

Speech prepared for the Mini-Hearing on EU Citizenship, Committee on Civil Liberties, Justice and Home Affairs, European Parliament, Monday 19 February 2018

EU CITIZENSHIP, FUNDAMENTAL RIGHTS AND THE ROMA

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Dear Mr President and Dear Honourable Members of the LIBE Committee,

I would like to thank you for your kind invitation to attend the hearing and to speak about EU citizenship and fundamental rights. I am delighted to address this important issue. I recall the European Parliament's Resolution with a view to the 1996 Intergovernmental Conference in which the European Parliament called for stronger links between EU Citizenship and Fundamental Rights. In this respect, the European Parliament's position has been consistent over the decades.

Matthew Arnold, who wrote his poetry in the 19th century, defined 'civilisation' as 'the humanisation of man in society', and believed, following Coleridge, that states have the positive duty of humanising and civilising their members, in addition to responding to the plight of others in need. Both *humane* and *humanising* policies and discourses are thus the hallmarks of civilised polities. Interestingly, although the EEC and Euratom Treaties in 1957 did not include any references to human rights, in the 'Declaration on European identity', which was adopted by the Member States at the Copenhagen Summit in 1973, the nine Member States at that time expressed their determination to build a Community of law and democracy which 'measures up to the needs of the individual and preserves the rich variety of national cultures'.¹

^{*}I would welcome comments and observations. Please do not hesitate to contact me at <https://www.dorakostakopoulou.com>.

Soon afterwards, the Commission adopted a Communication on 'The Protection of Fundamental Rights in the European Community'.²

In the decades that followed, the Court of Justice and the other European Union institutions worked hard and consistently in order to give human rights a central position within the European Union legal order.³ Initially, through its case law the Court made human rights an integral part of the general principles of EU law and thus primary norms of EU law.⁴ The European Parliament contributed to the enhancement of protection of fundamental rights by incorporating them into the Draft Treaty on European Union (17 February 1984) and by adopting the Declaration of Fundamental Rights and Freedoms of 12 April 1989.⁵ This was followed by explicit Treaty references to the European Convention on Human Rights and to human rights resulting from the common constitutional traditions of the Member States at Maastricht and Amsterdam and the drafting of the EU Charter of Fundamental Rights. The

¹ European Commission, "Annex 2 to Chapter II, 7th General Report," (1973).

² Bul. EC, 1976, suppl. 5/76.

³ The literature on fundamental rights in the EU is voluminous; for early accounts, see M. Zuleeg, 'Fundamental Rights and the Law of the European Communities', (1971) CMLRev. Vol. 8, pp. 446-461; P. Pescatore, 'The Protection of Human Rights in the European Communities', (1972) CMLRev. Vol. 9, pp. 73-79; P. Alston, J. Heenan and M. Bustelo (eds.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999); P. Pescatore, 'The Context and Significance of Fundamental Rights in the Law of the European Communities', (1981) 2 HRLJ 295; A. von Bogdandy, 'The European Union as a Human Rights Organisation: Human Rights and the Core of the European Union', (2000) 37 CMLRev 1307; F. Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice', (2001) 26 ELRev 331; K. Lenaerts, 'Fundamental Rights in the European Union', (2000) ELRev. 25, pp. 575-600; P. Alston, *The EU and Human Rights* (Oxford: OUP Press, 1999); J. Dutheil De la Rochere, 'The EU and the Individual: Fundamental Rights in the draft Constitutional Treaty', (2004) CMLRev. 41, pp. 345-354.

⁴ U. Scheuner, 'Fundamental Rights in European Community law and in National Constitutional law', (1975) CMLRev. Vol. 12, 171-191; J. Schwarze, 'The Administrative law of the Community and the protection of human rights', (1986) CMLRev. Vol. 23, pp. 401-417; H. G. Schermers, 'The European Communities bound by fundamental human rights', (1990) CMLRev. Vol. 27, pp. 249-258; K. Lenaerts and J.A. Gutierrez-Fons, 'The Role of the General Principles of EU Law' in A. Arnulf et al. (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing, 2011), 179.

