual belongs to his or her family, neighborhood, municipality, region, state, nation and transnational entity. Because she or he belongs to the one, she or he is able to create the other.

Multilevel constitutionalism is thus not meant to evoke the picture of hierarchically structured constitutional levels but rather intertwining and accordingly interdependent elements within both, national and European constitutional ensembles (national constitutions, constitutional elements within the EU Treaty, the EC Treaty, the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union).²² The Reform Treaty of Lisbon might have given up the equally ambitious and programmatic term “constitution” as well as symbols of identity such as a European Flag or a European Anthem.²³ However, it has not given up the constitutional quality (*D. Th. Tsatsos*) of its baseline regulations.²⁴ The newly shaped three-part treaty complex including the normatively binding EU Charter on Fundamental Rights re-introduces a *constitutional scheme* for the Union.²⁵ Due to this constitutional momentum, the strict line of distinction between international and constitutional law has been eventually blurred of.

2. The Conceptual Consequence: Legal Pluralism

As the multilevel-analysis has confirmed anew, human relationships, especially in the economic sphere, are no longer dependent on one legal system. The normative answer to the internal effects and external dimensions of globalization is given by a model of multiply intertwined legal systems. Such an overly complex multitude is reflected in terms like “polysytémie normative”²⁶ or “legal pluralism”.²⁷ These theories draw attention to “the possibility that within the same social order, or social or geographical space, more than one body of law, pertaining more

²² Also Ph. Dann (ed.), *The Unity of the European Constitution*, 2006.

²³ In general *P. Häberle*, *Nationalflaggen. Bürgerdemokratische Identitätselemente und internationale Erkennungssymbole*, 2008; *id.*, *Nationalhymnen als kulturelle Identitätselemente des Verfassungsstaates*, 2007.

²⁴ As to the constitutional elements of EU and EC law *A. v. Bogdandy*, *Constitutional Principles*, in: *id./A. Bast* (eds.), *Principles of European Constitutional Law*, 2006, pp. 3; *F. Balaguer Callejon*, *La constitución europea tras el consejo europeo de Bruselas y el tratado de Lisboa*, *ReDCE* 8 (2007), pp. 11.

²⁵ The literature as to these questions is quite abundant, see e.g. *J. Geerlings*, *Der Europäische Verfassungsprozess nach den gescheiterten Referenden in Frankreich und den Niederlanden*, *DVBl.* 2006, pp. 129; *H. M. Heinig*, *Europäisches Verfassungsrecht ohne Verfassung(svertrag)?*, *JZ* 2007, pp. 905; *F. C. Mayer*, *Wege aus der Verfassungskrise – Zur Zukunft des Vertrages über eine Verfassung für Europa*, *JZ* 2007, pp. 593; *H.-J. Rabe*, *Zur Metamorphose des Europäischen Verfassungsvertrages*, *NJW* 2007, pp. 3153; *Th. S. Richter*, *Die EU-Verfassung ist tot, es lebe der Reformvertrag!*, *EuZW* 2007, pp. 631.

²⁶ *A.-J. Arnaud*, *Pur une pensée juridique européenne*, 1991.

²⁷ *J. Vanderlinden*, *Le pluralisme juridique: essai de synthèse*, in: *J. Gillissen* (ed.), *Le Pluralisme Juridique*, 1971, pp. 19; *id.*, *Return to legal pluralism: twenty years later*, in: *Journal of Legal Pluralism* 28 (1989), pp. 149; *K. v. Benda-Beckmann*, *Transnational dimension of legal pluralism*, in: *W. Fikentscher* (ed.), *Begegnung und Konflikt – eine kulturanthropologische Bestandsaufnahme*, 2001, pp. 33; *F. v. Benda-Beckmann*, *Who’s afraid of legal pluralism*, *Journal of Legal Pluralism* 47 (2002), pp. 37; *A. Griffiths*, *Legal Pluralism*, in: *R. Banakar/M. Travers* (eds.), *An Introduction to Law and Social Theory*, 2002, pp. 289.

or less the same set of activities, may co-exist.” The individual citizen is still confronted with and subject of “rules and principles generated and used by the state organisation”, but they appear as only one variation “besides law generated and maintained by other organisations and authorities with different legitimation such as religion or tradition”.²⁸ Global legal pluralism, moreover, has to take into account the different and differentiated sets of norms existing on the sub-national, the national, the regional, and the international level. The diversity is multiplied beyond that what an even politically most aware and cosmopolitan citizen could comprehend let alone *experience* as meaningful legal foundations for his daily life.²⁹ The continuing debates regarding the universality or cultural relativity of human rights make things not easier for him or her.³⁰

Various are the descriptions of this situation in the legal literature, especially in the literature of legal ethnology. Some speak of “transnational flows of legal models or a “multilayered amalgam of United Nations resolutions, national law and local categories and customs”³¹, others use the metaphor of inter-legality: “National law and local law”, one might add European and International Law, “do not exist the one next to the other as self-contained entities or like billiard balls that perhaps hit each other but in itself are closed, massive entities.”³² The methodological consequence is a comparison of constitutions, of legal enactments, of judgements, of legal practice, of contexts, and not the least of language. A practical consequence might be the competition between different legal systems, including their selective use of and problematic forum shopping.³³ The citizen who wants to know which rights he or she can exercise, where and in which way he or she can most effectively do so and, most importantly, which legal regimes and political communities he or she is a member of, faces serious challenges and insecurities. Citizenship itself must not become the playing field of multilevel-governance but has to correspond to the real world conditions thereof – in Europe and beyond.

²⁸ F. and K. von Benda-Beckmann, *The Dynamics of Change and Continuity in Plural Legal Orders*, in: Woodman (ed.), *The Journal of Legal Pluralism and Unofficial Law*, Nr. 53-4, 2006, p. 14, 17.

²⁹ J.-Ph. Robé, *Multinational enterprises: the constitution of a pluralistic legal order*, in: G. Teubner (ed.), *Global Law without a State*, 1997, pp. 45; G. Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in: *ibidem.*, pp. 3; G.-P. Calliess, *Reflective transnational law: on definition of transnational law*, in: *Zeitschrift für Rechtssoziologie* 23 (2002), pp. 185; Snyder, *Governing Economic Globalization: Global Legal Pluralism and European Law*, in: Moore (Hrsg.), *Law and Anthropology – A Reader*, ..., p. 318.

³⁰ Zur Diskussion E. Brems, *Human Rights: Universality and Diversity*, 2001; *dies.*, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, in: *Human Rights Quarterly* 19 (1997), S. 136 ff.; B. De Sousa Santos, *Toward a Multicultural Conception of Human Rights*, in: *Zeitschrift für Rechtssoziologie* 18 (1997), S. 1 ff.; A. An-Nacim, *Human Rights in Cross-Cultural Perspectives*, 1992. J. Donnelly, *Cultural Relativism and Universal Human Rights*, in: *Human Rights Quarterly*, Vol. 6, 1984, S. 400 ff.

³¹ Merry, *Legal Pluralism and Transnational Culture*, in: Wilson (ed.), *Human Rights, Culture and Context – Anthropological Perspectives*, ..., p. 29.

³² Hoekema, *European Legal Encounters between Minority and Majority Culture: Cases of Interlegality*, in: Woodman (ed.), *The Journal Legal Pluralism and Unofficial Law*, Nr. 51, 2005, p. 6.

³³ C. J. H. van Lynden et al. (eds.), *Forum Shopping*, 1998; A. S. Bell, *Forum Shopping and Venue in Transnational Litigation*, 2003; P. de Vareilles-Sommieres, *Forum Shopping in the European Judicial Area*, 2007.

3. The Substantive Consequence: Shared Sovereignties, a Multiplicity of Legitimizing Factors, and the Quest for Legitimacy

What has been qualified as “multilevel constitutionalism”, marks a tremendous shift from the early stage of European integration. Then, it was widely assumed that the traditional model of international law would apply to the European Communities, too.³⁴ The member states were held to be the only “masters of the treaties” and thus democratic legitimization within the member states did suffice. However, in its *Van Gend en Loos*³⁵ and *Costa v ENEL*³⁶ decisions, the ECJ clearly overturned these assumptions. Famous became the *Van Gend en Loos* phrase of “a new legal order of international law for the benefit of which the states have limited their sovereign rights”.³⁷ Even more radically the Court shaped its *Costa* doctrine according to which EC regulations were directly applicable in all member states and thus EC law enjoyed some form of sovereignty vis-à-vis domestic law. If this was the case, the Community’s powers could not be seen as exclusively deriving from the member states but had to be understood as being “somehow autonomous and original” – requiring *autonomous and original* democratic legitimacy³⁸ Hence, all the aforementioned European treaties are more than ordinary international treaties. What makes them “more” is the “transformation” (*J. J. Weiler*) of formerly closed nation states to an integrated Union and the *shared sovereignties*³⁹ between the Union and its member states in consequence thereof.⁴⁰

However, these shared sovereignties need, as said above, a specific form of *common* legitimacy by *shared* legitimizing moments.⁴¹ They require a European parallel of “government of the people, by the people, for the people” – to quote *Abraham Lincoln’s* famous *Gettysburg Address*. This is all the more the case since the European Union enjoys powers unparalleled by any other international organization or transnational entity whereas only the Parliament but nei-

³⁴ D. Chalmers/Ch. Hadjiemmanuil/G. Monti/A. Tomkins, *European Union Law*, 2006, p. 183; Th. Oppermann, *Europarecht*, 3rd ed. 2005, pp. 8

³⁵ Case 26/62 (1963) ECR 1.

³⁶ Case 6/64 (1964) ECR 585.

³⁷ Case 26/62 (1963) ECR 1 at p. 47-8.

