

COMMUNITY RIGHTS AND FREEDOMS – THE PREMISE OF THE RIGHT OF FREE MOVEMENT AND RESIDENCE

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Abstract

Citizenship represents the totality of rights and freedoms which a State grants to its citizens, plus all their obligations to the state. In terms of its social role, citizenship is one of individual identities and involves developing certain skills or a civic culture which allows for a meaningful exercise of the status of citizen.

The notion of European citizenship contributes a better understanding of the European Union's composite nature, as the EU is a community of law, a socioeconomic system and, increasingly, a political entity. The article addresses from a theoretical perspective a series of Community rights which the EU citizen can access.

Keywords: national citizenship, European citizenship, fundamental rights, obligations

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1. Introduction

Citizenship is a personal status, such as social class, age, gender and consists in obedience to a certain state power.[†] European citizenship is a challenge for the theory and practice of national citizenship.[‡] It outlines a post-national citizenship, which, for the first time, refers to a set of values and institutions, instead of binding to a territory belonging to a culture and to a nation-state.

The revival of the public interest in citizenship, in the 1990s, is not due to a transient mode or to a purely academic motivation. The public is now more interested in citizenship because the citizens and the politicians are concerned about what the statistics and the experts have called “democratic deficit”.

As far as EU citizenship is concerned, this status is limited to 4 supranational rights, introduced by the Maastricht Treaty. It is a status that only applies to citizens of a EU Member State and complements the citizenship recognized by the national constitutions of the countries concerned. European citizenship refers to the legal status of nationals of the European Union Member States. This status was introduced by the Maastricht Treaty and developed by the European Union Charter of Fundamental Rights as a set of supranational rights.

Citizenship is an element of legal capacity of the individual, and this requires a number of rights. European citizenship is distinguished by the political rights conferred to EU citizen, the right of EU citizens to petition, the right of European citizens to move and settle freely, or a series of protection rights, such as diplomatic protection[§].

Thus, in the Resolution on the functioning of the Treaty on the European Union (TEU) in the perspective of the 1996 Inter-Governmental Conference, on 17

[†] Deleanu, I., *Drept constituțional și instituții politice. Tratat*, vol III, București, Ed. Europa Nova, 1996, p. 26.

[‡] Nemțoi, G., *Drept constituțional și instituții publice. Note de curs*, București, Ed. Didactică și Pedagogică, Bucharest, 2013, p. 141

[§] Bîrzea, C., *Cetățenia europeană*, București, Ed. Politeia, 2005, p. 79.

May 1995, the European Parliament demanded that European citizenship be strengthened, especially through the EU's accession to the European Convention on Human Rights, banning the death penalty, minority protection, equality between men and women and by strengthening political citizenship. Clearly, these rights, although recognized in EU law, are general human rights, so they are not reserved for Member States nationals, and are not inherent rights deriving from European citizenship.**

2. Freedom of movement and residence

The Maastricht Treaty represented the essential regulation of law, according to which every citizen of the Union has the right to move and settle freely on Member States' territories (TEC, art. 8A, para. 1, new art. 18 par. 1). This ended the controversies and the tensions that relate to freedom of movement. This consecration reaffirms the strengthening of freedom that was made long before, but had lost its exclusively economic character.

The combination of intergovernmental cooperation – particularly illustrated by the Schengen agreements – with community integration, and the persistent refusal of some states to eliminate internal border controls made the Treaty of Amsterdam almost unreadable, despite efforts to order the matter.

Freedom of movement and residence is a right of EU citizens, nationals of recognized Member States (or Community nationals), being progressively generalized in their interest and in the interest of their families^{††}. Now, after the entry in effect of the Treaty of Lisbon, on 1 December 2009, the provisions for the free movement of persons contained in Title IV of Part III of the Treaty on the

** Preda, A., *Drept internațional public*, București, Ed. Sylvi, 1999.

†† Craig, P., de Burca, G., *Dreptul Uniunii Europene, Comentarii, jurisprudență, doctrină*, 4th ed., București, Ed. Hamangiu, 2009.

Functioning of the European Union (TFEU), fall into two categories: Chapter I – workers and Chapter II – the right of establishment.

Community legislation gives the European citizen the two joined rights, which extends with priority onto his or her family. Freedom of movement shall entail the abolition of any discrimination in terms of employment, remuneration or other forms of compensation, which are set out in a contract of employment between the employer of a state and the EU citizen employee.

In its complexity the freedom of movement is justified by art. 45 TFEU.

In the case of workers, their free movement entails a number of rights that allow the consecration of major EU citizen action.

1. The right to accept real offers of employment,
2. The right to move freely for this purpose in the Member States,
3. The right of residence in a Member State for the purpose of employment in accordance with provisions or administrative laws of each state,
4. The right to remain on the territory of a Member State after having been employed there, in conditions which shall be subject to regulations adopted by the Commission.

