



Promoting the rule of law for 50 years, 1958-2008

The Rights and Responsibilities of Citizenship

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Introduction

'Since they properly concern duties, obligations, privileges and rights, discussions of citizenship necessarily proceed in a normative shadow.'¹

Difficulty to define the notion of citizenship

As a preliminary remark, it must be noted that the debate around citizenship is not facilitated as there is often little agreement among scholars over precisely how to understand the term 'citizenship'. This is corroborated by the idea that though citizenship is often talked about as a singular concept, the term encompasses in practice a number of discrete but related phenomena surrounding the relationship between the individual and the polity.²

While absent in the terminology used by most legal systems, the dichotomy between nationality and citizenship in much of the literature surrounding the subject is of interest. In this respect, it has to be noted that the concepts of 'nationality' and 'citizenship' are often distinguished. The two terms reflect two different legal frameworks, although they are essentially the same concept: both terms identify the legal status of an individual in light of his or her State membership, but citizenship is confined mostly to domestic legal forums whereas nationality is connected to the international forum.³ It has been argued that:

[T]he idea of nationality is used to connote the relationship between an individual and the nation, regardless of the legal citizenship held by the person. A nation may be defined as a collection of people having some kind of corporate identity recognised by themselves and others, a history of association and a name [...] By contrast, the status of citizen is used to denote the link between an individual and a State, a form of political organization with territorial boundaries which may encompass more than one nation (as in the case of the United Kingdom of Great Britain and Northern Ireland).⁴

In this sense, an individual may hold the legal citizenship of one State, but perceive her status as deriving principally from her attachments to a nation.

While not always the case, in the majority of references nationality is characterised as the outward-looking aspect of one's ties to a State. By contrast, citizenship is characterised as the

¹ C Tilly, 'A Primer on Citizenship in Theory and Society', Vol 26, No 4, Special Issue on Recasting citizenship, August 2007, 599 – 602.

² K Rubenstein and D Adler, 'International Citizenship: the Future of Nationality in a Globalized World', 7 Indiana Journal of Global Legal Studies, 519 (Spring 2000).

³ *ibid.*

⁴ H Hardy, 'Citizenship and the Right to Vote', 17 Oxford J Legal Stud 76 (1997).

inward-looking aspect of rights and responsibilities one exercises and performs within the society of that State. In the renowned *Nottebohm*⁵ case, the International Court of Justice described nationality as 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'. Nationality is the legal expression of the fact that the individual, upon whom it is conferred, either directly by law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring the nationality than any other State. However, this definition has its problems. The absence of any clear legal or theoretical delineation separating nationality from citizenship has meant the interpretation of the concepts along some rather different lines. Where consensus has occurred, nationality has come to mean the affiliation of an individual with a State from the external point of view of international law, while citizenship implies the internal host of national rights and duties incumbent upon the individual.

While Halsbury's Laws of England describe nationality as a term denoting the quality of political membership of a State (in itself a term that implicitly refers to citizenship), Close has defined nationality as 'the external face of a complex concept which also possesses an internal face which is citizenship'⁶. For Shaw, the area between the dichotomy that characterises the individual-collective dualism and the multi-level non-state polity sees an interaction definitive of citizenship. This latter can, however, also be characterised as an institution, a 'dynamic patchwork displayed in the constantly negotiated and re-negotiated tension between identity and rights'⁷. Defining citizenship, Evans has stated that 'the constitutional arrangements made for participation by a defined category of individuals in the life of the State'⁸ sum up the main characteristics. However, given the ideal of access to fundamental rights by all, regardless of nationality or citizenship, plus the attribution of certain rights upon residence status, plus the dependence of citizenship on nationality in some cases, yet their respective independence in others, it becomes easy to see that one rule simply cannot fit all.

Citizenship as a relational, ultimately subjective concept is one that requires much more debate. Of particular absence in current discourse on this topic is any discussion of the inherent internalisation of the public/private dichotomy within the individual, and the importance of this process in formulating notions of citizenship. As such, any definitive conclusions cannot claim to have taken into account the whole picture.

⁵ *Nottebohm Case*, (second phase), Judgment of April 6th, 1955: ICJ Reports, at 23.

⁶ Quoted in E Guild 'The Legal Framework of Citizenship of the European Union', in Cesarani and Fulbrook, *Citizenship, Nationality and Migration in Europe*, Routledge 1996, at 32.

⁷ J Shaw, 'The Interpretation of European Union Citizenship', *Modern Law Review*, Vol 61, Issue 3, May 1998, 293-317 at 294.

⁸ Evans, 'Nationality Law and European Integration', 16 *ELRev* 118.

Citizenship designates a set of mutually enforceable claims relating categories of persons to agents of government.⁹ 'It has the character of a contract: variable in range, never completely specifiable, always depending on unstated assumptions about context, modified by practice, constrained by collective memory, yet ineluctably involving rights and obligations sufficiently defined that either party is likely to express indignation and take corrective action when the other fails to meet expectations built into the relationship.'¹⁰

'Citizenship represents cohesion in a world increasingly characterised by fragmentation'¹¹. Dual nationality which violated the traditional notions of loyalty to a single State is one indicator of the emergence of postnational citizenship.¹² It is obviously difficult to give determinate content to a common national identity in a liberal democracy as one of its core values is its emphasis on individual freedom of belief.

Current restrictive conceptions of citizenship have been explained by reference to two theories. Firstly, a number of legal systems have failed to establish a system of differentiation between citizenship and nationality, either as theoretical or legal concepts. As such, citizenship rights are often left indistinguishable from nationality rights, leaving the latter meaningless in the case of substantial expansion of the former. A restrictive interpretation of what constitutes citizenship thereby avoids the uneasy position of granting de facto nationality in all but name. This is interesting because of the inclusion within Union citizenship of certain political rights. Indeed, Aron has argued that a 'State can without self-contradiction grant aliens the economic and social rights it accords its own citizens and still refuse them political rights'. It does, though, seem incongruous that whereas a national of X can vote in X's elections while resident in Y, a national of Y cannot vote in X's elections even though resident in X and likely to be affected by the policies at issue.

Unless stated otherwise, the terms 'nationality' and 'citizenship' will be used interchangeably. In the scope of this report, citizenship will be understood in its broader sense; that is, as legal status, rights and duties, political activity, but also as a form of collective identity and sentiment.

Traditional view – Citizenship as the corollary of the State

'The first form of citizenship is linked to the city-state and showed the attributes of that sort of society – its small scale, limited membership, cultural homogeneity, opportunities for face to face

⁹ C Tilly, *A Primer on Citizenship in Theory and Society*, Vol. 26, No. 4, Special Issue on Recasting Citizenship, August 2007, 599 – 602.

¹⁰ *ibid.*

¹¹ K Rubenstein and D Adler (n2) 519.

¹² Y N Soysal, 'Changing Parameters of Citizenship and Claims-Making: Organized Islam in European Public Spheres', 26 in *Theory and Society*, 509-512 (1997).

participation in the political process, etc.’¹³ ‘With the growth of the modern nation-state citizenship has become large scale – it is the usual conditions of the inhabitants [...] [t]he modern citizens have thus largely lost their rights to acquire virtue in the Aristotelian sense – their individual and largely passive contributions are submerged by the will of the majority.’¹⁴

Traditionally, citizenship is seen as the corollary of the State. As Hanna Arendt declared, citizenship is an inherent national project.¹⁵ According to this theory, ‘any conception that is not framed by national boundaries is both nonsensical and a terrible mistake.’¹⁶ This idea is corroborated by the fact that there is no clear international law stating under which circumstances a State must confer nationality upon a person and when a person has the right to become a citizen.