³⁸ D. Chalmers/Ch. Hadjiemmanuil/G. Monti/A. Tomkins, *European Union Law*, 2006, p. 183; D. M. Curtin, *Postnational Democracy. The European Union in Search of a Political Philosophy*, 1997; A. Héritier, *Elements of Democratic Legitimation in Europe: An Alternative Perspective*, in: *Journal of European Public Policy* 6 (1999), pp. 269; L. Siedentop, *Democracy in Europe*, 2001; M. Nettesheim, *Demokratisierung der Europäischen Union und Europäisierung der Demokratietheorie – Wechselwirkungen bei der Herausbildung eines europäischen Demokratieprinzips*, in: H. Bauer/P. M. Huber/K.-P. Sommermann, *Demokratie in Europa*, 2005, pp. 144.

³⁹ See G. de Búrca, *Sovereignty and the Supremacy Doctrine of the European Court of Justice*, in: N. Walker (ed.), *Sovereignty in Transition*, 2003, pp. 449; A. Schmitt Glaeser, *Souveränität und Vorrang*, in: A. v. Bogdandy, *Europäisches Verfassungsrecht*, 2003, pp. 205.

⁴⁰ For an analysis of a parallel development in early US-constitutionalism shortly before and after 1787 see J.-P. Jaqué, *Der Vertrag über eine Verfassung für Europa: Konstitutionalisierung oder Vertragsrevision?*, *EuGRZ* 2004, pp. 551 at 552-3. Important reference is made to letters no. 15 and 16 of A. Hamilton, in: Rossiter (ed.), *The Federalist Papers*, 1961.

⁴¹ A. Benz, *Compounded Representation in EU Multilevel Governance*, in: B. Kohler-Koch (ed.), *Linking EU and National Governance*, 2003, pp. 82; J. Rosenau, *Governance and Democracy in a globalizing World*, in: D. Archibugi/D. Held/M. Köhler (eds.), *Reimagining Political Community*, 1998, pp. 28.

ther the Council nor the Commission are directly and democratically elected.⁴² Given this, at least *prima facie*, democratic deficit one has to be aware of the Union's respectively Community's power to create rights and obligations both for the Member States and their nationals; one has to refer to norms that have direct effect⁴³ and enjoy supremacy⁴⁴, even over national constitutions⁴⁵; one has to mention decisions with major impact on the economy and policy in the Member States and in Europa including public funding⁴⁶. Finally, it must not be forgotten that the European Community can engage its Member States in international agreements.⁴⁷ Consequently, all these variations of European public power have to be exercised by if not directly elected so *democratically accountable* institutions.⁴⁸ The more complex a multi-level form of democratic governance, the more complex is the *infrastructure* of democratic accountability.⁴⁹ Moments of input and output legitimacy need to be combined; direct and indirect forms of participation and control are intertwined; transparency and control, procedural justice and fair processes or participation constitute additional factors of legitimacy.⁵⁰ European democratic legitimacy is created by interplay of personal, material and functional mechanisms to guarantee a government of the citizens, by the citizens, and for the citizens. The citizen is, at any rate, the

⁴² J. H. H. Weiler, To Be a European Citizen: Eros und Civilization, in: id., The Constitution of Europe, 1999, pp. 324, 336; S. O'Leary, European Union Citizenship. The Options for Reform, 1996, p. 8.

⁴³ Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administrative der Belastingen* (163) ECR 1; Case 2/74, *Reyners v. Belgium* (1974) ECR 631; Case C-443/98 *Unilever Italia SpA v. Central Food SpA* (2000) ECR I-7535; P. Pescatore, The Doctrine of "Direct Effect": An Infant Disease of Community Law (1983) 8 ELRev. 155; B. de Witte, Direct Effect, Supremacy and the Nature of Legal Order, in: P. Craig/G. de Búrca (eds.), The Evolution of EU Law, 1999; J. Prinszen, Direct Effect: Rethinking a Classic of EC Legal Doctrine, 2002.

⁴⁴ Case 6/64 *Flaminio Costa v. ENEL* (1964) ECR 585, 593; Case 11/70 *Internationale Handelsgesellschaft mbH. v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) ECR 1125; Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (1978) ECR 629; K. Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe, 2001;

⁴⁵ The dimension of this „constitutional supremacy is very well disputed. From a German point of view see BVerfGE 89, 155 – *Maastricht*; U. Everling, The Maastricht Judgement of the German Federal Constitutional Court and its significance for the development of the European Union (1994) YBEL 1; M. Zuleeg, The European constitution under Constitutional Constraints: The German Scenario (1997) 22 ELRev. 11; in general W. Sadurski, "Solange Chapter 3": Constitutional Courts in Central Europe – Democracy – European Union, EUI Working Papers, Law No. 2006/40.

⁴⁶ See also A. Biondi/P. Eeckhout/J. Flynn (eds.), The Law of State Aid in the European Union, 2004.

⁴⁷ M. Koskeniemi (ed.), International Law Aspects of the European Union, 1998; E. Cannizzaro (ed.), The European Union as an Actor in International Relations, 2002; P. Eeckhout, External Relations of the European Union. Legal and Constitutional Foundations, 2004.

⁴⁸ D. Beetham/C. Lord, Legitimacy and the EU, 1998.

⁴⁹ A. v. Bogdandy, Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung, KritV 2000, pp. 284; J. Cohen/C. Sabel, Directly-Deliberative Polyarchy, European Law Journal 3 (1997), pp. 321

⁵⁰ M. Nettesheim, Demokratisierung der Europäischen Union und Europäisierung der Demokratietheorie – Wechselwirkungen bei der Herausbildung eines europäischen Demokratieprinzips, in: H. Bauer/P. M. Huber/K.-P. Sommermann, Demokratie in Europa, 2005, pp. 144, 176; B. Barber, Strong Democracy: Participatory Politics for a New Age, 1984.

source of legitimacy and a democracy is, at any rate, rooted in the political substance of citizenship.⁵¹

I. The Notion of Citizenship

1. The Distinction between “Citoyen” and “Bourgeois”

Keeping in mind that the formerly self-sustained nation state today is integrated in regional political entities or international organizations with a *constitutional quality* (*D. Th. Tsatsos*) of their own, it becomes essential – as *J. Shaw* stated in his article on “European Union Citizenship: The IGC and Beyond”⁵² – to go beyond the formal treaty provisions on citizenship and to see whether or not the very *idea(l)* of the *citizen* can be effectively re-conceptualized given multi-level governance structures. “There is no more dynamic social figure in modern history”, *R. Dahrendorf* rightfully said in a famous 1974 article, “than The Citizen.”⁵³ The notion of an individual being a citizen goes back to ancient times of the Greek polis or the Roman Empire (the *civis Romanus* enjoying a *status civilis*) – and beyond.⁵⁴ In medieval cities the citizen enjoyed freedoms, rights, and privileges. The modern “citoyen”, however, is to a very important extent the common child of the American and the French Revolution. Both created what can be described as the very substance of citizenship and participatory democracy as well: “the equilibrium of equality and liberty”.⁵⁵

It was the Declaration of Independence, which embodied the political notion of active citizenship in the democratic principle when saying that “Governments are instituted among Men, deriving their just powers from the consent of the governed”. Despite of its title, the 1789 Declaration of the Rights of Man and the Citizen does not explicitly define a concept of the citizen. However, it refers to those as citizens “who participate in the formation of the general will”⁵⁶, “who form the Nation, in the sense of being the moral title holders of sovereignty”.⁵⁷ Overcoming the ancien regime, the august title of a “citoyen”, of an “active citizen” was bestowed on the equally enlightened and emancipated individual, endowed not only with civil but also political

⁵¹ *D. Thüner*, „Citizenship“ und Demokratieprinzip: Föderative Ausgestaltung im innerstaatlichen, europäischen und globalen Rechtskreis, in: H. Brunkhorst/M. Kettner (eds.), *Globalisierung und Demokratie*, 2000, pp. 177.

⁵² *European Public Law* 3 (1997), pp. 413.

⁵³ *R. Dahrendorf*, *Citizenship and Beyond: The Social Dynamics of an Idea* (1974), in: B. S. Turner/P. Hamilton (eds.), *Citizenship. Critical Concepts*, vol. II, 1994, pp. 292, 292.

⁵⁴ See e.g. *V. Ehrenberg*, *Der Staat der Griechen*, 1965; *J. G. A. Pocock*, *The Ideal of Citizenship since Classical Times*, in: Beiner (ed.), *Theorizing Citizenship*, 1995.

⁵⁵ *R. Dahrendorf*, *Citizenship and Beyond: The Social Dynamics of an Idea* (1974), in: B. S. Turner/P. Hamilton (eds.), *Citizenship. Critical Concepts*, vol. II, 1994, pp. 292, 292.

⁵⁶ *B. Guiguet*, *Citizenship and Nationality: Tracing the French Roots of the Distinction*, in: M. La Torre (ed.), *European Citizenship. An Institutional Challenge*, 1998, pp. 95, 98.

⁵⁷ *F. Borella*, *Nationalité et citoyenneté en droit français*, in: Colas (ed.), *L’Etat de droit. Travaux de la mission de la modernisation de l’Etat*, 1987, p. 35, the English translation provided for by *B. Guiguet*, *Citizenship and Nationality: Tracing the French Roots of the Distinction*, in: M. La Torre (ed.), *European Citizenship. An Institutional Challenge*, 1998, pp. 95, 98.

rights. The right to vote, of course, became the most important mean of political participation.⁵⁸ The ideal citizen did not only enjoy this right but had the responsibility to be politically active in “a system of government from the roots”.⁵⁹

Until today, the citizen is being qualified by the ability (and the corresponding responsibility) to take part in the political decision-making processes of his or her political community, whereas the bourgeois is being characterized by his or her “autonomy as a private subject (especially as owner of the means of production and entrepreneur), free from any State intervention”.⁶⁰ The bourgeois enjoys the “right to be let alone”, the citizen is expected to serve the common good. It might be tempting – and of some heuristic value – to equate the “market citizen”⁶¹ with the bourgeois, the “Union Citizen” with the citizen. However, such a black and white-picture would fall short of comprising the complexity of the “old” as well as the “new” European Citizen. The right to elect the European Parliament was already granted to the “market citizen” (former Art. 138 sec. 3 EEC) and, more importantly, he was expected to make use of this right. The market citizen, too, was vested with human rights, was the beneficiary of social guarantees, and enjoyed – at least when being economically active – the right of free movement.