It is striking that a service which is defined by a contract of employment, gives the employee the possibility to connect to rights that are subordinated to Community law regarding free movement. Areas of work and the legal nature of the relationship between worker and employer may have private or public or statutory nature, as stated in art. 45 TFEU. To fall within this regulation, the work carried out by the foreign national must be real and effective^{††}.

3. The right of establishment

Freedom of establishment shall include the right to pursue self-employment and its exercise, also the formation and the management of companies

^{††} CJCE decision of June 21, 1988, in Case 197/86

or societies within the meaning of Art. 54 para. 2 TFUE, which stipulates the defined conditions for its own nationals by the law of the country of establishment subject to the rules contained in TFUE regarding the free movement of capital.

The right of establishment comes as the European Parliament and the Council, after consulting with the Economic and Social Committee, have decided through directives a number of opportunities for workers holding the citizenship of a Member-State.

So, provisions are mentioned granting priorities for those who settle on the Community territory in order to establish a particularly valuable contribution to the development of production and trade or to conduct independent activities, if they meet the legislative requirements imposed by the State on whose territory they are set.

Gradually, the restrictions on freedom of establishment were removed in every branch of business envisaged for setting up agencies or subsidiaries. The restrictions on the conditions relative to medical professions were also removed.

There are exemptions from the mentioned rules of establishment regarding the concerned Member State, pertaining to the activities associated with government, even with possibility to exercise public authority^{§§}.

4. The situation of third country nationals

Third country nationals do not have, in principle, the freedom of movement and residence, and there are less beneficial interactions between them and EU citizens.

According to the Community legislation in force, family members of a Member State national may accompany him or her in their adopted country and can exert activities. Conventions concluded between the Community and third countries are cautiously mentioning, if not freedom of movement, the right of

^{§§} Dragomir E., *Cetățenia europeană*, București, Ed. Lumina Lex, 2010, p. 57.

departure for the enhancement of access to employment. Even the most favorable of them, such as the EEC – Morocco cooperation agreement, leaves the Member States a wide margin of discretion^{***}.

An example is the Association Agreement signed in 1963 with Turkey and the Additional Protocol of 1970. This, due to their writing, is from the perspective of a progressive realization of the free movement of workers in accordance with procedures established by the Association Council, a step forward in establishing this right. However, the Court of Justice refused to recognize the direct effect^{†††}, which prevents Turkish workers to have free access to the territory of the Member States^{†††}.

Nevertheless, Decision 1/80 adopted by the Association Council produces a direct effect and confers a right of residence for Turkish citizens, derived from the right to work they enjoy^{§§§}. This right entails, even for Turkish workers who had one occupation for more than 4 years on the territory of a Member State, a reasonable time to search for a new job^{****} (similar to the solution in the Antonisse case, regarding community workers). Family members, pursuant to art. 7 of Decision 1/80, have the right to accompany the worker^{††††}.

The agreement on the European Economic Area (EEA) of 2 May 1992 is the most favorable regarding the situation of third-country nationals, as art. 28 provides the freedom of movement between Member States of the EC and the EFTA States, but its application has raised some problems.

^{***} CJCE, March 2, El-Yassini, C 416/96

^{†††} CJCE, September 30, 1987, Demirel, 12/86, Recueil, p. 3719.

^{†††} CJCE, December 16, 1992, Kuss, C 237/91, Recueil, p. I-6781

^{§§§} CJCE, September 10, 1990, Sevince, C 192/89, Recueil, p. I-3641

^{****} CJCE, January 23, 1997, Tetik, C 171/95, Recueil, p. I-5113

^{††††} CJCE, October 5, 1994, Eroglu, C 355/93, Recueil, p. I-5113

Third-country nationals^{****} legally employed by a community enterprise that performs a service in another Member State are entitled to reside in that Member State for the time needed for the execution of the service^{§§§§}.

The perspective of abolition of controls at the internal borders of the Union and the establishment of an “area of freedom, security and justice” implies a degree of harmonization of Member States' policies, towards the admission and residence of third-country nationals.

5. Conclusions

Free movement of workers, of EU citizens, recorded in art. 48 (new art. 39) TEC, includes the following: “The elimination of all discrimination based on nationality (...) regarding employment, remuneration and other conditions of work”, leading to the recognition of the right to “effectively respond to offered jobs” and the freedom of movement and residence within the Member States. Community legislation allows and protects this right that was set up in order to extend economic development.

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^{****} Sidjanski, D., *Viitorul federalist al Europei, Comunitatea Europeană de la origini la Tratatul de la Lisabona*, Iași, Ed. Polirom, 2010, p. 213

^{§§§§} CJCE, August 9, 1994, Vander Elst, C43/93, Recueil, p. I-3803, Moroccan workers employed by a Belgian company doing work on a building site in France.

Nemțoi, G. (2013) *Drept constituțional și instituții publice. Note de curs*, București, Ed. Didactică și Pedagogică.

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