In this respect, we must mention Brubaker, whose thesis on citizenship and nationhood is seen by many as a reference in the field. Brubaker asserts that control over citizenship is ‘an essential attribute of sovereignty’.¹⁷ ‘Indeed, given the erosion of control of immigration through membership of the European Community, “[i]n the European setting, citizenship is the last bastion of sovereignty.”’¹⁸ He further argued that ‘citizenship is a powerful instrument of social closure’ at both the global and national levels. At the global level, ‘shielding prosperous States from the migrant poor’ and at the national level, operating to distinguish ‘us’ from ‘them’. ‘Every State’, he writes, establishes a conceptual, legal, and ideological boundary between citizens and resident foreigners. Every State discriminates between citizens and resident foreigners, reserving certain rights and benefits, as well as certain obligations, for citizens. ‘The modern nation-state is in this sense inherently nationalistic. Its legitimacy depends on its furthering, or seeming to further, the interests of a particular, bounded citizenry.’¹⁹

Therefore:

There is a conceptually clear, legally consequential, and ideologically charged distinction between citizens and foreigners. Thus, ‘[o]nly citizens have a right to enter (and remain in) the territory of the State [and] suffrage and military service are normally restricted to citizens.’ Further, it is not the ‘State’ but the ‘nation-state’ which is regarded as the primary

¹³ G Close, ‘Definitions of Citizenship’, in P Gardner, *Hallmarks of Citizenship – a Green Paper*, British Institute of International and Comparative Law, 1994, 6.

¹⁴ G Close, *ibid.*, 7.

¹⁵ Quoted in L Bosniak, ‘Citizenship Denationalized’, *Indiana Journal of Global Studies*, Vol 7, 449 (2000) in H Arendt, *Men in Dark Times*, 1968.

¹⁶ L Bosniak *ibid.*

¹⁷ Brubaker, *Citizenship and Nationhood in France and Germany*, quoted in ‘Nationality, Citizenship and the Meaning of Naturalisation: Brubaker, the United Kingdom, EU Citizens, Third-Country Nationals and the European Union’, R M White, *N Ir Legal Q* 288 (2002) 288.

¹⁸ *ibid.*

¹⁹ R Brubaker, *Citizenship and Nationhood in France and Germany*, Harvard University Press, 1992, quoted in C McCrudden, ‘Citizenship and Law: the Structure of the Green Paper Identifying the Hallmarks of Citizenship’, in P Gardner, *Hallmarks of Citizenship – a Green Paper*, British Institute of International and Comparative Law, 1994, 20.

political entity. Any State 'claims to be the State of, and for, a particular, bounded citizenry [and further, it] claims legitimacy by claiming to express the will and further the interests of that citizenry', and this citizenry is 'usually conceived as a nation'...²⁰

Inaccuracy of the theory? Emergence of the notion of postnational citizenship

In the past few years however, some academics and scholars have announced the growing inadequacy of exclusively nation-centred conceptions of citizenship. As Professor Thomas Frank argued, there are a few States in which a single nationality completely corresponds with the State. According to his theory, the State comprises in fact a union of diverse cultural groups which have been compelled by external factors to unite nationally.²¹

Bosniak argues that 'the apparent oxymoronic notions of transnational or postnational or global citizenship challenge conventional presumptions that the nation-state is the sole actual and legitimate site of citizenship. The presumptive nationalism that frames most approaches to citizenship has become inaccurate and the concept has begun to exceed the boundaries of the nation-state and is no longer unequivocally taking anchor in national political collectivities'.

However, we agree with Bosniak when she affirms that postnational citizenship should be addressed as an aspirational claim rather than an actual fact. This idea is corroborated by the fact that no one has elaborated a systematic theory of post/transnational/global citizenship, and the concepts are more often than not deployed in a rather casual way.²²

The general trend in international law is that the question whether individuals have the passport of the country concerned is not decisive, at least not in relation with most of their rights. This change is, no doubt, caused by the way in which general human rights instruments and discussions have influenced the discussions on the specific legal protection of migrants, as well as of members of national minorities and indigenous people.²³ Various rights declarations agreed at supranational level over the past sixty years have increasingly led to the attribution of rights to the individual by mere fact of personhood. That is to say, rights that were once granted by the State to a group privileged within its territory (the citizens) are now the preserve of all, and cease to be monopolized by States. While the duty to uphold and protect such rights ultimately still falls on the State, this latter is duty-bound to recognise the fundamental rights of all, whether they 'belong' in the territory of the State or not. Indeed, such fundamental rights, granted at the

²⁰ R M White (n 17)

²¹ T M Franck, 'Clan and Superclan: Loyalty, Identity, and Community', 90 Am J Int'l L 409 (1997).

²² *ibid*, Bosniak (n15)

²³ M Van Den Bosch and W Van Genugten, 'International Legal Protection of Migrants Workers, National Minorities and Indigenous Peoples – Comparing Underlying Concepts', Int'l J. on Minority & Group Rts. 195 2002.

supranational level, are sufficient to curb State sovereignty against the aggrieved individual, assuming, as we do here, that this discussion is based firmly in a western liberal democracy.

The extension of fundamental rights in international documents has, to a certain extent, brought into question the necessity of the nation-state and deriving concepts of nationality and citizenship. These latter have previously been the sole means by which rights have been attributed and upheld. Yet with the extension of rights to all persons simply by virtue of their existence, rights deriving from citizenship of a nation-state can be seen as duplicates of globally attributed, inalienable rights. Coupled with the assertion of rights through movements across the globe, there is potential for the break-down of the nation-state at the local level to give rise to a postnational, supraprstate nexus of relations, in which rights derive from the individual, rather than the polity.

While rights that are now defined at the transnational level have inevitably become more abstract, the identity that followed from associating oneself with a nation-state that granted and protected rights, still remains territorially bound to the State. In other words, universal rights declarations have witnessed the decoupling of identity and rights. This ultimately leads to the question of how we premise 'belonging' if all are entitled to the same rights, and citizens are no longer privileged 'insiders'. As citizenship and the notion of 'belonging' is premised not only on identity with a particular territory, but also on the rights and duties of individuals within a collective identity, the apparent separation of the one from the other in law poses more questions than it answers.

The advent and growth of multi-level polities, of which the EU is a prime example, has seen great changes brought about by the sharing of sovereignty in the field of acquiring rights and defining identities. Demands for rights and recognition extend beyond borders, breaking the previously intrinsic link between citizenship and nationhood. Finally, the increasing discourse on global rights' advancement and protection, which focuses on the codification of human rights as a global organising principle, increasingly leads to the recognition of rights devolving from the person, not from the State.

International concern with the fundamental human rights of citizens is evident in a large number of instruments. It could be said that economic, cultural and social rights, as for example the rights to health care, to education and to employment, conferred upon everyone, receive wide coverage not only by UN instruments but also by its specialized agencies, such as the World Health Organization, United Nations Educational Scientific and Cultural Organisation (UNESCO) or the International Labour Organization, respectively. However, international instruments dealing with civil and political rights are less extensive, reserving certain rights, such as the right to vote, to hold public office, and to exit and enter, only to citizens. This could be explained by the fact that

these rights seem to be more closely connected with the principle of territorial sovereignty and the fact that States are unwilling to renounce their discretion in regulating them.

With regard to citizens' duties, the absence of their imposition in international law is remarkable. In fact, only regional instruments deal with the duties every individual owes to the State and the society, including the duties to pay taxes and to pay national insurance contributions. However, the imposition of duties has been described as controversial and potentially problematic because they may be used by a State to overcome individual rights when both duties and rights come into conflict.

Multi-dimension of the notion – Rights and duties and 'feeling of belonging'

Citizenship in a liberal State embodies two relationships. A vertical relationship runs between citizen and State, connecting the group of humans who can exact the highest protection from the State and who owe it the most onerous duties. A horizontal relationship connects citizens themselves, developing a community of people who share loyalties, civic allegiance, and national character. On a basic level, these relationships correspond respectively to the 'State' and the 'nation' that make up the 'nation-state'.²⁴ In this sense, encouraging naturalizations is a pursuit of the horizontal relationship, and hostility to dual citizenship is perceived as a devaluation of the horizontal nationality.²⁵

When a sovereign grants full functional citizenship to an individual with a horizontal relationship to a different community, however, the individual's national identity is not necessarily the same as the passport she holds. 'In a world of increased migration, the emotional elements of membership need not be coextensive with the functional.'²⁶ As such, the idea of 'belonging', or relying on one's citizenship rights, is bypassed and a hegemonic language for the legitimation of State, and supranational action is constructed. The past decades have been characterized by a continuing process of expansion of categories of rights pertaining to various cultures, and as such it may even be possible to argue that sub-groups within society play an increasingly important role in defining 'belonging'.