When describing the citizen as responsibly acting political participant, as the *homo politicus*, citizenship becomes the institutional counterpart of rationality. It becomes the “crystallization of rationality into a social role”.⁶² However, modernity and post-modernity have lost the “age-of-enlightenment”-confidence in rationality.⁶³ The – not only epistemological – crisis of modernity can very well be described as a crisis of the belief in rationality. This crisis is reflected in the picture of the 21st century citizen. It is a fragmented picture. The *Hobbesian* “homo homini lupus”, whose evil nature needs to be restrained by public authority, encounters and counteracts the *Lockean* rationalist, who is ready to enter into the social contract with his fellow citizens all of them being free and equal. The citizen can be a self-interested consumer

⁵⁸ M. Troper, The Concept of Citizenship in the Period of the French Revolution, in: M. La Torre (ed.), *European Citizenship. An Institutional Challenge*, 1998, pp. 27, 29.

⁵⁹ F. Borella, Nationalité et citoyenneté en droit français, in: Colas (ed.), *L'Etat de droit. Travaux de la mission de la modernisation de l'Etat*, 1987, p. 40, the English translation again provided for by B. Guiguet, *Citizenship and Nationality: Tracing the French Roots of the Distinction*, in: M. La Torre (ed.), *European Citizenship. An Institutional Challenge*, 1998, pp. 95, 99.

⁶⁰ M. La Torre, *Citizenship: A European Wager*, Vol. 8, *Ratio Juris* (1995), p. 113; a classical text in German political and constitutional theory is provided for by R. Smend, *Bürger und Bourgeois im deutschen Staatsrecht*, in: id., *Staatsrechtliche Abhandlungen*, 2nd ed. 1968, pp., distinguishing between the “sittlich an den Staat gebundenen Bürger” (citoyen) and the “rechenhafter Egoist der kapitalistischen Zeit” (bourgeois); furthermore U. K. Preuß, *Der EU-Staatsbürger – Bourgeois oder Citoyen*, in: G. Winter (ed.), *Das Öffentliche Heute*, 2002, pp. 179.

⁶¹ E. Grabitz, *Europäisches Bürgerrecht zwischen Marktbürgerschaft und Staatsbürgerschaft*, 1970; A. Randelzhofer, *Marktbürgerschaft – Unionsbürgerschaft – Staatsbürgerschaft*, in: *Gedächtnisschrift für E. Grabitz*, 1995, pp. 580; J. Habermas, *Die postnationale Konstellation*, 1998, pp. 91, 142 speaks of a „funktionalistisch reduzierten Personenkonzept“ (a functionalist thus limited concept of the human person).

⁶² R. Dahrendorf, *Citizenship and Beyond: The Social Dynamics of an Idea* (1974), in: B. S. Turner/P. Hamilton (eds.), *Citizenship. Critical Concepts*, vol. II, 1994, pp. 292, 294.

⁶³ See e.g. M. García-Salmones, *The Ethos of the Rule of Law in International Legal Discourse: Portrait of an Outsider*, in: *International Community Law Review* 10 (2008), pp. 29 ff., 38 et passim.

taking an “Area of Freedom, Security and Justice”⁶⁴ for granted; the citizen can be the political actor – even the missionary activist – being concerned about freedom, security and justice that is to say about *political unity*. The citizen might be the private egoist or the bonum commune oriented altruist; the citizen might be educated and responsible or ignorant and irresponsible. Disabled or mentally retarded, the citizen can not be able to act at all. The real citizen most likely is a bit of all these just mentioned and many other factors. He or she is composed of fragmented political, religious, cultural, and social identities.

What will be the consequence of this real world picture for the *ideal citizen* as nucleus of political unity? *H. Heller*, in his 1927 treatise on sovereignty, has given a still valid answer. Even though only a small minority of citizens – due to either their intentions or their abilities or a mixture of both – is taking part in the daily plebiscite, also the completely indifferent individual, the “sleeping citizen” has his or her share in order building for one simple reason: whatever he does or fails to do, is regularized by the rules and laws of the political community.⁶⁵ All actions or non-actions – indirectly and subconsciously – test and challenge, confirm or question these rules and laws. The more heterogeneous the body of citizens is, the more challenging are the tests. Regardless of all his aberrations in between apotheosis and apocalypse, the heterogeneous nation state, being “the greatest constitutional achievement in history”⁶⁶, has provided for a firm legal and political framework to endure these tests and challenges. And so will do the European Union not be replacing but encompassing the nation states.

2. The Distinction between “Nationality” and “Citizenship” – Two Different, but Interdependent Types of “Belonginess”

a) Nationality

Even though often used synonymously, citizenship and nationality are two different concepts⁶⁷ the latter one providing for “a positive legal prescription” of belongingness to state.⁶⁸ Nationality can be defined as legally established link connecting the state and the people building this very state.⁶⁹ The individual, being a national, is subject to the public authority and legal order of his or her state. In principle, each state is free to grant nationality according to its own

⁶⁴ *G. Brinkmann*, An Area of Freedom, Security and Justice: Five Years After its Creation: The Immigration and Asylum Agenda, *ELJ* 10:2 (2004); *M. Ruffert*, Der Raum der Freiheit, der Sicherheit und des Rechts nach dem Reformvertrag – Kontinuierliche Verfassungsgebung in schwierigem Terrain, in: *I. Pernice* (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung*, 2008, pp. 169.

⁶⁵ *H. Heller*, Die Souveränität, 1927, reprinted in: *id.*, *Gesammelte Schriften*, vol. II, 1971, pp. 31, 108/109; furthermore *W. Berka*, Bürgerverantwortung im demokratischen Verfassungsstaat, *VVDStRL* 55 (1996), pp. 48 at 58.

⁶⁶ *R. Dahrendorf*, Cittadinanza: una nuova agenda per il cambiamento, in: *Sociologica del diritto* (1993), pp. 7, 16.

⁶⁷ See e.g. the definitions suggested by *E. Guild*, *The Legal Elements of European Identity*, 2004, pp. 20/21.

⁶⁸ *S. O’Leary*, *European Union Citizenship. The Options for Reform*, 1996, p. 12.

⁶⁹ *M. Shaw*, *International Law*, 5th ed. 2003, pp. 584; *B. Guiguet*, *Citizenship and Nationality: Tracing the French Roots of the Distinction*, in: *M. La Torre* (ed.), *European Citizenship. An Institutional Challenge*, 1998, pp. 95.

laws and nationality questions fall within its domestic jurisdiction.⁷⁰ Art. 1 of the 1930 Hague Convention on the Conflict of Nationality Laws clearly states that “it is for each state to determine under its own law who are its nationals”. Prior to the introduction of Union Citizenship, the Court of Justice had confirmed this notion regarding the EC and held that is rested within the exclusive competence of the Member States to determine the rules of nationality. The Court, however, added that the Member States had to exercise their exclusive power with due regard to the requirements of Community law.⁷¹

The nationality rules most commonly adopted by the states are the “*ius sanguinis*”-principle, the *ius soli*-principle or a combination thereof.⁷² Public international law does only set one limit famously elaborated by the International Court of Justice in its *Nottebohm* Case. According to that landmark ruling nationality is dependent on “(...) a legal bond having as its basis a social attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”⁷³ What qualifies as this “genuine link”, however, goes beyond the purely formal legal relationship between individual and state and refers to the very moment of “existence, interests and sentiments” where citizenship is built upon.

b) Citizenship

Manifold are the theories on citizenship. One might recall the sociological study of *Thomas H. Marshall*⁷⁴, the classical approaches by de *Tocqueville* and *Durkheim* as to civic culture and virtue, *Rousseau*'s self-determination of the citizens as “popular sovereignty”, or the Marxist reconceptualization of civil society. Correspondingly, definitions of citizenship reflect *strictu sensu* legal, normative, social scientific or cultural sciences perspectives.⁷⁵ Citizenship itself is not a straightforward concept but rather involving “numerous political, historical, social and cultural overtones” that cause a huge “diversity in the make up” of citizen-based legal entities.⁷⁶ What these entities, from a jurisprudential point of view, have in common is the transformation of political ideas into a legal status – a status which substantially defines the bond between the individual and the political community.⁷⁷ The status, however, does not necessarily have to be static; it qualifies as the very foundation of a legally structured *process* of community building.

⁷⁰ See *I. Brownlie*, *Principles of Public International Law*, 6th ed. 2006, p. 373.

⁷¹ Case C-369/90, *Micheletti and Others v. Delegacion del Gobierno Cantabria* (1992) ECR I-4239; more recently and after the introduction of Union Citizenship with the same emphasis Case C-192/99 *R v. Secretary of State for the Home Department, ex parte Kaur* (2001) ECR I-1169; *J. D. Mather*, *The Court of Justice and the Union Citizen*, *European Law Journal* 11 (2005), pp. 722, 723-724.

⁷² *P. Weis*, *Nationality and Statelessness International Law*, 2nd ed. 1979, p. 98.

⁷³ ICJ Reports, 1955, pp. 4, 23.

⁷⁴ *Citizenship and Social Class*, 1950.

⁷⁵ A huge variety of possible definitions is introduced by *J. Shaw*, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of the Political Space*, 2007, pp. 18.

⁷⁶ *S. O'Leary*, *European Union Citizenship. The Options for Reform*, 1996, p. 12.

⁷⁷ *J. D. Galloway*, *Citizenship: A Jurisprudential Paradox*, in: *M. La Torre* (ed.), *European Citizenship. An Institutional Challenge*, 1998, pp. 65, 68.

