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978-0-521-86070-3 - The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space

Jo Shaw

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PART I

Electoral rights in legal and political context

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Introduction: electoral rights and the boundaries of the suffrage

This book explores some of the relationships between the contested concepts and practices of citizenship and membership, of nation and nationality, and of states and ‘state-like’ polities, such as the European Union.¹ Its frame of reference is the EU and its Member States, and its primary prism of analysis is the concept of citizenship. To illuminate these relationships, the book uses the case of electoral rights for non-nationals,² or ‘aliens’ as they are still sometimes anachronistically called. That is, it looks at the cases where non-nationals, i.e. those who, without the formal nationality of the state where they reside, are permitted to vote (and indeed to stand) in elections in the host state. These are most often local elections, or, in the special case of the EU, European Parliament elections; occasionally, non-nationals are permitted to vote or stand in national or ‘regional’ elections (that is, elections to the devolved or ‘state’-level authorities in Member States which have federal or devolved systems of government). In addition, the book also looks at

¹ Or ‘EU’, or ‘Union’.

² A note on terminology: this book refers throughout to the voting rights of ‘non-nationals’ rather than ‘non-citizens’, in recognition of the fact that the term ‘citizenship’ implies contested and textured concepts of membership of different types of communities (and not just states) which stretch beyond ‘national citizenship’. The term ‘non-nationals’ is used to refer, legally speaking, to those without formal legal nationality or national citizenship of a state, in the sense in which the term ‘nationality’ is recognised and used under international law, and is used without reference to ethnic or even civic implications of terms such as ‘nationalism’, ‘national identity’ or ‘nation state’. Thus, so far as possible, I use the terms ‘nationality’ or ‘national citizenship’ to denote legal membership of a state and ‘citizenship’ (without the attachment of national) to denote a broader socio-political concept of membership, while recognising that these usages are not shared by other authors, and thus in some quotations citizenship is used in a different sense. Moreover, all these terms need to be used with especial care when applied to the cases of the states of Central and Eastern Europe, where nationality has historically meant something quite different to the concept as developed in international law; it often refers in that context to membership of a national community defined ethnically, culturally and/or religiously.

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many cases where non-nationals are denied those same rights, on the premise that the denial of rights is often as illuminating as the granting of them.

The extension of electoral rights beyond the boundaries of national citizenship is almost always a highly contested political and legal move, although a recent opinion poll highlights that, despite generally negative attitudes towards foreigners and immigrants within the Member States, there are often positive attitudes amongst citizens to the proposition that non-nationals who pay taxes should also enjoy the right to vote in local elections.³ Indeed, the suggestion that EU citizens should have the right to vote in all elections organised in the Member State in which they live, regardless of national citizenship, came in third place when respondents in a Eurobarometer survey were asked to nominate (from a list) which two measures they thought offered the best ways of strengthening European citizenship.⁴ This seems to indicate quite widespread support for the general liberal and cosmopolitan principle of alien suffrage, which holds that states ought to ensure that long-term-resident non-nationals have rights of political participation in any host polity to the greatest extent possible, in accordance with respect for democracy and fundamental rights, especially the principles of equality and non-domination of minorities by majorities. On that view, residence is a sufficiently strong factor of affinity and belonging to ground a claim for political equality on the part of someone lacking the formal badge of national citizenship. On the other hand, opposition to extending electoral rights finds expression in a more state-focused communitarian principle which holds that it would be wrong to reduce the incentives for the formal acquisition of national citizenship, because to do so might undermine the quality and character of that citizenship, by watering it down by reference to an ever wider range of foreigners' rights.

³ *Migration and Citizenship Rights in Europe: European Citizens' Attitudes*, Quaderni FNE, Collana Osservatori, No. 21, November 2005. The results show the following percentages in favour of electoral rights at the local level: France: 82%; Italy: 74%; Germany: 62%; Poland: 56%; Czech Republic: 45%; Hungary: 32%. Of these Member States, only Hungary actually confers local electoral rights on third country nationals and it produces, ironically, the lowest results!

⁴ Eurobarometer Special 251, *The Future of Europe*, May 2006, at 45–6. The adoption of a European welfare system and the adoption of a European Constitution were cited most commonly by the respondents as the measures most likely to strengthen European citizenship. However, 8 per cent of respondents, and 25 per cent of respondents questioned in the UK, spontaneously stated that they did not wish to be European citizens.

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As the basis for looking at the contestability of electoral rights for non-nationals, this chapter introduces the basic building blocks of the argument, by setting out the legal framework for electoral rights, especially in the European Union but also – in brief – in the Member States. It outlines the research questions which the book seeks to address, although these will be elaborated more fully later, towards the end of Chapter 3, after we have looked in detail at the concept of citizenship and at the theories and practices of alien suffrage.