Hence while boundaries are constructed to exclusionary purpose by the polity, migration of workers and global fundamental rights' attribution work to neutralise that which such boundaries are erected to protect – i.e., citizenship status with all the rights and privileges that such entails. Yet it remains ultimately within the sole competence of the nation-state to protect and uphold such

²⁴ 'The Functionality of Citizenship', Harvard Law Review, Vol 110, No 8 (June, 1997)1814-183.

²⁵ *ibid.*

²⁶ 'The Functionality of Citizenship', Harvard Law Review, Vol 110, No 8 (June, 1997) 1814-183.

rights within the national polity through the exercise of territorial sovereignty, the mere existence of which necessitates its own protection through border reinforcement. Therefore we conclude that the global level institutions and processes that foster postnational membership also reify the nation State and its sovereignty – the two are co-dependent, or at least rely on the tension created by such duality of purpose.

The rights and responsibilities in the countries examined in this report are illustrative of this widespread lack of clear meaning regarding the status of ‘citizen’ and its attendant rights and responsibilities. The meaning of ‘citizen’ is often inferred through case law and legislation, and in many countries it is often left to the legislature to determine the characteristics of such status. What is clear from these reports, however, is that the designation of ‘citizen’ is not, by itself, the basis for a person’s enjoyment of civic rights or obligation to perform civic duties.

Certain rights and responsibilities are clearly reserved for citizens: the right to a passport, the right to vote in national elections, the right to stand as a candidate for national offices and the duty of allegiance. The duty to undertake military service is in most cases applicable to citizens, with the notable exception of Australia where, in certain circumstances, residents may be called to serve as well.

Most of the rights and responsibilities are not strictly dependent upon citizenship at all. The rights to freedom of movement, to vote in local elections, to stand as a candidate in local elections, to welfare, to health care, to education, to employment, to housing, linguistic rights, the duty to pay taxes and the duty to pay national insurance contributions are attributed to those who reside within the country (or, with regard to voting in local elections in Australian States and territories, whether the individual owns property in the locality) whether or not they have acquired citizen status. Even temporary residents can share similar rights to citizens, provided they have the relevant authorisation from the national authorities.

Others, such as the right not to be discriminated against and the right to protection, are not conferred in relation to residence or citizenship, but rather because all people are deemed deserving of such treatment based on ideals found within international and European rights instruments.

Inextricably linked to the civic context of rights and responsibilities is the struggle of each country to maintain national identity while simultaneously adjusting to the effects of migration in an increasingly globalized context. As migration rates increase, national legislation has had to become more flexible in order to take into account not just the legal consequences of migration,

but also the need for social integration. The treatment of non-citizens in these countries is representative of a tension between what may be considered an unwillingness to open borders (largely due to perceived threats of terrorism) and a desire to enhance integration, which is perhaps viewed as a solution to the aforementioned threat. The fear of loss of national identity has become even more amplified since the creation of EU citizenship and the rights incident to such status. Denmark and France seem to be leaning toward policy that is over-protective despite European initiatives to the contrary which seek to improve European treatment of non-nationals, whereas Spain has begun the process of amending its legislation in order to deal with the recent wave of immigration into its borders and is still quite a long way from focusing on integrationist policies.

To reiterate the dichotomy mentioned in the beginning of this section²⁷, a solution to the tension between nationality and functional citizenship could be to decouple them. This theory can be exemplified by the European Union, a supranational organization that grants the political and legal rights of functional citizens to nationals of all Member States but does not purport to instill a single overriding national identity. 'EU citizenship is a decoupled functional citizenship that intentionally lacks nationality, hence the careful statement of the Treaty of Maastricht that "Every person holding the nationality of a Member State shall be citizen of the Union"²⁸.

The extent of the effects of European Union citizenship has arguably exceeded the initial scepticism that characterised early scholarly opinion. In extending rights to all Member State nationals that were previously available only to workers, or any person exercising one of the four Community freedoms, the citizenship provisions have enhanced access to rights for all persons within the Union. While the European Court of Justice was originally reluctant to use citizenship provisions in isolation, preferring instead to decide by reference to provisions on the four freedoms, recent case law has suggested that the Court may be more willing to use citizenship of the Union as an independent vessel of rights. This in turn draws on fundamental freedoms contained in the European Social Charter, the European Convention on Human Rights, and the Charter of Rights contained in the forthcoming EU Reform Treaty. However, there remain several problems with the current provisions. Notably, the issue of reverse discrimination, stemming from the Court's inability to rule on 'wholly internal' situations, leading to the current position where an English student studying at a Scottish university must pay tuition fees, whereas a German student, for example, would be exempt from such charges. Secondly, a system of so-called 'self-discrimination' has been identified, whereby some Member States who provide for Treaty ratification by referendum not only allow citizens of those Member States direct democratic

²⁷ 'The Functionality of Citizenship' (n 24).

²⁸ Article 8.

participation, but place representatives of the Member States in rather different bargaining positions at Intergovernmental Conferences than their counterparts.

The way forward: integration policies

Considering the premise that formal citizenship as a legal status persists, citizenship as a formal legal status is enjoying a resurgence of authority at present, and this is directly linked to the worldwide crackdown on illegal immigration.²⁹

Citizenship has also retained a role as a purely legal status, the importance of which is being re-asserted in the face of the contemporary politics of a global war-on-terror.³⁰ It has been argued that human rights cannot logically be a theoretical underpinning for citizenship, regardless of how citizenship may be conceptualized. This is because fundamentally, citizenship is always defined in terms of membership within a political community, in contrast to human rights, which are based on membership of common humanity. Although it is important to acknowledge the important role of human rights within the practice of active citizenship and to recognise that the practice of human rights occurs within a political community, it is inaccurate to conflate the two concepts. Whatever else citizenship is or is to become, it remains tied to national legal texts. Lavergne maintains that in Western nations, migration law rather than citizenship law is the principal effective hurdle to formal membership.

This is best exemplified by the emergence of new migration policies ranging from highly restrictive to fairly inclusive. For example, in France the control of immigration has led to a policy of what may be deemed 'chosen migration' which attempts to ensure that only those people who would be considered an added value to society will be welcome. By contrast, many governments in the Nordic countries have developed programmes seeking to promote understanding and tolerance of other cultures. This latter policy direction subscribes to the idea that citizenship may be founded on a connection that originates from the past and which entails a shared history, language and culture. This connection may also be founded on a common present and future.³¹

To belong or not to belong, that is the question. The past year has borne witness to the emergence of a series of citizenship-related initiatives, as governments have sought to define, circumscribe, and enhance what it means to be a citizen. However, as successful societies increasingly depend on the participation and contribution of foreigners, whether residents or new migrants, the concept of citizenship has evolved in ways which challenge formal etiquettes,

²⁹ Dauvergne, 'Citizenship with a Vengeance', 8 *Theoretical Enquiries* L 489.

³⁰ *ibid.*

³¹ Y Zilbershats, 'Reconsidering the Concept of Citizenship', *Texas International Law Journal*, Vol 36, 692.

rendering traditionally-perceived citizenship obsolete. A new de facto, all-encompassing, form of citizenship, born out of a large number of integration policies, is seeing the day.