Citizenship thus creates a “Rechtsgemeinschaft”, a community under law.⁷⁸ “It makes those”, so again *R. Dahrendorf* with reference to a *Kantian* notion of civil society, “who belong a part of the system of rules which protects them from each other and (from) outsiders.” *Belongingness* – one could also speak of the social dynamic of *inclusion* and *exclusion* – is expressed in the language of law:⁷⁹ the language of rights and duties. It is furthermore expressed by the perception of the self and the other – individually and collectively – that is to say *identity* and as a presupposition of *identity consciousness*.⁸⁰

The political pattern of identity⁸¹ has as one important reference point the problem of societal self-organization, in a democratic society the self-organization of the free and the equal, and at its core interdependent patterns of participation and communication, of cultural practices and religious beliefs, of “national consciousness” and “multicultural sensibility”.⁸² It is often heard that he or she is a citizen who perceives the identity of the polity or polity as, at least part, of her own identity. This equation, however, may not be mistaken for a holistic or even totalitarian concept of citizenship. The community itself – being a heterogeneous amalgam of imaginations, institutionalizations, and organization⁸³ – consists of multiple and fragmented identities. The growing internal and external complexity of communities is paralleled by a growing number of referents for identity.⁸⁴ The nation is one, the Union another referent among many.⁸⁵ The consequent distinction between a national and a citizen amounts to a “conceptual decoupling of nationality from citizenship” and to the “conception of a polity the *demos* of which, its membership, is understood in the first place in civic and political rather than ethno-cultural terms.”⁸⁶ These political terms can be described by the means of commitment, shared values, responsibility for the *bonum commune*, mutual rights and duties, mutual social responsibility. All these

⁷⁸ *R. Dahrendorf*, *Citizenship and Beyond: The Social Dynamics of an Idea* (1974), in: B. S. Turner/P. Hamilton (eds.), *Citizenship. Critical Concepts*, vol. II, 1994, pp. 292, 292.

⁷⁹ *Ibidem*.

⁸⁰ See *P. Häberle*, *Europäische Verfassungslehre*, 5th ed. 2008, p. 354; *id.*, *Verfassungslehre als Kulturwissenschaft*, 2nd ed. 1998, pp. 624; *Y. N. Soysal*, *Limits of Citizenship. Migrants and Postnational Membership in Europe*, 1994; *U. Haltern*, *Europarecht und das Politische*, 2005, p. 423.

⁸¹ *J. P. Müller*, *Europäische Verfassung und europäische Identität*, in: G. F. Schuppert/I. Pernice/U. Haltern (eds.), *Europawissenschaft*, 2005, pp. 352; J. C. Alexander u. a. (Hrsg.), *Cultural Trauma and Collective Identity*, 2004; *A. Uhle*, *Freiheitlicher Verfassungsstaat und kulturelle Identität*, 2004, pp. 7; *S. Koriath/A. v. Bogdandy*, *Europäische und nationale Identität: Integration durch Verfassungsrecht?*, *VVDStRL* 62 (2003), pp. 117 respectively pp. 156; *E. Pache*, *Europäische und nationale Identität: Integration durch Verfassungsrecht?*, *DVBl.* 2002, pp. 1154; *I. Plasseraud*, *L'identité*, 2001; *A. Kopp*, *Europäische Identität als Kategorie des Europarechts*, 2002; *W. Graf Vitzthum*, *Die Identität Europas*, *EuR* 2002, pp. 1; *K. M. Meessen*, *In Search of the European Identity*, in: W. Benedek et al. (eds.), *Development and Developing International and European Law*, 1999, S. 441 ff.; *M. Hilf*, *Europäische Union und nationale Identität der Mitgliedstaaten*, in: GS E. Grabitz, 1995, pp. 157; *A. D. Smith*, *National Identity and the Idea of European Unity*, in: *International Affairs*, 1992, S. 55 ff

⁸² See also *J. Habermas*, *Citizenship and National Identity: Some Reflections on the Future of Europe*, *Praxis International*, 1992, vol. 12, pp. 1.

⁸³ *U. Haltern*, *Europarecht und das Politische*, 2005, p. 424.

⁸⁴ *J. H. H. Weiler*, *To Be a European Citizen: Eros und Civilization*, in: *id.*, *The Constitution of Europe*, 1999, pp. 324, 324.

⁸⁵ See *J. H. H. Weiler*, *Epilogue, The European Courts of Justice: Beyond „Beyond Doctrine” or the Legitimacy Crisis of European Constitutionalism*, in: *Slaughter/Stone/Sweet/Weiler* (Hrsg.), *The European Courts and National Courts*, 1998, S. 365 ff., 377 f.; *id.*, *The Constitution of Europe*, 1999, pp. 238.

⁸⁶ *J. H. H. Weiler*, *To Be a European Citizen: Eros und Civilization*, in: *id.*, *The Constitution of Europe*, 1999, pp. 324, 344.

means work on different levels, too: the family, the workplace, local municipalities, regional communities, federal states, the nation state, the European Community.⁸⁷ The relevant identities as “a member of” are shared and so is belongingness itself.

Eventually, notice has to be attracted to the dynamic element of modern citizenship. All the aforementioned referents are in a permanent state of flux. And so are the changing social roles, the changing standards of inclusion and exclusion, and not the least the changing balances between rights and duties. Among the most obvious changes is migration. It has not only led to the creation of different political statuses as citizens, permanent residents, visitors (some with short term working permits), live-in caregivers and various others⁸⁸, but it has also brought about a more accurate and insightful view on the intrinsic pluralism of all societies – also relatively homogenous national societies. The European culture is a culture of “unity in diversity” (*J. Ch. Burckhardt*). Accordingly, citizenship as emanation of culture, as cultural process, as participation in culture, and participation in socio-cultural standards⁸⁹, is as diversified as European Unity itself. Citizenship is the very process of “forming civic unity in diversity”. When defining what a nation was, *E. Renan* gave the famous answer: “A nation's existence is, if you will pardon the metaphor, a daily plebiscite, just as an individual's existence is a perpetual affirmation of life.”⁹⁰ So is citizenship, beyond the nation, a daily affirmation of belongingness and thus of “unity in diversity.”

II. The Notion of European Union Citizenship

Before enshrined in the treaty of Maastricht, the rhetoric of Community Citizenship corresponding to a “People’s Europe” had been in use for a long time.⁹¹ The primary law enactment, however, did not only cause a new *legal quality* but also brought about the question whether this new legal quality had any practical significance and, even more importantly, whether it put the former centrality of national citizenship into a new perspective.⁹² The dependency of Union citizenship on the nationality of a Member State is, indeed, the crucial point.⁹³ Contrary to the

⁸⁷ See *V. Havel*, *Die Herrschaft der Gesetze*, in: id., *Sommermeditationen*, 2nd ed. 1994, pp. 14, 26, combining the ideas of multiple sources of identity on the one, universal human rights on the other hand.

⁸⁸ *J. D. Galloway*, *Citizenship: A Jurisprudential Paradox*, in: M. La Torre (ed.), *European Citizenship. An Institutional Challenge*, 1998, pp. 65, 66.

⁸⁹ *V. Petev*, *Citizenship and Raison D’Etat. The Quest for Identity in Central and Eastern Europe*, in: M. La Torre (ed.), *European Citizenship. An Institutional Challenge*, 1998, pp. 83, 83.

⁹⁰ *E. Renan*, *What is a Nation? (Qu'est-ce qu'une nation?)*, Lecture at Sorbonne, 11 March 1882, in: G. Eley/R. Grigor Suny (eds.) *Becoming National: A Reader*, 1996: pp. 41-55; in general *P. Häberle*, *Verfassung als öffentlicher Prozess*, 3rd ed., 1998.

⁹¹ *A. Wiener*, *Assessing the Constructive Potential of Union Citizenship? A Socio-Historical Perspective*, *European Integration Online Papers*, Vol. 1 (1997), No. 17; *P. Craig/G. de Búrca*, *EU Law*, 4th ed. 2008, p. 847; *S. Kadelbach*, *Unionsbürgerschaft*, in: A. v. Bogdandy, *Europäisches Verfassungsrecht*, 2003, pp. 539, pp. 541.

⁹² On „Creating Citizenship“ before and after Maastricht *E. Guild*, *The Legal Elements of European Identity*, 2004, pp. 35; *P. Craig/G. de Búrca*, *EU Law*, 4th ed. 2008, p. 848/49.

⁹³ And even the choice of the wording „Union Citizenship“ is problematic since the most important citizenship provisions can be found in the ECT (Art. 18 and following), not in the EUT. The reference to the Union has been made for symbolic reasons (see *S. O’Leary*, *European Union Citizenship. The Op-*

US or comparable federal systems, where federal citizenship is supreme and State citizenship thus subordinate, Union citizenship is based upon Member state nationality.⁹⁴ The Conditions under which Member States confer nationality are not regulated by EU law. The Member States still have the constitutional power to decide on their own citizenship and naturalization laws, limited only by the aforementioned public law principle of a “genuine link” and, according to Union law, obliged to recognize the nationality duly granted by other Member States.⁹⁵ It is quite clear that all the rights that stem from Union Citizenship are not as complete as those flowing from national citizenship. A most significant example is given by a simple fact: According to community law, a non-national who is a Union Citizen can nevertheless be expelled from the territory of a Member State due to public policy, public safety or public health reasons (see e.g. Art. 39 sec. 3, 45 ECT). Under international law, such an expulsion or exclusion would not be open to the State of which the person concerned is a national.⁹⁶ The levels of “*belongingness*” are different and so are the mutual rights and obligations of the individual towards his or her community.

Consequently, *multilevel constitutionalism* requires a corresponding concept of *multilevel citizenship*.⁹⁷ On the national as well as on the Union level, the citizen is the *constituent* of his or her political community. As *Union Citizens* the individual is – at least potentially – participating in the process of building up a European constitution – emotionally and rationally.⁹⁸ The different means of citizen based constitution building vary from “*imagining Europe*” to filing a claim before the European Court of Justice.⁹⁹ The status of a European citizen might be somewhat in between a privileged alien and a real citizen¹⁰⁰, but there can be found substantive elements of (European) Citizenship (see the following sections 1 to 4) on the national and Union level sup-

tions for Reform, 1996, p. 11). If the Treaty of Lisbon should enter into force, however, the “Community” will be replaced by the “Union” as legal entity and subject of public international law.