We should begin, however, with the right to vote. The right to vote is one of the most important formal legal *indiciae* or ‘hallmarks’ of citizenship (Gardner, 1997: 39):

as one of the political rights, the right to vote enables citizens to participate, through the medium of elected representatives, in the exercise of political power. The right is thus relevant to all other hallmarks, since the content of the rights and duties of citizens at any one time can indirectly be influenced or determined by its exercise.

Thus elections can be seen as moments which are central to the production and reproduction of democracy and democratic institutions, moments at which communities are formed and form themselves. Consequently, the capacity to participate in an election must be seen as central to the complex notion of citizenship. But is the converse always true? Is it right to assume that nationality, as a primary legal indicator of national citizenship, is or should always be crucial to the franchise? Are there circumstances in which those without formal citizenship in that legal sense should be able to vote in elections? Indeed, should they be given any political participation rights at all in the host polity? Given their status as non-citizens, it is arguable that both their interest in and loyalty to the host polity could be regarded as suspect. In other words, is it legitimate to restrain the political speech and freedom of association of resident non-nationals, as well as denying them the normal participation rights given to nationals and/or special participation rights, such as the right to elect foreigners’ councils or similar bodies?

A paradox faces all polities: so long as the criterion for allocating political rights of participation, especially electoral rights, has been overwhelmingly the formal one of nationality and so long as the gateways to nationality have been limited by states operating restrictive nationality laws, many who live and indeed are born within the boundaries of any given polity have been unable to participate politically, fully

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or even partially. Whether this is regarded as an anomaly of the present system of Westphalian states, a natural or desirable consequence of that same system, or indeed evidence of its decline and increasing irrelevance, it is clearly a fact as only a minority of states grant electoral rights to non-nationals. We can observe that the mixing of 'national' populations results from a number of factors: globalisation and the interpenetration of economies in the modern world, coupled with the uneven distribution of economic well-being and labour-market opportunities, are clearly key factors promoting mobility and migration, but so too are repressive state regimes which deny political and personal freedoms and give rise to refugee populations, and also the fact that state boundaries sometimes change whether by consent or force and thus generate 'minority' populations separated from their 'homelands' (e.g. the break-up of previously multinational states or empires). There are also positive causes of mixity, such as the existence of entities like the European Union which positively encourage mobility, at least within and amongst its own Member States and at least for market or near-market reasons. All of these factors in different ways generate mobility and create groups of residents within states who lack the formal legal badge of citizenship: nationality. In turn, those who lack nationality are quite commonly denied the right to vote. This results in the selection of political representatives at the national, regional and local level by a limited group of residents, even though the results of those elections affect all residents, and not just nationals as a limited group. For the elected representatives will exercise political power throughout the jurisdiction of the state and *vis-à-vis* all residents, without regard to whether individuals hold nationality or not.

Particular attention is paid in this book to the limited passive and active electoral rights conferred by Article 19 of the Treaty establishing the European Community⁵ on citizens of the Union. They are treated as a test case to show how changes in certain legal rules within the context of the EU are linked to a broader process of transformation of citizenship in the context of migration, globalisation and associated challenges to the viability and future of the nation state.

Introduced initially by the Treaty of Maastricht (or Treaty on European Union⁶) as part of the wider 'citizenship package', Article 19(1) provides that a citizen of the Union residing in a Member State other than the one of which she is a national shall have the right to vote

⁵ Hereinafter referred to as the 'EC Treaty'. ⁶ Hereinafter referred to as the 'EU Treaty'.

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and stand as a candidate in municipal elections ‘under the same conditions as nationals of that State’. That is, a citizen of the Union has a non-discrimination or equal treatment right. In very similar terms, in relation to elections to the European Parliament, Article 19(2) lays down the right to vote and stand as a candidate for a citizen of the Union residing in a Member State other than the one of which she is a national. Electoral rights at the Union level are limited in two crucial respects: first, they cover only a limited range of elections, namely, municipal or local elections⁷ and European Parliament elections, the latter being unique to the European Union as a form of supranational electoral competition; secondly, they extend only to those privileged non-nationals covered by the definition of citizenship of the Union as provided for in Article 17(1) EC, namely, the nationals of the twenty-seven Member States (twelve Member States at the time of entry into force). Article 19 is very limited. It does not cover access on the part of EU citizens to the most important elections taking place within the Member States, namely, general or national elections (or indeed to ‘state’ or regional elections such as those which take place in federal states or states with devolved authorities⁸). It also excludes from consideration the much larger group of non-nationals resident in the Member States, namely, the citizens of third countries (or ‘third country nationals’).