In this regard, the experience of Northern European countries is instructive. On the one hand, the strong social structures which underlie Nordic systems function due to an advanced form of societal commitment, which only a high level of integration may achieve. Integration initiatives in this region increasingly have this aim in mind. On the other hand, in the Baltic countries integration has gained importance with these countries' accession to the EU. Their need to adapt and develop rapidly in this area is a reflection thereof. Part IV looks at the wealth of integration initiatives in Nordic countries, and the new approaches being developed in the Baltic, in the fields of measures aimed at new migrants, and citizenship education in schools.

As part of a pan-European approach, these countries aim towards mainstreaming integration into all policy fields. For example, introductory programmes for migrants in Sweden and Iceland are destined to facilitate the initial phases of a migrant's integration into society, from adapting to a new working environment, to learning the language, to involvement in sport and other municipal activities. Furthermore, citizenship education is dealt with through a threefold approach, strongly emphasizing the practical, with the aim of nurturing today the kind of reflexes which will make for a healthy society tomorrow.

Structure of the report

The starting point of this report consists of two books previously published by the British Institute of International and Comparative Law: *Hallmarks of Citizenship – a Green Paper* and *Citizenship - a White Paper*, published respectively in 1994 and 1997, by Piers Gardner former Director of the Institute.³² These Papers approached the study of citizenship from a legal and comparative perspective. In the same way, we believe that 'appealing to citizenship' and a 'revival of the idea of citizenship' can 'counter political apathy and restore a republican view of the relationship between the citizen and society without at the same time encouraging a dirigist view of the role of the State.'³³

The method of the study, in trying to define the boundaries of citizenship, was first, to follow the structure of the Green and White Papers to formulate a list of Hallmarks of Citizenship. The Hallmarks of Citizenship encompass civic, political, social and economic rights and duties

³² P Gardner, *Hallmarks of Citizenship – a Green Paper*, British Institute of International and Comparative Law, 1994 and *Citizenship - a White Paper*, British Institute of International and Comparative Law, 1997.

³³ C McCrudden, 'Citizenship and Law: the Structure of the Green Paper Identifying the Hallmarks of Citizenship', in P Gardner, *Hallmarks of Citizenship – a Green Paper*, British Institute of International and Comparative Law (1994) 23.

traditionally considered to 'set the boundaries as to the proper scope of the legal rights and obligations to which citizenship refers'.³⁴

The second step consists of considering, at the international and European level, and within selected jurisdictions, the basis on which these legal rights and obligations are conferred, or not, on the basis of nationality-citizenship. The hallmarks that were studied in this report are as follows:

- Freedom of Movement;
- Right to a Passport;
- Right to Vote;
- Right of Petition and to a Referendum;
- Right to Stand as a Candidate in National and Local Elections;
- Right to Access to Public Office and Public Service;
- Right to Protection;
- Right to Welfare Benefits;
- Right to Health Care;
- Right to Education;
- Right to Employment;
- Right to Housing;
- Linguistic Rights;
- Right to Non-discrimination;
- Duty of Allegiance;
- Duty to Undertake Military or Alternative Service;
- Duty to Pay Taxes
- Duty to Pay National Insurance Contributions.

The first part of the project consists of an analysis of international law as it applies to citizenship. International law as it applies to the above Hallmarks of citizenship was assessed and the White and Green papers as a basis. We will then endeavour to look at European citizenship and its influence on State policy towards its citizens. This will take place through an examination of the relevant European Directives, Regulations and case law. We will also evaluate whether the above listed Hallmarks of Citizenship are impacted by EU citizenship rights. The third part of the report consists of selected national case studies: Australia, Denmark, France, Spain and the United States. Here again, national law is evaluated on the basis of the Hallmarks, and the question of the interaction between the status of national and resident is also addressed. The fourth part of the study previously consisted of a look at alternative approaches to citizenship.

³⁴ P Gardner (n32) vii.

However, it appears that the trend in most countries is to move away from the classical approach whereby rights and duties depend on the level of association with a specific country (e.g. rights derived by virtue of citizenship in a commonwealth country). Therefore, we have decided to approach this part based on the new trend toward policies aimed at improving the quality of life for all members of society, regardless of their country of origin. Such policies have overwhelmingly taken the form of citizenship education initiatives. This part seeks to explore such initiatives in the Nordic States. Finally, an Annex will provide a table summarizing the signature and ratifications of the main international instruments (Annex I) as well a table of international instruments showing the most relevant provisions relating to the studied Hallmarks (Annex II).

International Instruments Affecting the Hallmarks of Citizenship

Introduction

The regulation of the rights and duties of citizens has traditionally been a matter of municipal law falling outside the scope of international law. However, while international law confers fundamental human rights upon everyone, regardless of nationality or citizenship, it also reserves certain rights to citizens, limiting somehow the national discretion of the states.¹

The aim of this section is to engage in an analysis, which is not exhaustive, of the most relevant international instruments affecting the identified hallmarks of citizenship. Before doing that, a brief summary of the scope and relevance to our study of these instruments is provided.

The Universal Declaration of Human Rights 1948 (UDHR hereinafter) covers most of the rights and duties identified as our hallmarks of citizenship. The majority of these rights are universal human rights conferred upon 'everyone' whereas others, such as freedom of movement, political rights, and access to public office are reserved to citizens.² The UDHR says nothing expressly about aliens, although they are presumably covered as its preamble proclaims the Declaration to be a 'common standard of achievement for all peoples and all nations'.³

At the time of its adoption it was unanimously agreed that the UDHR would not impose legal obligation on states⁴. In addition it was adopted as a resolution of the General Assembly, which does not automatically have the force of international law. However, it has become the source of international legal obligations as it has been accepted as a norm, or at least significant evidence, of customary international law.⁵ It is said that the Universal Declaration 'constitutes an

¹ These concepts will be further developed in the section 'Principles of Citizenship in International Law' of this report.

² See hallmarks of citizenship of this report for an extensive application of the UDHR.

³ RB Lillich, *The human rights of aliens in contemporary international law* (Manchester University Press, Manchester, 1984) 43.

⁴ Eleanor Roosevelt, Chairman of the UN Commission on Human Rights during the drafting of the Declaration, stated on the character of the document: 'It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its Members, and to serve as a common standard of achievement for all peoples of all nations', quoted in H Hannum, 'The Status of the UDHR in National and International Law' (1995-1996) 25 Ga. J. Int'l & Comp L. 318.

⁵ See, e.g., Hannum (n 4), 319-325 citing the following: Resolution adopted by the International Law Association, reprinted in International Law Association, Report of the Sixty-Sixth Conference, Buenos Aires, Argentina 1994 (forthcoming 1995); H Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention', in *The European Convention of Human Rights* (1965) 1, 15 Brit. Inst. Int'l & Comp L., Ser. No 5.; LB Sohn, 'The Human Rights Law of the Charter' (1977) 12 Tex. Int'l L.J. 129-133; P Alston, 'The Universal Declaration at 35: Western and Passé or Alive and Universal', 1982/31 ICJ Rev 60, 69; R Bilder, 'The Status of International Human Rights Law: An Overview, in *International Human Rights Law & Practice*' (1978) 1, 8, James Tuttle ed. See also M Robbins, 'Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement' (2004-2005) 35 Cal. W. Int'l L.J. 281.

authoritative interpretation of the Charter of the highest order, and has over the years become part of customary international law'⁶

Yet it cannot be said that any of the provisions of the UDHR have become customary law as it remains unclear whether State practice supports full compliance with for example the right of equal treatment and non-discrimination, freedom of movement, and the right to a nationality.⁷ On the other hand, rights such as the right to free choice of employment and the right to free primary education seem to enjoy sufficiently widespread support as to be at least 'potential candidates' to be recognised as customary international law.⁸

Nevertheless, it is said that 'even if the Universal Declaration does not rise to the level of customary international law, it is impossible to ignore its political as well as its moral influence on the conduct of international relations.'⁹

Furthermore, it should be noted that, 'although the UDHR in itself may not be a legal doctrine involving legal obligations, it is of legal value inasmuch as it contains an authoritative interpretation of the human rights and fundamental freedoms which do constitute an obligation binding on United Nations Members under the Charter'.¹⁰

As a result, it could be said that the UDHR's binding force derives either from its nature of customary international law or from its political and moral influence on the conduct of international relations.