⁹⁴ E. A. Marias, From Market Citizen to Union Citizen, in: id. (ed.), *European Citizenship*, 1994, pp. 1, 13 with reference to C. Closa, *The Concept of Citizenship in the Treaty on the European Union* (1992) 29 CMLRev. 1137, 1141.

⁹⁵ According to the aforementioned Case C-369/90 *Micheletti v. Delegación del Gobierno en Cantabria* (1992) ECR I-4239; Case C-200/02 *Chen v. Home Secretary* (2004) ECR I-9925; see also S. Hall, *Determining the Scope Ratione Personae of European Citizenship: Customary International Law Prevails for Now* (2001) 28 LIEI 355; S. Kadelbach, *Unionsbürgerschaft*, in: A. v. Bogdandy, *Europäisches Verfassungsrecht*, 2003, pp. 539, pp. 545.

⁹⁶ R. C. White, *The Citizen’s Right to Free Movement*, in: EBLR, vol, 16 (2005), pp. 547, 548. Particularly in migrant societies the relationship of third country nationals and citizenship is of high importance, see E. Guild, *The Legal Elements of European Identity*, 2004, pp. 82. Very critical S. O’Leary, *European Union Citizenship. The Options for Reform*, 1996, p. iv: “Choosing Member State nationality as the means of access to citizenship suggests that a particular type of European identity is being fostered, one which bears little relation with the social reality in Member states which have been receiving immigrants from third countries for many years.”

⁹⁷ Which may not be mistaken for „dual citizenship“, which finds itself confronted with a „global hostility“, see T. Aleinikoff/D. Klusmeyer, *Citizenship Policies for an age of Migration*, 2002, p. 22; moreover J. Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of the Political Space*, 2007, p. 23.

⁹⁸ With special emphasis on electoral rights in the multi-level Euro polity J. Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of the Political Space*, 2007, pp. 351.

⁹⁹ P. Häberle, *Europäische Verfassungslehre*, 5th ed. 2008, p. 354.

¹⁰⁰ R. C. White, *The Citizen’s Right to Free Movement*, in: EBLR, vol, 16 (2005), pp. 547, 550.

plementing each other. The form and intensity of belongingness and participation are doubtlessly different from a European macro and national micro-dimension, but given these differentiations Union citizenship is aimed to establish a “direct bond between the individual and the Union, devoid of the Member State”¹⁰¹. This bond of an originally *European* citizenship has to be seen as deeply symbolic political reaction to a crisis: *a crisis of legitimacy*. In the eyes not only of its critics, the Europe Union reflects a typical “*angst*” of modernity and post-modernity. The Union stands for a giant, overly complex, and at the same time dauntingly fragmented political entity: An entity which is incomprehensible of dealing with the challenges of daily life (local life, national life), an entity which is lost in bureaucracy, able to make law without sufficient democratic input, able to engage itself and the member states in military activities, committed to a socially blind market culture and adhering to a neo-materialist ethos of consumerism. The old Leviathan seems to be re-born in European shape.¹⁰²

Reacting to these fear raising factors, European Citizenship qualifies as a *promise* and a *process* as well: It is the promise to define the role of the citizen with multilevel-governance structures and to build European constitution making upon the citizen as the democratic sovereign. It is the process of continuously forming a body of European Citizens by granting them rights¹⁰³, inviting them to politically participate, and seeing them as the constituents of a European public sphere.¹⁰⁴ In other words: The Legitimation of the Union as political Union rests with its citizens. To form an “ever closer Union” is not exclusively left to the Member State but becomes a *common opportunity for* and a *common responsibility of* the citizens. The objectives of Union Citizenship can thus be summarized the following way¹⁰⁵: The citizenship concept shall strengthen the protection of all relevant rights and interests of Member state nationals; it shall especially guarantee a suitable degree of legal protection to mobile Member State nationals in mobile societies; more generally, it shall help to reduce the democratic deficit and to develop a European identity; it shall make the individual a part of European constitution building and accordingly define the scope of Europe’s political union: a *Citizens’ Europe*.

1. The Connex of Union Citizenship to Human and Political Rights, Citizenship as an Instrument of Political Participation

According to Art. 6 sec. 2 TEU, „the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms

¹⁰¹ J. D. Mather, The Court of Justice and the Union Citizen, *European Law Journal* 11 (2005), pp. 722, 722; P. Häberle, *Europäische Verfassungslehre*, 5th ed. 2008, p. 354: “Der Begriff Unionsbürgerschaft schiebt den Staatsbegriff beiseite, indem er ihn nicht verwendet.”

¹⁰² J. H. H. Weiler, To Be a European Citizen: Eros und Civilization, in: id., *The Constitution of Europe*, 1999, pp. 324, 332; S. O’Leary, *European Union Citizenship. The Options for Reform*, 1996, p. 7.

¹⁰³ V. Constantinesco, La citoyenneté de l’Union, in: J. Schwarze (ed.), *Vom Binnenmarkt zur Europäischen Union*, 1993, pp. 25; J. Verhoeven, Les citoyens de l’Europe, in: *Annales de droit de Louvain* 1993, pp. 165, pp. 172.

¹⁰⁴ For a decidedly optimistic view P. Häberle, Gibt es eine Europäische Öffentlichkeit?, for a sceptical approach D. Grimm, Braucht Europa eine Verfassung?, 1995, mit der Behauptung, der europäischen Politikebene fehle die Öffentlichkeitsentsprechung (S. 44).

¹⁰⁵ S. O’Leary, *European Union Citizenship. The Options for Reform*, 1996, p. 89.

(...) and as they result from the constitutional traditions common to the Member States, as general principles of Community law”.¹⁰⁶ The EU Charta on human rights, not yet binding and thus *soft law*, provides for an optional mean of finding and interpreting the law. Surely, neither are universal human rights limited to citizens nor would the aforementioned human rights provisions be ineffective without Union Citizenship.¹⁰⁷ However, Union Citizenship is supportive of human rights *awareness* and *enforcement*. In the same way, as the interdependent dimensions of human rights can, going back to *Georg Jellinek’s* well known status-concept, be concretized by a *status negativus*, a *status positivus* and a *status activus*, Union Citizenship itself is based upon a *threefold status* of human rights entitlements.¹⁰⁸ Given this parallel status, the risk that a forged link between citizenship and the protection of human rights would be detrimental for the letter one is relatively small.¹⁰⁹ Without any doubt, fundamental and thus universal human rights should be enjoyed by man as such whereas citizenship rights are selectively granted to those who belong to their relevant political community. However, connecting both categories will not increase the difference between universal and citizenship rights. On the contrary, such a connection will make clear that the threefold status of citizenship is to strengthen the threefold status of basic human rights. The privileged status of citizenship is a status of inclusion and exclusion as to a specific political community. At the same time, citizenship, due to its implicit reference to humanity and a human rights universe, describes a *process* of overcoming the inclusion/exclusion dichotomy.

Focusing on the different statuses of citizenship, the *status negativus* is pronounced in particular. The freedoms of the common market (e.g. Art. 23 ECT and following, Art. 43 ECT and following) are the most obvious expression of this “negative” freedom. So are, when it comes to the human rights dimension, the freedoms of religion and expression, the freedom of assembly, the freedom of arts and sciences, the property rights, the privacy or the due process rights and many other “to be let alone”-rights as developed by the European Court of Justice.¹¹⁰ The *status positivus* gives an entitlement to social participation and active political protection. Beyond the mere respect for its citizen’s freedom, the political community is to do something. A reference to social rights and to social support is e.g. made in Art. 34 ECT. Manifold are the considerations of social as well as cultural participation within the framework of the Human Rights Charta (Chapter IV: “solidarity”; Art. 22: diversity of cultures, religions and languages).¹¹¹ Art. 20 ECT requires effective political guardianship when providing for an entitlement to diplo-

¹⁰⁶ A. v. *Bogdandy*, The EU as Human Rights Organization (2000) 37 CMLRev. 1307; P. M. *Twomey*, European Citizenship and Human Rights: Actual Situation and Future Perspectives, in: E. A. *Marias* (ed.), European Citizenship, 1994, pp. 119.

¹⁰⁷ J. H. H. *Weiler*, European Citizenship and Human Rights, in: J. A. Winter (ed.), Reforming the Treaty of the European Union – The Legal Debate, 1996, pp. 57.

¹⁰⁸ P. *Häberle*, Europäische Verfassungslehre, 5th ed. 2008, p. 355; see also *id.*, Grundrechte im Leistungsstaat, VVDStRL 30 (1972), pp. 43, 86; S. *Magiera*, Der Rechtsstatus der Unionsbürger, in: FS Delbrück, 2005, pp. 429.

¹⁰⁹ As to the controversial debate see S. *O’Leary*, European Union Citizenship. The Options for Reform, 1996, pp. 69.

¹¹⁰ P. *Häberle*, Europäische Verfassungslehre, 5th ed. 2008, p. 355-356; see also Ch. Grabenwarter, Die Grundrechte für die Europäische Union, DVBl. 2001, pp. 1.

¹¹¹ For further reference M. *Kotzur*, Die Soziale Marktwirtschaft nach dem Reformvertrag, in: I. Pernice (ed.), Der Vertrag von Lissabon: Reform der EU ohne Verfassung, 2008, pp. 197.

matic and consular protection.¹¹² It is only a small step from effective political protection to active political participation. *Status activus politicus*¹¹³ is resembled by Art. 19 sec. 2 ETC: the right to vote and to stand as a candidate in elections to the European Parliament in the Member State which the citizen resides in. Innovative is and controversially discussed was Art. 19 Abs. 1 ECT: the right to vote and to stand as a candidate at municipal elections in the Member State in which the citizen resides.¹¹⁴ Electoral rights on the basis of residence had already been suggested in 1986 by a Commission Report entitled “Voting Rights in Local Elections for Community Nationals.”¹¹⁵ Art. 21, 194, and 195 ECT encompassing the right to petition either to the European Parliament or the European Ombudsman complete the *status activus politicus*-picture.