The Article 19 electoral rights comprise one part of the limited package of explicit rights conferred by Part Two of the EC Treaty on citizens of the Union. Article 17(1) EC declares that ‘Citizenship of the Union is hereby established’. This might seem rather impressive at first sight, but, in a phrase added by the Treaty of Amsterdam, citizenship of the Union is declared in Article 17(1) to be *complementary* to national citizenship, which it shall not *replace*. In many respects, the inclusion of the citizenship provisions in the EC Treaty in 1993 marked a

⁷ The term ‘municipal elections’ is used in the EC Treaty specifically in order to link the Treaty’s coverage to ‘municipalities’, which are commonly recognised as the smallest administrative subdivision with democratically elected self-government. In practice, common usage in English generally refers to ‘local elections’, and on the whole this term is used throughout this book, except where reference is made to the specific texts of the EC Treaty and the implementing Directive, where the term ‘municipal elections’ is generally adopted. However, the two should be treated for the purposes of this book as synonymous.

⁸ The UK is an important exception to this, in that EU citizens can vote in elections held in Northern Ireland, Scotland and Wales to the assemblies/parliaments exercising devolved powers in those regions/countries. This is laid down in the relevant UK statutes. The implications of this are explored further in Chapter 8, Section VI.

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codification of existing legal and especially judicial approaches to the status and rights of persons under EC law which some already described as a form of 'Community citizenship' based largely upon the concept of the free movement of persons and the principle of equal treatment.⁹ It would therefore hardly be appropriate to characterise the Maastricht citizenship 'package' as a major constitutional innovation for the European Union, although the electoral rights are amongst the small number of genuine novelties which it did introduce, along with the right to diplomatic and consular protection from the authorities of any Member State for a citizen of the Union when in a third country (Article 20 EC).¹⁰ Also covered in the package is a more generalised right to move and reside freely within the territory of the Member States than previously existed under EC law (Article 18 EC), the right to write to the institutions or bodies of the Union in any of the official languages of the Union, and to receive a reply in the same language, the right to petition the European Parliament, and the right to apply to the Ombudsman for redress in relation to maladministration by the Union institutions (all set out in the three paragraphs of Article 21 EC). However, as Articles 194 and 195 EC make clear in texts which articulate in a little more detail the provisions of Article 21, the latter two rights are not confined to Union citizens, but also extend to all resident natural and legal persons, and ought more properly to be seen as part of the constitutional arrangements underpinning transparency and democracy at the Union level, rather than as 'rights' attaching to those designated as the 'members' of the Union understood as a polity, namely, Union citizens (Article 17(1) EC).

In that respect, Union 'citizenship rights' share much in common with national 'citizenship rights', in the sense that in both cases the boundary between insiders and outsiders is commonly blurred. In practice, at national level, it is often hard to distinguish between the formal rights of citizens (i.e. those with formal national membership) and non-nationals, in

⁹ For an analysis of the case law, see, for example, O'Leary, 1996 and Wilkinson, 1995, and, for an early example of the scholarly use of the notion of citizenship in relation to free movement of persons, see Plender, 1976.

¹⁰ A Presidency working document in preparation for a meeting of the Ministers of Foreign Affairs engaged in the negotiations towards the Treaty of Maastricht commented *à propos* the first Gulf War that 'Drawing from the experience of the Gulf crisis, it was considered that Community citizens, irrespective of their Member States, should have the right, when outside the Community and when necessary, to avail themselves of the protection of the diplomatic missions of any Member State': Council Document 8724/1/90, 2 October 1990, 16.

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the sense that the latter often enjoy most of the formal rights of the former, with the exception of certain political rights, and access to employment in many parts of the public service.¹¹ This seems to be the case, also, with many Union citizenship rights, but not the electoral rights as framed in Article 19 (i.e. the right of EU citizens to vote when resident in other Member States), which are exclusive to EU citizens.

Where Union citizenship differs sharply from national citizenship is in its top-down constructed character. This is emphasised not only by the rather false solemnity whereby Union citizenship is ‘established’ by Article 17, but also by Article 22 which allows Member States to adopt amendments to the citizenship provisions, developing the list of rights, through a truncated treaty amendment procedure which avoids the need for a full intergovernmental conference. The Commission is mandated to report periodically to the Council on progress relating to the issues covered by the citizenship provisions. Bearing in mind the contents of these reports, the Council can act unanimously on a proposal from the Commission, after consulting the European Parliament, to adopt amendments to the citizenship provisions. However, such amendments will not enter into force until they have been ratified by all the Member States in accordance with their respective constitutional requirements, just like a full amending Treaty. The Article 22 procedure has never so far been invoked. Its existence reinforces the fact that the developmental potential of the citizenship provisions lies clearly in the hands of the Member States and not the EU institutions (Preuss *et al.*, 2003: 5), even though it is for the Commission to make the initial proposal for a change. There is little scope under the normal legislative procedure for the concept of citizenship to be developed other than within the frame provided by the legal basis in Article 18 to develop measures on freedom of movement, given the limitations on EU competences in the other fields covered by citizenship. As we shall see in later chapters, there is, however, a limited developmental potential within the citizenship provisions themselves, not least because they have already been given a broader, more teleological reading by the Court of Justice in recent cases.