International concern with the rights and duties of citizens is also apparent in many other international instruments, as it will be further developed. Covenants and treaties are a source of customary law as they can provide some indication of the likelihood that states will adhere to a given standard of behaviour after the adoption of the treaty. It is said that, 'Customary international law exists and crystallises when a pattern of State behaviour generates a certain threshold of understanding about the content of a rule, along with widespread manifestations of consent to be bound to the rule, this sense of obligation being the so-called "*opinion juris*".'¹¹

Whether a rule of customary law exists depends on the general practice of states. Therefore, 'the more states that become parties to the treaty the easier it is to argue that its rules have passed

⁶ Montreal Statement of the [Nongovernmental] Assembly for Human Rights (1968), reprinted in 9 J. Int'l Comm. Jurists Rev 94, as cited in Hannum (n 4) 323.

⁷ Hannum (n 4) 342-347.

⁸ *ibid.*, 349.

⁹ *ibid.*, 350.

¹⁰ W McKean, *Equality and Discrimination under International Law* (Clarendon Press, Oxford, 1983) 269.

¹¹ SJ Anaya, 'Customary International Law' (1998) 92 Am. Soc'y Int'l L Proc 42.

into customary law'.¹² Besides, the binding force of customary law does not extend only to the State Parties but to all states, because 'once international treaties gain broad acceptance and are relied upon by courts, those treaties enter the body of customary law and, consequently, they are binding on all states, even those electing not to ratify them'.¹³

In order to determine the authority as sources of customary law and the binding force of the international instruments affecting the hallmarks of citizenship that will be cited in the following section, it is essential to bear in mind their degree of acceptance by the international community.¹⁴

While summarising all the instruments affecting the hallmarks of citizenship that will be mentioned in this report would not be practical, only a brief reference to the most relevant treaties will be made in the following paragraphs.

The first mentioned is the International Covenant on Civil and Political Rights (ICCPR hereinafter) signed in 1966, and which include among its State Parties most of the UN members. The extensive obligations of the State Parties under ICCPR are not only toward their own citizens but also toward anyone who happens to be within their territory and subject to their jurisdiction.¹⁵ However, the ICCPR reserves political rights only upon citizens, demonstrating that a State's treatment of its own nationals could not be considered a matter purely of the State's internal affairs.¹⁶ The UN Human Rights Committee identified a list of customary human rights contained in the Covenant with binding force, but apart from the right of minorities to use their own language, they do not relate to our hallmarks of citizenship.¹⁷ In addition, the Covenant does not expressly authorise to enforce the obligations contained against any State Party, being the enforcement mechanism based simply on reporting systems.¹⁸

¹² AM Weisburd, 'The effect of treaties and other formal international acts on the customary law of Human Rights' (1995-1996) 25 Ga. J. Int'l & Comp L 110.

¹³ See Robbins (n 5) 295.

¹⁴ See Appendix I for the most relevant treaties ratification.

¹⁵ ICCPR, Article 2.

¹⁶ Weisburd (n 12) 113.

¹⁷ See United Nations International Covenant on Civil and Political Rights Human Rights Committee 'General Comment Adopted Under Article 40 on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols, or in Relation to Declarations Under Article 41 of the Covenant', General Comment No 24(52), para 8, UN. Doc. CCPR/C/21/Rev1/Add.6 (1994), reprinted in 34 ILM 839 (1995): 'Provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.'

¹⁸ See interpretation of ICCPR Article 41 in Weisburd (n 12) 113.

The International Covenant on Economic, Social and Cultural Rights (ICESCR hereinafter), signed in 1966 also with a high level of State Parties is less stringent, imposing only on the State Parties the obligation to adopt the necessary legislative and other measures to progressively achieve the full realisation of these rights conferred upon 'everyone'.¹⁹ In addition to the lesser formulation of the duties imposed, developing countries benefit from a special provision with respect to their obligation to guarantee those economic rights to non-nationals, in view of their national economies.²⁰ The enforcement mechanism also consists of a reporting system.²¹

The International Convention on the Elimination of All Forms of Racial Discrimination 1966 (CERD hereinafter), with a very high number of State Parties, prohibits any kind of discrimination, including on the grounds of national origin, in the enjoyment of the human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²² However, CERD excludes from its application distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.²³ The extent of this exception has been interpreted by the UN Committee on the Elimination of Racial Discrimination, as it will be further described.²⁴

The Declaration on the Human Rights of Individuals Who Are Not Nationals Of The Country In Which They Live, adopted in 1985 in the form of a resolution of the UN General Assembly, basically consists of a list of principal international human rights, to which only lawful aliens are entitled. Some of the rights recognised in the Declaration, for example the right to leave one's own country²⁵, may only be restricted where such restrictions are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others.²⁶

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention hereinafter) signed in 1990 as an attempt to address the important phenomenon of international migration, to date does not count more than thirty-seven State Parties. The convention, which includes an extensive catalogue of fundamental human rights, only applies to documented or regular workers and member of their families,

¹⁹ ICESCR, Article 2.

²⁰ *ibid*, Article 2.3.

²¹ *ibid*, Part IV.

²² CERD, Article 1.1.

²³ *ibid*, Article 1.2.

²⁴ See hallmark 14 Non-discrimination.

²⁵ Article 5.2(a). See also the right to freedom of expression, the right to peaceful assembly and the right to own property, included in Article 5.2(b)(c) and (d).

²⁶ Article 5.2.

including spouse, dependent children and any other dependent relatives recognised as members of the family by agreements between the states concerned.²⁷

It should be mentioned that the Convention on the Rights of the Child 1989, (hereinafter CRC) has undoubtedly become part of customary international law with binding force after receiving universal acceptance. Fundamental rights, including the right to a nationality, are universally conferred upon every child regardless of either their condition as nationals or aliens, or that of their parents.²⁸

The activities of the United Nations organs, such as the UN Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights, will be cited in the following section as they provide further interpretation of the provisions contained in the corresponding instruments. In addition, it is said that they are capable of contributing to the development of customary international law regarding human rights. It has been stated that:

The statements and resolutions within international organisations about human rights may prompt patterns of State behaviour, and in that way lead to customary international law. ... Also, under traditional theory, a resolution or statement by or from within an international institution may provide evidence of customary international law to the extent that such a resolution or statement reflects what states already believe their obligations to be. ... In sum, the multiples activities of international institutions not only matter in a political or sociological sense but, to the extent that they build understanding and expectations regarding human rights norms, they also can be seen as contributing to the formation of customary international law²⁹

The report will also refer to the main instruments applying to the three regional systems of enforcement of human rights on the regional level currently functioning (the European, the Inter-American, the Arab and the African system). The four systems mainly follow the same pattern as the UDHR, ICCPR and ICESCR, conferring fundamental human rights upon everyone, reserving political rights, right to access to public office and freedom of movement to citizens.

Instruments applying to specific categories of persons, such as children, migrant workers, refugees, stateless, minorities and indigenous and tribal peoples will be also referred to in the following section.

²⁷ Articles 1 to 4.

²⁸ Article 2.

²⁹ Anaya (n 11) 43-44.

The Hallmarks of Citizenship

Hallmark 1 - Freedom of Movement

Freedom of movement comprises the rights to enter, to leave and to move freely and reside within the territory of a State.

UDHR generally declares the right of everyone to freedom of movement and residence within the borders of each State.³⁰ However, it is in principle a matter for the State to decide who it will admit to its territory.³¹ ICCPR stipulates that 'everyone lawfully' within the territory of a State shall have the right to liberty of movement and freedom to choose his residence.³²

The right of freedom of movement is recognised in other international instruments, both general³³ and regional³⁴.