The European Court of Justice has taken an active role in considering and further-developing the so described substantive as well as procedural status of citizenship. Whenever the Luxembourg Court protects human rights it does not only refer to the principles which are common to the legal cultures of all Member States or expressed in international conventions, but also to the framework, to the very structures and very objectives of the community.¹¹⁶ Citizenship is such a new structure giving rise to new human rights dimension. That can particularly be seen in the areas of free movement and residence.

2. The Citizens’ Rights of Free Movement and Residence

The original European Economic Community provided mainly for economic rights, well known as the Four Freedoms of the Common market, including the free movement of persons, goods and services, also the freedom of establishment and the free movement of capital.¹¹⁷ These essential freedoms were supplemented by the principle of non-discrimination and social rights, such as equal pay for men and women.¹¹⁸ Doubtlessly, this market based *functional* approach turned out to be not sufficient for the creation of a supranational civil society.¹¹⁹ It, however, led to the breakdown of domestic markets – especially given the enhanced mobility in a globalized economy. This breakdown had a clear political dimension. In the very early days the right to move might have been conceived as a right for the “economically active: those in work,

¹¹² J. Weyland, La protection diplomatique et consulaire des citoyens de l’Union européenne, in: E. A. Marias (ed.), *European Citizenship*, 1994, pp. 63.

¹¹³ Furthermore P. Craig/G. de Búrca, *EU Law*, 4th ed. 2008, pp. 869; J. Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of the Political Space*, 2007, pp. 3.

¹¹⁴ M. Silvestro, Droit de vote et d’éligibilité aux élections municipales et au Parlement européen, in: E. A. Marias (ed.), *European Citizenship*, 1994, pp. 69.

¹¹⁵ Bull. EC. Suppl. 7/86.

¹¹⁶ J. Coppell/A. O’Neill, *The European Court of Justice: Taking Rights Seriously?* (1992) 12 *Legal Studies* pp. 227; J. J. Weiler/N. Lockhart, „Taking Rights Seriously“ *Seriously: The European Court and its Fundamental Rights Jurisprudence* (1995) 32 *CMLRev.* 51, pp. 579.

¹¹⁷ C. Barnard, *The Substantive Law of the EU. The Four Freedoms*, 2004; J. Snell, *Goods and Services in EC Law. A Study of the Relationship between the Freedoms*, 2001.

¹¹⁸ C. Costello/G. Davies, *The Case Law of the Court of Justice in the Field of Sex Equality Since 2000* (2006) 43 *CMLRev.* 1567.

¹¹⁹ E. A. Marias, *From Market Citizen to Union Citizen*, in: id. (ed.), *European Citizenship*, 1994, pp. 1, 2.

the self-employed, and those delivering services”.¹²⁰ Due to an active role of the European Court of Justice¹²¹, the free movement of persons very soon became the foundation not only of the common market but also a fundamental principle for the political community.¹²² The relevant Treaty provisions were broadly interpreted by the Luxemburg Justices, who – relying on the effet-utile approach – progressively expanded their scope.¹²³ This is true for the scope “*ratione personae*” first limited to “market actors” namely workers and self-employed persons. Step by step, the scope of personal application was expanded to their family members, later on to recipients of services, tourists, consumers, and even students.

Acting on the dynamic jurisprudence of the European Court, the Parliament and the Council echoed the words found in recent judgments in their new residence directive (preamble, third paragraph):

“Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.”¹²⁴

There is a clear tendency to establish a liberalised system of immigration control – especially regarding the countries who already participate in the *Schengen* arrangements. The engagement in economic activity does no longer qualify as the decisive momentum to trigger the right of free movement and residence in the Member State of one’s own choice. This *constitutional novelty* is expressed in the *Baumbast* Ruling where the Court gave direct effect to Art. 18 ECT, holding that “(...) a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Art. 18 (I) EC.”¹²⁵ Given this policy rather than market ori-

¹²⁰ R. C. White, The Citizen’s Right to Free Movement, in: EBLR, vol, 16 (2005), pp. 547.

¹²¹ J. D. Mather, The Court of Justice and the Union Citizen, European Law Journal 11 (2005), pp. 722.

¹²² I. Bulvinaite, Union Citizenship and its Role in the Free Movement of Persons Regimes (2003) 5 Web Journal of Current Legal Issues.

¹²³ J. Wouters, European Citizenship and the Case-Law of the Court of Justice of the European Communities and the Free Movement of Persons, in: E. A. Marias (ed.), European Citizenship, 1994, pp. 25; S. O’Leary, European Union Citizenship. The Options for Reform, 1996, pp. 26.

¹²⁴ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, 30.4.2004 EN Official Journal of the European Union L 158. In 1974 already, the heads of state and government, meeting in Paris, had proposed that a working group should be instructed to “study the conditions and the timing” under which the citizens of the – at that time – nine Member States “could be given special rights as Members of the Community” (Point 111, Bull. E.C. 12-1974). In 1979 the Commission had proposed a Directive on a right of residence, followed by different reports regarding a possible status of Union citizens. For detailed reference see S. O’Leary, European Union Citizenship. The Options for Reform, 1996, pp. 35-36.

¹²⁵ Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department*, (2002) ECR I-7091; for an analysis see M. Dougan/E. Spaventa, Educating Rudy and the non-English patient: A double bill on residency rights under Article 18 EC, (2003) 28 ELRev 699; R. C. White, The Citizen’s Right to Free Movement, in: EBLR, vol, 16 (2005), pp. 547, 549.; J. D. Mather, The Court of Justice and the Union Citizen, European Law Journal 11 (2005), pp. 722, 725-726 with reference to the Cases *Adams*, *Phull*, *Mounciffe*, and *Wijensbeek*; M. Dougan, The Constitutional Dimension of the Case Law on Union Citizenship, ELRev. 2006, 31(5), pp. 613

ented conception, the Art. 18 rights are to fill in the gaps left by the free movement guarantees within and functionally restricted to the common market. In the words of Advocate General *Cosmos*: “Art. 18 EC enshrines a right of a different kind, a true right of movement, stemming from the status as citizen of the Union, which is not subsidiary in relation to European unification, whether economic or not”.¹²⁶

3. The social dimension of Union Citizenship

On the national level, the social welfare State constitutes a key element of political legitimacy and so does – after the Lisbon Reform Treaty with increasing importance – the concept of social market economy on the Union level.¹²⁷ Social justice, and more particularly, social solidarity¹²⁸, form a paradigm of both, European constitutionalism and European citizenship. Vertically, ties of mutual solidarity bind the political community to its citizens and require *bonum commune*-oriented loyalty of the citizens vice versa. Horizontally, ties of solidarity structure the relations between the citizens amongst each other. Social citizenship¹²⁹ results from social responsibility. This, however, is an in many regards idealistic picture. Political communities dispose of only limited financial resources which they need to make *sustainable* use of. Self-responsibility and self-sustainability are another that is to say the *liberal democracy* paradigm of European constitutionalism and citizenship. Finally, individuals may act irresponsibly. They are free to be selfish and may selfishly rely on their right not to participate in bonum commune-producing processes. A constitutional scheme of governance has to counterbalance the so characterized freedom- or “*liberté*”- and the solidarity- or “*fraternité*”- momentum.¹³⁰ As to the latter one, the European Court of Justice has taken an active role in strengthening the constitutional dimension of Union Citizenship.¹³¹

In re *Martinez-Sala*¹³² the Court created a new equal treatment-right of foreigners with nationals as to their entitlement to social assistance – given both being Union citizens. This ap-

¹²⁶ Case C-378/97 *Criminal Proceedings against Wijensbeek* (1999) ECR I-6207 para 85.

¹²⁷ *M. Kotzur*, Die Soziale Marktwirtschaft nach dem Reformvertrag, in: I. Pernice (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung*, 2008, pp. 197; *O. Golynger*, Jobseekers’ Rights in the European Union: Challenges of Changing the Paradigm of Social Solidarity, *ELRev.* 2005, 30(1), pp. 111, 121.

¹²⁸ *R. Bieber*, Solidarität als Verfassungsprinzip der Europäischen Union, in: A. v. Bogdandy/S. Kadelbach (ed.), *Solidarität und Europäische Integration*, 2002, pp. 41; *U. Volkmann*, Solidarität – Programm und Prinzip der Verfassung, 1998; *Ch. Tomuschat*, Solidarität in Europa, in: F. Capotorti et al. (eds.), *Liber Amicorum P. Pescatore*, 1987, pp. 729 ff.

¹²⁹ *Faist*, Social Citizenship in the European Union: Nested Membership (2001) 39/1 *J.C.M.S.* 37, pp. 46

¹³⁰ See *D. Frum*, The Vanishing Republican Voter, *New York Times Magazine*, 5 Sept. 2008: also conservative political parties must develop a positive agenda that integrates “the right kind of egalitarianism with our conservative principles of liberty”.

¹³¹ *M. Dougan*, The Constitutional Dimension of the Case Law on Union Citizenship, *ELRev.* 2006, 31(5), pp. 613; *K. D. Borchardt*, Der sozialrechtliche Gehalt der Unionsbürgerschaft, *NJW* 2000, pp. 2057.