⁵ OJ 1989, C120/51.

latter was signed on 7 December 2000, was amended on 12 December 2007 and became legally binding following the entry into force of the Treaty of Lisbon.⁶

According to Article 6(1) TEU,⁷ the Charter has ‘the same legal value as the Treaties’. It binds all EU institutions and the Member States when they implement and derogate from EU law (Article 51 of the Charter).⁸ The EU Charter thus reflects ‘the most fundamental values that uphold the Union as a polis’⁹ or a polity. Fundamental rights are thus the building blocks of a political notion of European identity and EU citizenship. A ‘Europe of citizens’ is inseparable from a ‘Europe of rights’.¹⁰

Since both European Union citizenship and fundamental rights are mutually constitutive of a notion of ‘European belonging’ as AG Colomer has stated,¹¹ how should one conceive of their relation? It is true that both institutions found explicit treaty recognition in the early 1990s.¹² It is equally true that both have evolved significantly since then. More specifically, their formal, that is, treaty-based, birth overlapped. Article 6 of the Treaty on

⁶ The discussion here will not focus on the issue of the accession of the EU to the ECHR. For early accounts on this, see J. P. Jacque, *The Accession of the European Union to the European Convention on Human Rights and the Fundamental Freedoms*, (2011) CMLRev. Vol. 48(4), pp. 995-1023; T. Lock, ‘Walking on a Tightrope: the draft ECHR accession agreement and the autonomy of the EU legal order’, (2011) CMLRev. Vol. 48(4), pp. 1025-1054.

⁷ See also Declaration No 1 on the Charter of Fundamental Rights of the European Union [2012] OJ C 326/339.

⁸ The Court of Justice has set out the requirements on the implementation of EU law by the Member States for the purposes of Article 51 of the Charter in Case C-206/13 *Cruciano Siragusa v Regione Sicilia* EU:C:2014:126, para 25.

⁹ K. Lenaerts and M. Desomer, ‘Bricks for a Constitutional Treaty of the European Union: values, objectives and means’, (2002) ELRev. Vol. 27, pp. 377-404, at p. 380.

¹⁰ The Stockholm programme which was adopted by the European Council in Brussels on 10-11 December 2009 laid down a policy agenda for the period 2012-14 which was citizen-centred; Council of the European Union, *The Stockholm Programme – An Open and Secure Europe serving the citizens*, Brussels, 2 December 2009, 17024/09. See also the Commission’s Communication on ‘An Area of Freedom, Security and Justice serving the citizen: wider freedom in a safer environment’, Brussels, 10 June 2009, COM(2009) 262/4.

¹¹ AG Colomer’s Opinion in Case C-228/07 *Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich*, delivered on 15 May 2008.

¹² S. O’Leary, ‘The Relationship between Community Citizenship and the Protection of Fundamental Rights’, (1995) CMLRev. Vol. 32, pp. 519-554.

European Union (the Maastricht Treaty) listed the ECHR and the common national constitutional traditions which inspire the general principles of EU law while Article 8 EC established that ‘every person holding the nationality of a member state shall be a citizen of the Union’. AG Colomer has noted that a driving force for the judicial evolution of EU citizenship since Maastricht and for endowing ‘the case law with coherence and pragmatic authority’ was the emergence of fundamental rights.¹³

The parallel development of the two institutions has given rise to the argument that some kind of overlap is needed. It has been argued that their fusion is both desirable and necessary. EU citizenship could only be a meaningful institution if it incorporated fundamental rights.¹⁴ The European Parliament has supported this view.¹⁵ Such a close association would endow EU citizenship with a strong constitutional status and would end its ‘market’ underpinnings. In other words, the paradigm of ‘homo economicus’ would be fully transformed into that of a ‘homo civitatis’.¹⁶ As a cosmopolitan citizenship, EU citizenship would affirm the centrality of the principle of non-discrimination and put an end to its incoherent application.¹⁷

Although this proposal could be criticised for erasing the specificity of these institutions since citizenship rights are the rights of members qua citizens while human rights affirm the value of human dignity, I fully support a greater connectivity or reciprocal interdependence

¹³ AG Colomer’s Opinion in *Petersen*, note 11 above, para 25.

¹⁴ A. Von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei and M. Smrkold, ‘Reverse Solange – Protecting the essence of fundamental rights against EU Member States’, (2012) CMLRev. Vol. 49, at 489, 516. See also A. Von Bogdandy, ‘The European Union as a Human Rights Organization: Human Rights and the Core of the European Union’, (2000) CMLRev. Vol. 37, pp. 1307-1338.

¹⁵ European Parliament, Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference – Implementation and development of the Union, 17 May 1995, OJ C151/56.

¹⁶ *Ibid*, at para 15.

¹⁷ G. de Burca, ‘The Role of Equality in European Community Law’ in A. Dashwood and S. O’Leary (eds.) *The Principle of Equal Treatment in EC Law* (Sweet and Maxwell, 1997).

between EU citizenship and fundamental rights. EU citizenship and fundamental rights are contextually related, that is, situated within the emergence of a political European Union, but they are also normatively connected. In addition, the increased significance of one institution is conditioned by the increased significance of the other.