The right to leave is also expressly recognised in international instruments both general³⁵ and regional³⁶. The right to leave does not involve an automatic right to enter other states³⁷, although ICCPR declares that no one shall be arbitrarily deprived of the right to enter 'his' own country.³⁸ Customary international law also recognises that nationals do have the right to enter and reside in their State of nationality.³⁹

The UN Human Rights Committee (hereinafter UN HRC) has substantively examined the right to freedom of movement in the context of the ICCPR. According to it, once a person is lawfully within a State, any restriction to his or her right to freedom of movement, including the right to leave, has to be justified under the rules provided for the Covenant.⁴⁰ Therefore, any restriction shall be provided by law, shall be necessary to protect national security, public order (*ordre*

³⁰ UDHR, Article 13.1.

³¹ See UN Human Rights Committee General Comment No 15: The position of aliens under the Covenant: 11/04/86, para 5.

³² ICCPR, Article 12.1.

³³ Such as CERD, Article 5(d)(i); the Declaration On The Human Rights Of Individuals Who Are Not Nationals Of The Country In Which They Live, Article 5.3; and CEDAW, Article 4.

³⁴ Such as Protocol 4 to the European Convention on Human Rights (hereinafter ECHR), Articles 2.1 and 3.2; the American Declaration of the Rights and Duties of Man, Article VIII; ACHR, Article 22.1; ACHPR, Article 12.1; and the Arab Charter on Human Rights, Article 26.1.

³⁵ CERD, Article 5(d)(ii); Declaration On The Human Rights Of Individuals Who Are Not Nationals Of The Country In Which They Live, Article 5.2(a); CEDAW, Article 15.4.

³⁶ Protocol 4 ECHR, Article 2.2; American Declaration of the Rights and Duties of Man, ACHR, Article VIII; ACHR, Article 22.2; African Charter on Human and Peoples' Rights, Article 12.2; and Arab Charter on Human Rights, Article 27.1.

³⁷ C Harvey and RP Barnidge, 'Human Rights, Free Movement and the Right to Leave in International Law' (2007) *International Journal of Refugee Law* 1.

³⁸ ICCPR, Article 12.4.

³⁹ See, generally, R Jennings and A Watts, *Oppenheim's International Law* (9th ed., Longman, Harlow, 1992) Section 379 p 857, as cited in JP Gardner (ed.), *Citizenship The White Paper*, (The British Institute of International and Comparative Law, London, 1997), (hereinafter 'The White Paper') footnote 27 p 24.

⁴⁰ UN Human Rights Committee General Comment No. 27: Freedom of movement (Art.12): 02/11/99. CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para 4.

public), public health or morals or the rights and freedoms of others, and shall also be consistent with the other rights recognised in the Covenant.⁴¹ The same conditions to impose restrictions are contemplated in regional instruments.⁴²

The UN HRC states that 'the enjoyment of the right of freedom of movement of persons must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place of his or her choice'.⁴³ Equally, the right to leave the territory of a State may not be made dependent either on any specific purpose or on the period of time the individual chooses to stay outside the country.⁴⁴

Apart from the requirements above mentioned, the UN HRC declares that restrictions to this right must be proportionate to the interest to be protected, appropriate to achieve their protective function and they must be the least intrusive to achieve the desired result.⁴⁵ Following these criteria, the UN HCR has considered that states may impose reasonable restrictions on the rights of individuals who have not yet performed mandatory national service to leave the country until such a service is completed.⁴⁶ Restrictions on the freedom of movement within the context of suspected terrorist activities were also justified by the UN HRC as they were provided by law and deemed necessary for the protection of national security and public order.⁴⁷ The Committee considered that pending judicial proceedings may also justify restrictions on an individual's right to leave, unless the judicial proceedings are unduly delayed.⁴⁸

On the other hand, the UN HRC has offered an inclusive list of practices and rules that frustrate the right to leave which include, among others: the requirement to exact description of the travel route; restrictions on family members travelling together; the requirement of a repatriation deposit or a return ticket; and the requirement of an invitation from the State of destination or from people living there.⁴⁹ According to the UN HRC exit visas 'categorically' violate freedom of movement as recognised in ICCPR.⁵⁰

⁴¹ ICCPR, Article 12.3.

⁴² ACHR, Article 22.3 and 4.

⁴³ UN HRC General Comment No 27 (n 40), para 5.

⁴⁴ *ibid*, para 8.

⁴⁵ *ibid*, para 14.

⁴⁶ Communication No 492/1992, *Lauri Peltonen v Finland*, para 8.3 (referring to E/CN.4/SR.106, p 4; E/CN.4/SR.150, para 41; E/CN.4/SR.151, para 4 and E/CN.4/SR/315, p 12).

⁴⁷ Communication No 456/1991, *Ismet Celepli v Sweden*, and Communication No 833/1998, *Mrs Samira Karker, on Behalf of Her Husband, Mr. Salah Karker v France*.

⁴⁸ Communication No 263/1987, *Miguel Gonzalez del Rio v Peru*, para 5.3

⁴⁹ UN HRC General Comment No 27 (n 40) para 17.

⁵⁰ See Concluding Observations, Belarus, ICCPR, A/47/40 (1992), 124, para 561; Concluding Observations, Ukraine, ICCPR, A/50/40 vol. I (1995) 57, para 320; Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant; Concluding Observations of the Human Rights Committee: Uzbekistan, 83rd Sess., 4, UN Doc. CCPR/CO/83/UZB (2005).

On the issue of the prevention of smuggling and trafficking of migrants, the Protocol Against the Smuggling of Migrants⁵¹ seems to impose obligations on the States to prevent their nationals from leaving their own states by unauthorised or irregular means.⁵² Nevertheless, restrictions to the right to leave shall be justified within the terms of article 12(3) of ICCPR.⁵³

The UN HRC has also dealt with the right to enter one's own country, declaring that it comprises not only the right to remain in one's own country and to return after having left one's own country, but also the right to come to the country for the first time if this person was born outside.⁵⁴ The UN HRC further states that a State Party must not arbitrarily prevent a person from returning to his or her own country after stripping this person of nationality or expelling him or her to a third country.⁵⁵

Nevertheless, according to some international instruments, both general⁵⁶ and regional⁵⁷, aliens lawfully in the territory of a State Party may be expelled therefrom only in pursuance of a decision reached in accordance with law. The collective expulsion of aliens is prohibited in some regional instruments.⁵⁸

With regard to children, according to the CRC State Parties shall deal in a positive, humane and expeditious manner with applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification.⁵⁹ State Parties shall also respect the right of the child or his or her parents to leave any country, including their own and to enter their own country subject to the same restrictions imposed by ICCPR.

Migrant workers and the members of their families shall be free to leave any State, including their own State, and to enter and remain in their State of origin, subject only to restrictions provided by law, where they are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and they are consistent with other rights recognised in the

⁵¹ Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organized Crime, GA RES. 55/25, annex III, UN GAOR, 55th Sess., Supp No 49, 65, UN Doc. A/45/49 (Vol. I) (2001).

⁵² Such as adopting legislative and other measures to establish as criminal offences the smuggling of migrants when committed intentionally to obtain a financial or other material benefit; the exchange of information between States, particularly those with common borders, to prevent smuggling; and the adoption of measures to facilitate and accept the return of persons who have been the object of this conduct.

⁵³ That is to say, they shall meet the tests of legality and necessity, are consistent with the other provisions of the ICCPR.

⁵⁴ UN HRC General Comment No 27 (n 40) para 20.

⁵⁵ *ibid*, para 21. See also Communication No 538/1993, *Charles Stewart v Canada*, para 12.4.

⁵⁶ ICCPR, Article 13 and Declaration on the Human Rights of Individuals Who Are Not Nationals Of The Country In Which They Live, Article 7.

⁵⁷ ACHR 1969, Article 22.6; ACHPR, Article 12.4 and Arab Charter on Human Rights 2004, Article 26.2.