¹³² Case 85/96 *Martinez-Sala v. Freistaat Bayern*, (1998) ECR I-2691; *S. O’Leary*, Putting Flesh on the Bones of European Union Citizenship, (1999) *ELRev.* 68; *R. C. White*, The Citizen’s Right to Free Movement, in: *EBLR*, vol. 16 (2005), pp. 547, 553; *J. D. Mather*, The Court of Justice and the Union Citizen, *European Law Journal* 11 (2005), pp. 722, 729.

proach was re-emphasised in the cases of *Grzelczyk*¹³³ and *Garcia Avello*¹³⁴ concerning social assistance for students. In *Grzelczyk* the court outlined: “Union citizenship is designed to be the 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 nationality, subject to such exceptions as are expressly provided for” (judgment para 31). The decision goes on saying: “There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the treaty confers on the citizens of the Union (judgement para 35). Again in *Trojani*, the Court pointed out that the Status of a Citizen was a status of equality conferring directly effective rights of equal treatment upon the individual.¹³⁵ Once more in *Bidar*¹³⁶ the scope of the non-discrimination-clause in Art. 12 ECT was broadened with respect to student loans and grants. Union Citizenship is used to consolidate not only *social* but also *educational* rights.¹³⁷ In that context one has to be aware of the goals set at the 2000 Lisbon Council Meeting. The European Union shall become the most competitive knowledge-based economy in the world by 2010, capable of sustainable economic growth with more and better jobs and greater social cohesion.¹³⁸

However, as progressive and promising the social and educational rights aspect of Union Citizenship might be, the approach also bears the risk of an ill-balanced concept of membership.¹³⁹ The fear of welfare tourism is more than counterproductive for the integration into an “ever closer Union”. The consequence of an overly strong emphasis on social rights would be – and to some extent already is – a “political debate as well as popular discourse in which unlimited socio-economic rights of aliens are perceived as a factor contributing to erosion both of liberal democracy and the national welfare state.”¹⁴⁰ What is intended to guarantee social *inclusion* might result in *exclusion*. The non-national seeking social benefits might be seen rather as unwelcome foreigner than fellow citizen if social solidarity is plaid of against the legitimate interests of the Member States. The Court became very well aware which risks a judicially activist exercise in “social engineering” might comprise.¹⁴¹ The Justices thus referred to the *prin-*

¹³³ Case C-184/99 *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, (2001), ECR-6193; *C. Jacqueson*, Union Citizenship and the Court of Justice: something new under the sun? Towards social citizenship, (2002) 72 ELRev 260; *R. C. White*, The Citizen’s Right to Free Movement, in: EBLR, vol. 16 (2005), pp. 547, 553.

¹³⁴ Case C-148/02 *Garcia Avello* (2003) ECR I-11613.

¹³⁵ Case *Trojani v. CPAS* (2004) ECR I-7573; Case C-138/02 *Collins v. Secretary of State for Work and Pensions* (2004) ECR I-2703; *E. Guild*, The Legal Elements of European Identity, 2004, pp. 51

¹³⁶ *R (on the application of Dany Bidar) v. Ealing LBC and Secretary of State for Education and Skills* (2005) ECR I-2119; for an analysis see *O. Golyner*, Student Loans: The European Concept of Social justice according to Bidar, ELRev. 2006, 31(3), pp. 390.

¹³⁷ *R. Dahrendorf*, Bildung ist Bürgerrecht, 1965; *P. Häberle*, Bürgerschaft durch Bildung...

¹³⁸ Presidency Conclusions of the European Council (March 23 to 24, 2000).

¹³⁹ Very critical *K. Hailbronner*, Union Citizenship and the Access to Social Benefits, CMLRev. 42 (2005), pp. 1245.

¹⁴⁰ *O. Golyner*, Jobseekers’ Rights in the European Union: Challenges of Changing the Paradigm of Social Solidarity, ELRev. 2005, 30(1), pp. 111, 121; furthermore *K. Hailbronner*, Die Unionsbürgerschaft und das Ende rationaler Jurisprudenz durch den EuGH?, NJW 2004, pp. 2185; *U. Becker*, Sozialrecht in der Europäischen Integration – eine Zwischenbilanz, ZFSH/SGB 2007, pp. 134 ff.

¹⁴¹ *M. Dougan*, The Constitutional Dimension of the Case Law on Union Citizenship, ELRev. 2006, 31(5), pp. 613, 622.

principle of proportionality as flexible and effective tool for a *balancing approach* between social rights as prerequisite of belongingness and belongingness as prerequisite for social rights. Whoever asks for financial support needs to have a “genuine link with the host country” – so to say *Nottebohm Europeanized* – and no unreasonable burden must be put on the social system of the host Member State.¹⁴² Solidarity is a corrective where self-sustainability fails but not a replacement for self-responsibility.¹⁴³

4. Duties, Responsibilities and Obligations of the Union Citizens

Citizenship is not only composed of rights and freedoms but also duties, responsibilities and obligations. *S. Pufendorf* provided for a classical catalogue in his work “On the Duty of Man and Citizen According to Natural Law”¹⁴⁴ He made a distinction between either general or special duties, the first ones “arising from the common obligation to be subject to the civil authority”, the latter ones arising from the “particular tasks and functions which the sovereign may impose upon individuals”.¹⁴⁵ *Pufendorf* moreover distinguishes between the duties of a “good citizen” towards the political community (obedience, loyalty, respect; “safety and security” being his “dearest wish”; offering life, wealth, fortune, intelligence and industry to the prosperity of the community) and towards his fellow-citizens (“to live with them in peace and friendship; to be courteous and obliging; not to cause trouble by being stubborn and difficult; not to covet or steal other people’s property”).¹⁴⁶

Translated into modern constitutional terms, the vertical dimension of duties towards the political community is first and foremost expressed by the obligation to serve on juries, to pay taxes, and to perform military or social service.¹⁴⁷ An obligation to vote can be found only in very few constitutions.¹⁴⁸ The horizontal dimension of duties towards the fellow citizens is first and foremost expressed by balancing human rights and freedoms, by the horizontal effect of human rights provisions or by implicit social dimensions of human rights.¹⁴⁹ As to the category of vertical duties, there is an obvious gap in the scheme of Union citizenship. This gap, however, is filled by the typical mechanisms of *multilevel-constitutionalism*. Since the European

¹⁴² *O. Golynger*, Student Loans: The European Concept of Social justice according to Bidar, *ELRev.* 2006, 31(3), pp. 390, 401; *id.*, Jobseekers’ Rights in the European Union: Challenges of Changing the Paradigm of Social Solidarity, *ELRev.* 2005, 30(1), pp. 111.

¹⁴³ *Ch. Enders*, Sozialstaatlichkeit im Spannungsfeld von Eigenverantwortung und Fürsorge, *VVDStRL* 64 (2005), pp. 7; *K. Hailbronner*, Union Citizenship and the Access to Social Benefits, *CMLRev.* 42 (2005), pp. 1245, 1267.

¹⁴⁴ Reprint 1991, pp. 175.

¹⁴⁵ *Ibidem* at 175.

¹⁴⁶ *Ibidem*.

¹⁴⁷ See *S. O’Leary*, *European Union Citizenship. The Options for Reform*, 1996, p. 2.

¹⁴⁸ *M. Morlok*, in: H. Dreier (ed.), *GG-Kommentar*, vol. II, 2nd ed. 2006, Art. 38 para 22; an obligation to vote can be found, e.g., in Art. 62 Constitution of Belgium; Art. 48 sec. 2 Italian Constitution emphasizes at the same time the freedom of elections and the civic duty to participate in these free elections; see also Art. 48 sec. 2 Portuguese Constitution.

¹⁴⁹ *D. Merten*, Bürgerverantwortung im demokratischen Verfassungsstaat, *VVDStRL* 55 (1996), pp. 7 at 18-19: „Bürgerverantwortung als Freiheitskorrelat“ („responsibility of the citizens as correlative to freedom); at 20 with reference to *I. Kant*: „Bürgerverantwortung als kategorischer Imperativ“ („responsibility of the citizens as categorical imperative).

Community lacks the competence to raise taxes, the Community is financed by its Member States. The national taxpayer's obligation qualifies – to the extent to which the Union is entitled to financial support by the relevant Member State – as an indirect European obligation. A parallel argument could be made – at least after a success of the Lisbon Reform Treaty – for the military.

As far as the horizontal dimension is concerned, the human rights arguments on the national and the European level are identical. The nation state as well as the Union respectively Community hold it to be a responsibility of a citizen to accept the limits of his or her human rights in correlation to the human rights of other. National Constitutional Courts and European Court of justice apply comparable balancing approaches. Once more: Responsibility works as the counterpart to freedom.¹⁵⁰ Regarding both, the vertical and the horizontal dimension, the European Treaties might not define *explicit duties* but they contain *implicit expectations*: expectations of loyalty and respect; of awareness for safety and security; of support for the well-being of others and the prosperity of the community; and of engagement for peace and good neighbourhood. These expectations are a European reading of *Pufendorf's* catalogue. Since the European Union is in the process of being constitutionalized, it is a *constitutional reading of constitutional expectations*.¹⁵¹

III. The Notion of Global Citizenship

I. Kant's vision of “*Weltbürgertum*” – “*cosmopolitan citizenship*” –, expressed in his famous essay on “The Idea of a General History with a Cosmopolitan Intention” – “*in weltbürgerlicher Absicht*” –, conceptualized the citizen as being on his way from the city through the nation to a universal world-state respectively a universal federation of republics.¹⁵² Despite the fact, that international legal structures are – fortunately – far away from forming a “world state”, the *Kantian* notion is somewhat reflected by today's multilevel scheme of governance and citizenship. However, two important constraints have to be made. As to the first constraint, the citizen “being on his way” does not imply a *transformation* of local or national into universal citizenship. Globalism and localism are not alternative, but complementary principles.¹⁵³ The individual, as global economic actor, participant in political processes with global effect, or subject of

¹⁵⁰ *J. H. Klement*, Verantwortung. Funktion und Legitimation eines Begriffs im Öffentlichen Recht, 2006, p. 503; moreover *D. Merten/W. Berka/O. Deppenheuer*, Bürgerverantwortung im demokratischen Verfassungsstaat, VVDStRL 55 (1996), pp. 7, pp. 48, and pp. 90.