Fundamental rights could thus be relied upon to affirm citizenship rights that have been violated when, for example, the Member States deny the family reunion of Union citizens by imposing requirements which are not present in the provisions of Directive 2004/38, and to strengthen citizens' rights by limiting the discretion of the Member States when they derogate from free movement and EU citizenship. As regards the latter, fundamental rights provide additional layers of protection against the expulsion of EU citizens.

Deepening and increasing the inter-connections between the Charter of Fundamental Rights and EU Citizenship create more opportunities for the enrichment of both institutions. Why should not the fundamental rights to respect for private and family life (Article 7 EUCFR) and the protection of personal data (Article 8 EUCFR) find their way into the EU citizenship provisions? The prohibition of collective expulsions (- an issue that emerged as a result of the forced eviction of Roma EU citizens in France and Italy) (Article 19 EUCFR) ought to be part of the EU citizenship provisions. Such a provision would reflect the reality institutionalised discrimination against the Roma and provide protection for them and others.

The EU-MIDIS (European Union Minorities and Discrimination Survey) revealed that the Roma are the most discriminated against group among those surveyed. The majority of the Roma in the Czech Republic (64%), Hungary (62%), Poland (59%) and Greece (55%) felt that they were discriminated against on the basis of their ethnicity at least once in twelve months.¹⁸

¹⁸ EU-MIDIS, Main Results Report 2009, European Union Agency for Fundamental Rights, 2010, p. 155.

In addition, Roma respondents reported that they were relatively unaware of anti-discrimination laws and unlikely to report incidents of discrimination. The European Union has acknowledged that the inclusion of the Roma in the EU Member States requires a commitment to removing structural inequalities in the fields of employment, education, housing and health and to empowering the members of the Roma communities.¹⁹ Overcoming discrimination in housing and in employment, ending forced evictions and the ghettoisation of the Roma EU citizens within municipalities and raising living standards all require sustained commitment and action, and the future development of a social EU citizenship could contribute towards addressing some of these inequalities. For although EU citizenship has empowered individuals, it has not managed to reduce structural inequalities more generally and minority discrimination.

EU citizenship could be a truly transformative institution. One could imagine an EU citizenship with explicit references to social protection (Principle 12), minimum income to ensure dignified living (Principle 14), access to health care (Principle 16), assistance for the homeless and the combatting of homelessness (Principle 19), protection of health and safety at work (Principle 10) and the right to fair wages and protection from dismissal (Principles 6 and 7).²⁰

Writing in the 1990s, I also argued that a clause could be inserted in Part 2 TFEU stating that ‘all Union citizens have an obligation to display solidarity with other Union citizens and nationals of third countries. This obligation entails respect for each person’s dignity and the

¹⁹ N. Ferreira and D. Kostakopoulou, ‘The Roma and EU Citizenship’ in N. Ferreira and D. Kostakopoulou (eds.) *The Human Face of the European Union* (Cambridge University Press, 2016), p. 230.

²⁰ European Commission, The European Pillar of Social Rights, 24 October 2017, at https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en.

rejection of any form of social marginalisation'.²¹ More recently, I have argued that 'possible social citizenship duties that might find their way into the TFEU's provisions on EU citizenship in the future are: a) a duty addressed to both the Member States and the Union to promote the equal standing of all citizens in the EU by taking all possible measures to promote labour market participation and to fight poverty, homelessness and social exclusion; b) a duty on the part of the Member States and the Union to promote inclusive access to the resources, rights and opportunities needed for participation in the democratic life of the Union; and c) an institutional equality duty applying to all levels of policy-making'.²²

A 'Europe of rights' is tangled with a 'Europe of citizens' and a 'Europe of democracy'. When the boundaries of the EU Charter of Fundamental Rights and EU Citizenship are perforated and become fuzzier, citizens and residents can expect to enjoy institutional conditions which are more conducive to human living and flourishing. What does the future hold for the relation of the Charter of Fundamental Rights and EU Citizenship? I would argue that their relation will continue to evolve in a mutually enriching way. The latter implies interdependence, cross pollination and complex interaction without fusion. Union citizenship and fundamental rights are the nodes of a system of good democratic governance designed to promote human living, co-living and flourishing.

²¹ D. Kostakopoulou, 'Towards a constructive theory of citizenship in the European Union', (1996) *Journal of Political Philosophy* Vol. 4(4), pp. 337-58

²² D. Kostakopoulou, 'European Union citizenship rights and duties: civil, political and social', in E. Isin and P. Nyers (eds.), *Routledge Handbook of Global Citizenship Studies*, (Routledge, 2014), p. 434.