⁵⁸ Protocol 4 ECHR, Article 4; ACHR, Article 22.9; and ACHPR, Article 12.5.

⁵⁹ CRC, Article 10.

Migrant Workers Convention.⁶⁰ They shall have the right to liberty of movement and freedom to choose their residence within the territory of the State of employment, subject only to the restrictions mentioned in this paragraph.⁶¹

The Refugees and Stateless Conventions do not guarantee a right of entry but refugees and stateless 'lawfully' in the territory of a State Party shall have the right to choose their place of residence and to move freely within its territory, subject to the same regulations applicable to aliens generally in the same circumstances.⁶²

Refugees and stateless lawfully within a State shall be expelled on grounds of national security or public order and in pursuance of a decision reached in accordance with due process of law that shall permit contradiction, except where compelling reasons of national security otherwise require.⁶³ The expulsion or return of a refugee to the frontiers where his life or freedom would be threatened on account of his race, religion, nationality, etc., is prohibited⁶⁴, unless there are reasonable grounds for regarding the refugee as a danger to the security of the country in which he is.⁶⁵

Indigenous and tribal peoples shall not be forcibly removed from their lands or territories and they shall not be relocated without their consent and after agreement on just and fair compensation, with the option of return, where possible.⁶⁶

Hallmark 2 - Right to a Passport

While international law does not confer a general right to a passport, it may confer such a right as a necessary requirement for the exercise of the right of freedom of movement.⁶⁷ International

⁶⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 (hereinafter Migrant Workers Convention), Article 8.

⁶¹ *ibid*, Article 39.

⁶² Convention on Refugees (Convention on Refugees hereinafter) and Convention on Stateless (Convention on Stateless hereinafter), Article 26.

⁶³ Convention on Refugees, Article 32 and Convention on Stateless, Article 31.

⁶⁴ Principle of 'non-refoulement' codified, among others, in the Convention on Refugees, Article 33; and Protocol Relating to the Status of Refugees, Article VII.

⁶⁵ Convention on Refugees, Article 33. It also includes the case where the refugee, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the country in which he is.

⁶⁶ UN Declaration on the Rights of Indigenous Peoples 2007, Article 10.

⁶⁷ See Communication 57/1979, *Vidal Martins v Uruguay*, UN Human Rights Committee, Selected Decisions 122; Communication No 468/10991, *Bahamonde v Equatorial Guinea* (1993) Report of the Human Rights Committee, Vol. II, GAOR, 49th Session, Supp No 40 (A/49/40), 183, para 9.3, p 187; Communication 492/1992, *Peltonen v Finland* (1994) Report of the Human Rights Committee, Vol II, GAOR, 49th Session, Supp No 40 (A/49/40), 238, para 8.2, P. 242.

concern with mutual recognition of passports and similar documents⁶⁸ to facilitate travel is apparent in both general⁶⁹ and regional⁷⁰ instruments.

A passport in international law is indication of the holder's identity, nationality and status.⁷¹ However, the holding of a passport does not automatically confer the right to exercise protection which is related more to status than to possession of a passport.⁷² As a general rule, it is a matter of municipal law to determine the form of a passport or visa to enter such a country.⁷³ The refusal of the issuance of a passport without any justification or being subject to an unreasonable delay have been considered by the UN HRC as a violation of the right to leave a country recognised in ICCPR.⁷⁴

States may deny or withdraw passports provided this is justified by reference to the permissible exceptions, such as in case of breach of duty to perform military service or to prevent person accused of crime from leaving a country.⁷⁵ States may be also subject to international obligations requiring them to deny passport facilities in certain circumstances.⁷⁶

Provisions to inform about formalities and arrangements for travel and the obligation not to destroy passports apply in relation to migrant workers and members of their families.⁷⁷ On the question of legitimate prosecution of migrants who leave their own State with documents they know to be fraudulent, the Protocol Against the Smuggling of Migrants expressly excludes migrants from criminal liability.⁷⁸

In relation to the repatriation of victims of trafficking in persons, State Parties of the UN Convention Against Transnational Organized Crime shall agree to issue travel documents or

⁶⁸ See Convention on the Privileges and Immunities of the United Nations, Article VII. The UN may issue United Nations laissez-passer to its officials that shall be recognised and accepted as valid travel documents by the authorities of Members.

⁶⁹ See e.g. ILO Convention No 108: Seafarers' National Identity Documents 1958 (389 UNTS 277).

⁷⁰ The Nordic Passport Control Agreement 1957.

⁷¹ See generally DC Turack, *The Passport in International Law* (Lexington Books, Lexington, 1972), 232-3; and FL Loehr, 'Passports', In *Encyclopedia of Public International Law*, (North Holland Pub. Co., Amsterdam, 1985), vol 8 428-431, as cited in The White Paper 34, footnote 30.

⁷² See *Nottebohm Case*, Judgment on the Merits, ICJ Rep, 1955, p 4, para 18 (*Nottebohm case* hereinafter).

⁷³ GS Goodwin-Gill, *International Law and the Movement of Persons Between States*, (Clarendon Press, Oxford, 1978) 25.

⁷⁴ See Communication No 1107/2000, *Loubna El Ghar v Socialist Peoples' Libyan Arab Jamahiriya (Loubna El Ghar)*, para 8; with regard to political dissidents see Communication No 77/1980, *Samuel Lichtensztejn v Uruguay (Samuel Lichtensztejn)*, para 9.

⁷⁵ See Communication 77/1980, *Samuel Lichtensztejn v Uruguay* (n 74) para 8.3; Communication 492/1992, *Peltonen v Finland* (1994), para 8.4, p. 243, as cited in The White Paper p 36, footnote 42. See also Communication 263/1987, *Gonzales del Rio v Peru* (1993), as cited in The White Paper, p 36, footnote 44.

⁷⁶ See e.g. Security Council Resolution 253 1968 (7 ILM 897), Article 5; Southern Rhodesia (UN Sanctions) (No 2) Order 1968 (SI 1968/1020), reg 13(a)(ii), as cited in The White Paper, p 35, footnote 34.

⁷⁷ Migrant Workers Convention, Articles 21 and 65.1(d).

⁷⁸ See Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organized Crime, GA Res. 55/25, annex III, UN GAOR, 55th Sess., Supp No 49, 65, UN Doc. A/45/49 (Vol. I) (2001), Article 5.

other authorization necessary to enable the person to travel to and re-enter its territory.⁷⁹ The same obligation to issue travel documents for the purpose of travel outside the territory applies in relation to refugees and stateless persons 'lawfully' staying in the territory of a State Party of the Refugees and Stateless Conventions.⁸⁰ Restrictions to this right of refugees and stateless persons refer to reasons of national security or public order.⁸¹ The issue of travel documents to refugees has also received consideration regionally.⁸²

Hallmark 3 - Right to Vote

Elections shall be by universal and equal suffrage, held by secret ballot or equivalent free voting procedures.⁸³

However, the right to vote is one of the few rights in international law which may be limited to nationals, although the language used in the various instruments is not always very clear. Actually, UDHR recognises the right of 'everyone' to take part in the government of 'his' country, which seems to exclude individuals from taking part in public elections in countries other than their own.⁸⁴

Similarly, ICCPR confers this right to 'every citizen', which also seem to exclude non-nationals or aliens from taking part in public elections.⁸⁵ According to ICCPR, no distinctions are permitted between citizens in the enjoyment of this right on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁸⁶ Therefore, the UN HRC has established that citizens may not be unreasonably excluded from this right except on grounds which are established by law and which are objective and reasonable, such as mental incapacity or convicted criminals.⁸⁷ Restrictions must be also established by law and must be reasonable, such as setting a minimum age limit to the right to vote⁸⁸, capacity and residence.⁸⁹

⁷⁹ United Nations Convention Against Transnational Organized Crime: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000, Article 8.