¹⁵¹ Regarding the idea of „expectations of a Constitution towards the citizens“ („Verfassungserwartungen“) see *P. Kirchhof*, Grundrechtsinhalte und Grundrechtsvoraussetzungen, in: *D. Merten/H.-J. Papier* (ed.), Handbuch der Grundrechte, vol. I, 2004, § 21, para.4; *H. Krüger*, Verfassungsvoraussetzungen und Verfassungserwartungen, in: *FS U. Scheuner*, 1973, pp. 285 ff.; *J. Isensee*, Grundrechtsvoraussetzungen und Verfassungserwartungen, in: *HStR*, vol. V, 1992, § 115, para 7.

¹⁵² *I. Kant*, Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht, in: *Populäre Schriften*, edited by *P. Menzer* (1911), pp. 21; *R. Dahrendorf*, Citizenship and Beyond: The Social Dynamics of an Idea (1974), in: *B. S. Turner/P. Hamilton* (eds.), *Citizenship. Critical Concepts*, vol. II, 1994, pp. 292, 293. As to the idea of a European Republic see *A. v. Bogdandy*, Konstitutionalisierung des europäischen öffentlichen Rechts in der europäischen Republik, *JZ* 2005, pp. 529

¹⁵³ *V. Ferrari*, Citizenship: Problems, Concepts and Policies, in: *M. La Torre* (ed.), *European Citizenship. An Institutional Challenge*, 1998, pp. 51, 51/52.

universal human rights, can be a citizen of the world and at the same time of a region, a country, a federal state, or a municipality. All these relations describe *multiple forms of belongingness*. Belongingness, though, does not only require a legal framework, it needs to be a natural *imagination and* it needs to be a day-to-day experience by those who are belonging. That goes without saying regarding the belongingness to small entities such as a family, a village or, a municipality; that can be held true regarding the nation understood as shaped by a *common destiny*; that becomes more than abstract regarding humanity as such. As *K. Laenerts and E. De Smijter* clearly point out with reference to Union Citizenship and the quest for legitimacy:

“Although it has to be recognised that legal structures may influence this self image, democratic legitimation requires that the span between the politically wanted self image of the citizens and their real self image is not too wide.”¹⁵⁴

As to the second constraint: When combined with universality belongingness might turn into a meaningless description. *Universal belongingness* without inclusion and exclusion as decisive criteria thereof, seems to be paradoxical. Universal rights belong to man as such, to the human being as person, not as citizen or subject of a specific legal order. The essential freedoms of the human being, as outlined e.g. in *F. D. Roosevelt's* famous “Four Freedoms Speech” (January 7, 1941) – refer to humankind, not citizenship.¹⁵⁵

There is, however, an aspect of *universal belongingness*: the belongingness to a *rational universe*. The common assumption “that all men are endowed with certain basic qualities which enable them to be parts of a rational universe” refers to the “evident relationship between rationality, the implicit universality of the law, and citizenship”.¹⁵⁶ The individual citizen is included in and excluded from different political entities, the citizen as *universal political role model* or *universal type* involves the status of liberty, the status of equality and the chance to participate. *J. Habermas'* ideal world of free communication could be mentioned as universal ideal making free and equal participation possible. Given the rationality – universality – citizenship trilogy, etymology invites to pay attention to a related contextualization of rationality – culture – and citizenship: *civilization*. The term stems from the Latin word “civilis” being nothing but the adjective form of “civis”. Civilization is, etymologically and politically, to a very important extent the outcome of a universal process of *citizenship building*.

¹⁵⁴ *K. Lenaerts/E. De Smijter*, The Question of Democratic Representation. Paper presented at the T.M.C. Asser Instituut, Conference on the TEU. Suggestions for Revision 14-16/9/1995, 1995.

¹⁵⁵ „In the future world, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression – everywhere in the world. The second is freedom of every person to worship God in his own way – everywhere in the world. The third is freedom from want – which, translated into world terms, means economic understandings, which will secure to every nation a healthy peacetime life for its inhabitants – everywhere in the world. The fourth is freedom from fear, which, translated into world terms, means a worldwide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour – everywhere in the world.“ For the citation see Zitiert nach: *L. Kühnhardt*, Die Universalität der Menschenrechte, 1987, pp.112; furthermore *H. Lauterpacht*, An International Bill of the Rights of Man, 1945, S. 6 f. und S. 84 f.

¹⁵⁶ *R. Dahrendorf*, Citizenship and Beyond: The Social Dynamics of an Idea (1974), in: B, S. Turner/P. Hamilton (eds.), Citizenship. Critical Concepts, vol. II, 1994, pp. 292, 294.

The obvious shortcomings of this rationality based concept of global citizenship have already been analyzed above. The individual is, for many reasons, neither always feeling that he or she belongs to the rational universe of humanity, nor being the rational actor. The nation state – and the civil society forming it – have more than once given proof that the enlightened, politically aware, and “public good”-oriented “citoyen” and thus the concept “active citizenship” sway “*in between*” rhetorics and reality. The failures on the national might exponentiate on the regional, in our case the European, and all the more on the transnational plane. A timely concept of citizenship has to take these “*constitutive deficits*” into account: it has to deal with *ratio* and *emotio*, it has to deal with fragmented identities, it has to deal with those who refuse responsible participation and it finally has to be aware that citizenship is not a “goal in itself but a means toward enlarging the life chances of men”.¹⁵⁷ The *Kantian* notion of “Weltbürgertum” gives the philosophical dimension for this “process of enlargement, the “global village” of 21st century globalization creates the real world parameter for this process and public international law – especially human rights law¹⁵⁸ – provides for the legal framework. Admittedly, even within the United Nations system, instruments of political participation are lacking. However, as subject of human rights and complainant before international tribunals, as participant in international discourses, NGO-activist or simply market actor, as tourist or internet user etc., the individual has a chance to become more than a *global player* – a *global citizen*.

Concluding Remarks

European citizenship is a promise and a process. It is the promise to accept “citizenship” as the “*citizenship*” of the other. It is the process to disprove of *C. Schmitt’s* “friend and foe”-ideology¹⁵⁹ by converting the closed national state into a polity composed of others – something that very much has also been part of the American experience. Despite of all shortcomings, it can be viewed “in terms of both its potential and its wider current meaning”.¹⁶⁰ Its potential refers to the ongoing process of constitution and thus citizenship building; it refers to the continuously changing parameters of belongingness; and it refers to the very aim of European integration: an ever closer citizen-based unity in diversity. Its wider current meaning recalls the

¹⁵⁷ *Ibidem* at 308.

¹⁵⁸ See for the interactions of public international and European Community law in the human rights field the recent *Yusuf*-Decision of the European Court of First Instance: *Th. Schilling*, Der Schutz der Menschenrechte gegen Beschlüsse des Sicherheitsrates, *ZaöRV* 64 (2004), pp. 343; *Ch. Walter*, Grundrechtsschutz gegen Hoheitsakte internationaler Organisationen, *AöR* 129 (2004), pp. 39; *M. Kotzur*, Eine Bewährungsprobe für die Europäische Grundrechtsgemeinschaft – Zur Entscheidung des EuG in der Rs. Yusuf u.a. gegen Rat, *EuGRZ* 2006, pp. 19; *K. Schmalenbach*, Normtheorie vs. Terrorismus: Der Vorrang des UN-Rechts vor EU-Recht, *JZ* 2006, pp. 349; *Ch. Tietje/S. Hamelmann*, Gezielte Finanzsanktionen der Vereinten Nationen im Spannungsverhältnis zum Gemeinschaftsrecht und zu den Menschenrechten, *JuS* 2006, pp. 299; *Ch. Möllers*, Bezwingendes Recht, in: *FAZ* (Feb. 15, 2006), p. 39.

¹⁵⁹ *C. Schmitt*, Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien, 6th ed. 1996, pp. 29; *Schott*, Die Unterscheidung Freund/Feind und der Begriff des Konflikts, in: E. M. Vogt/H. J. Silvermann/S. Trottein (eds.), *Derrida und die Politiken der Freundschaft*, 2003, pp. 107 ff.

¹⁶⁰ *P. Craig/G. de Búrca*, *EU Law*, 4th ed. 2008, p. 873.

necessity to let not only the “narrowly defined Treaty provisions”, but also “other aspects of transnational civic engagement within the EU” complete the picture.¹⁶¹

It might be a progressive mean of European integration to base Union Citizenship upon domicile or residence instead of Member State Nationality and thus to heighten the feelings of European belongingness and solidarity¹⁶². It might be easier to create an originally European political identity without recourse to the national Member States and their political identities. It might be tempting to constitutionalize a Citizens’ Europe without the national Member States being the intermediary entities. Despite the fact that such far reaching reforms with the clear direction towards a European federacy will not find Member State support, they would also not correspond to the multi-level scheme of European constitutionalism. The Union is not a replacement of the nation state, not a *post-national* entity¹⁶³, but a new architecture composed of intertwined constitutional structures. Every single structure is as important for the “European House” as a cross beam is for a real building. The image of “the House of Europe” – referring to the classical Greek “oikos”-philosophy – pictures the richness of heterorganic, asymmetric political entities, which ought to be assembled under a common roof.¹⁶⁴ What the European house will look like at the end of the day is not yet precisely clear, facing an “open finality” of the European integration. However, it is more than clear what should be engraved over the entrance door: “We, the citizens of Europe” have built it and will continuously be rebuilding it.

¹⁶¹ *Ibidem*.

¹⁶² *J. D. Mather*, The Court of Justice and the Union Citizen, *European Law Journal* 11 (2005), pp. 722, 725.

¹⁶³ Therefore, the term “post-national citizenship” might be somewhat misleading. Another perspective is taken by *D. Tambini*, Post-Nations Citizenship, 24 *Ethnic and Racial Studies* (2001), pp. 195.

¹⁶⁴ *P. Häberle*, *Europäische Verfassungslehre*, 5th ed. 2008, pp. 65, pp. 102; moreover *R. H. Ginsberg*, *Demystifying the European Union. The Enduring Logic of European Integration*, 2005.