In addition to the short explicit list of citizenship rights in Part Two of the EC Treaty, however, EU citizens also enjoy other important rights

¹¹ That does not mean that in practice they enjoy ‘equal’ citizenship with nationals, because in many states those of immigrant origin, whether with or without formal nationality, are often amongst the most socially excluded groups, especially those with racial or ethnic origins or religious affiliations which differ from majority populations.

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under the EC Treaty which are ‘attached’ to citizenship of the Union by virtue of Article 17(2) EC, in particular other rights associated with free movement such as access to employment, many welfare benefits and public services, including health care and education on the same basis as nationals, and the right to non-discrimination on grounds of nationality more generally (Article 12 EC). The centrality of these equal treatment rights as the core of Union citizenship at the present time has led Paul Magnette (2005: 177) to use the term ‘isopolity’, drawn from the Greek traditions of city states, to describe the basis of EU citizenship:

The fact that the authors of the treaty have developed this horizontal dimension of citizenship, rather than the vertical bonds between the citizens and the Union, confirms that they intended to build a ‘federation of states’ rather than a ‘European state’. In the EU, as in the ancient leagues of Greek cities, the *isopoliteia* is more developed than the *sympoliteia*.

However, the vertical relationship may be starting, in a tentative way, to develop. It was suggested by Advocate General Tizzano, in the Opinion which he gave on two cases brought before the Court of Justice on the scope of the franchise for European Parliament elections, that the right of Union citizens to vote for the European Parliament in European elections is implicit in the system of EU law and is thus one of the rights guaranteed under Article 17(2) EC.¹² Indeed, he argued that it was ‘perhaps the most important’ of the rights inhering in the status of Union citizenship.¹³ If the right to vote is an EU citizenship right, then it would clearly be a very significant right, given the weakness of the vertical dimension of citizenship in the EU context has long been noticeable by its absence. This (vertical) right – which is separate from the (horizontal) right granted by the Treaty to resident non-national EU citizens to vote under the same conditions as nationals (Article 19(2) EC) – is derived, Advocate General Tizzano argued, from the ‘principles of democracy on which the Union is based’, in particular the principle of universal suffrage. However, that right can be subjected to limitations, such as qualifications based on age or residence; in other words, it does not require the Member States to vest a right to vote for the European Parliament on all nationals including those who are resident in third countries. It remains up to the Member States to decide

¹² See Opinion of Advocate General Tizzano in Case C-145/04 *Spain v. United Kingdom (Gibraltar)* and Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag (Aruba)*, 6 April 2006, paras. 67–8.

¹³ Para. 82 of the Opinion.

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whether or not to confer expatriate voting rights on their nationals who are EU citizens when resident either elsewhere in the Union or in a third country (e.g. in order to preserve their connection with the home state) provided any differences in treatment can be objectively justified.

In the event, the Court of Justice, in deciding the cases,¹⁴ declined to make any general statements about whether voting for the European Parliament should be seen as an EU citizenship right, although this may be regarded as implicit in its approach. It certainly confirmed that the right to vote for the European Parliament is not an *exclusive* EU citizenship right, even if it is such a right, as Member States may grant the right to third country nationals under certain conditions. We shall look in more detail at these cases in Chapter 6.

It is thus worth emphasising that the right to non-discrimination on grounds of nationality, like the limited electoral rights under Article 19 which amount to specific applications of that general principle of equal treatment, is truly an exclusive ‘citizenship right’ of citizens of the Union at the present time. The only circumstances in which a third country national will derive certain equal treatment rights, such as the right of residence in a Member State on the same basis as nationals or the right to certain educational benefits, is indirectly from a citizen of the Union if the third country national is a member of the family of that Union citizen, who is in turn herself exercising free movement rights. Accordingly, such equal treatment rights as are enjoyed by those who are members of the families of mobile Union citizens are largely derived from secondary legislation, such as the detailed Directive of 2004 which governs the right of residence and the other entitlements of citizens of the Union, and their families, who have exercised the right of free movement.¹⁵ There are also groups of privileged third country nationals holding the nationality of a state which has an Association Agreement with the Union. For example, while Turkish citizens do not derive any rights of entry and residence in the Member States under the Association Agreement between Turkey and the EU, once lawfully resident they are protected by an equal treatment principle adopted in Decisions of the Association Council, and interpreted by the Court of Justice as

¹⁴ Case C-145/04 *Spain v. United Kingdom (Gibraltar)*, 12 September 2006; Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag (Aruba)*, 12 September 2006.

¹⁵ Directive 2004/38/EC of the European Parliament and Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/77.