⁸⁰ Convention on Refugees, Article 28 and Convention on Stateless, Article 16.1 and 2. See also in these articles that State Parties shall in particular give sympathetic consideration to the refugees or stateless persons who are unable to obtain a travel document from the country of their lawful residence.

⁸¹ *ibid.*

⁸² Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, Article 6.1.

⁸³ UDHR, Article 21.3; ICCPR, Article 25.b; CERD, Article 5.c; American Declaration of the Rights and Duties of Man, Article XX; and ACHR, Article 23.

⁸⁴ UDHR, Article 21.1.

⁸⁵ ICCPR, Article 25.b.

⁸⁶ *ibid.*, Article 2.1.

⁸⁷ UN HRC General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25); 12/07/96. CCPR/C/21/Rev1/Add.7, para 4 and 14.

⁸⁸ UN HRC General Comment No 25 (n 87) para 10.

⁸⁹ M Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, (Engel Publisher, Arlington, 1993) 435-446.

The same regulation applies at regional level, with the American Declaration of the Rights and Duties of Man limiting the right of every person to participate in the government of 'his' country and the American Convention on Human Rights (ACHR hereinafter), the African Charter on Human and Peoples' Rights (ACHPR hereinafter) and the Arab Charter on Human Rights granting this right to 'every citizen'.⁹⁰

Equally, although CERD states that State Parties shall guarantee the right of 'everyone', without distinction as to race, colour, or national or ethnic origin, to equality before the law in the enjoyment of the right to participate in elections and to vote, the convention shall not apply to distinctions, exclusions, restrictions and preferences made by a State Party to this convention between citizens and non-citizens.⁹¹ Therefore, restrictions on the right to vote to non-nationals would not be considered discriminatory, provided they do not discriminate against any particular nationality.⁹²

CEDAW, the Convention on the Political Rights of Women and, at regional level, the Inter-American Convention on Granting of Political Rights to Women, stipulate that women shall have the right to vote in all elections on equal terms with men without discrimination.⁹³

Regarding migrant workers, they shall have the right to participate in public affairs of their State of origin, but they may only enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights.⁹⁴ Traditionally, migrants are not granted political rights at a national level until they become citizens of the country in which they have lawfully resided for a long time.

National minorities shall have the right to participate effectively in public life as well as in decisions on the national and regional level concerning their minority, in a manner not incompatible with national legislation.⁹⁵ Indigenous and tribal peoples shall have the right to maintain and strengthen their distinct political institutions while retaining their right to participate fully in the political life of the State.⁹⁶

⁹⁰ American Declaration of the Rights and Duties of Man, Article XX; ACHR, Article 23; ACHPR, Article 13.1 and Arab Charter on Human Rights, Article 24.2.

⁹¹ CERD, Articles 5.c and 1.

⁹² *ibid*, Article 1.3.

⁹³ CEDAW, Article 7.a; Convention on the Political Rights of Women, Article I and Inter-American Convention on Granting of Political Rights to Women, Article 1.

⁹⁴ Migrant Workers Convention, Articles 41.1, 42.1 and 42.3.

⁹⁵ UN Declaration on the Right of Persons belonging to National or Ethnic, Religious and Linguistic Minorities 1992 (hereinafter UN Declaration on Minorities), Article 2.

⁹⁶ UN Declaration on the Rights of Indigenous Peoples 2007, Article 5.

Hallmark 4 - Right of Petition and to a Referendum

International law does not specifically confer the right to a referendum, although this right may be conferred under treaty in specific instances.⁹⁷ Exceptionally, CEDAW includes the right to vote in public referenda as one of these rights to be exercised by women on equal terms with men.⁹⁸ It may be that the right to participate in public affairs⁹⁹ implies the right to vote in a referendum but it does not mean that States are obliged to conduct public referenda.¹⁰⁰

The right to petition has only been codified in international law in the American Declaration of the Rights and Duties of Man, which recognises the right of every person to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.¹⁰¹

Hallmark 5 - Right to Stand as a Candidate in National and Local Elections

The right to stand as a candidate is also one of the few rights in international law that may be limited to citizens. This right is jointly regulated in international law, both generally and specifically (migrant workers, indigenous and tribal peoples and national minorities), by the same general and regional instruments which regulate the right to vote.¹⁰²

Consequently, the exercise of this right by citizens may not be suspended or excluded except on objective and reasonable grounds which are established by law, are proportionate and not discriminatory.¹⁰³ Mental incapacity and the requirement of a high level of proficiency in the State language are considered by the UN HRC reasonable and objective criterion to restrict this right.¹⁰⁴ Restriction on the ground of minimum age must be justifiable on objective and reasonable criteria,

⁹⁷ See e.g. Treaty of Versailles 1919, Article 50, Annex.

⁹⁸ CEDAW, Article 7.a.

⁹⁹ UDHR, Article 21.1; ICCPR, Article 25.b; CERD, Articles 1.2 and 5.c; CEDAW, Article 7.a; American Declaration of the Rights and Duties of Man, Article XX; ACHR, Article 23; ACHPR, Article 13.1; Inter-American Convention on Granting of Political Rights to Women, Article 1; Migrant Workers Convention, Article 41.1 and 41.2; UN Declaration on the Rights of Indigenous Peoples, Articles 5 and 18; and UN Declaration on Minorities, Article 2.

¹⁰⁰ See Nowak (n 89) 442 and UN HRC General Comment No 25 (n 87) para 19.

¹⁰¹ American Declaration of the Rights and Duties of Man, Article XXIV.

¹⁰² UDHR, Article 21.1; ICCPR, Article 25.b; CERD, Articles 1.2 and 5.c; CEDAW, Article 7.a; American Declaration of the Rights and Duties of Man, Article XX; ACHR, Article 23; ACHPR, Article 13.1; Arab Charter on Human Rights, Article 24.3; and Inter-American Convention on Granting of Political Rights to Women, Article 1. The right of women to be eligible for election to all publicly elected bodies on equal terms with men, without any discrimination is stipulated in Article II of the Convention on the Political Rights of Women 1953. See also the 1990 Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE, Parts I (6), (7.5), which mentions the right of citizens to seek political or public office individually or as representatives of political parties. There are also treaties concerned specifically with the rights of non-citizens, such as the European Convention on the Participation of Foreigners in Public Life at Local Level 1992, Chapter C, Articles 6 and 7.

¹⁰³ See e.g. Communication No R.7/32, *Touren v Uruguay* (1981) para 11, p 123-4; Communication No 9/35, *Aumeeruddy-Cziffra v Mauritius* (1981) para 9.2(c) 2, p 142; Communication No R.10/44, *Pietroroia v Uruguay* (1981) para 16, p 159.

¹⁰⁴ UN HRC General Comment No 25 (n 87) para 4. On the language requirement see Communication No 884/1999, *Antonina Ignatane v Latvia*, (2001), para 7.3, p 142.

whereas the right of candidacy should not be limited by requiring candidates to be members of parties at all.¹⁰⁵

Hallmark 6 - Right of Access to Public Office and Public Service

The right of access to public office or service is also one of the few rights in international law which may be limited to citizens. UDHR recognises the right to 'everyone' of equal access to public service in 'his' country and ICCPR confers this right to 'every citizen'.¹⁰⁶

The UN HRC, in its interpretation of ICCPR, has stated that 'to ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable'.¹⁰⁷ It also highlights as of particular importance that persons must not suffer discrimination in the exercise of this right on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁰⁸ Restrictions may be imposed, provided they are reasonable, proportionate and not discriminatory.¹⁰⁹

Although the term 'public service' is not defined in ICCPR, it is alleged to include all government appointed positions in the classic State branches of the legislature, executive and judiciary in which official powers are exercised and may also include posts in State schools, universities, broadcasting authorities or other State undertakings and services.¹¹⁰ Positions in international organisations do not fall under the term 'public service'.¹¹¹

CERD stipulates that State Parties shall guarantee the right of 'everyone', without distinction as to race, colour, or national or ethnic origin, to equal access to public office.¹¹² However, the convention shall not apply to distinctions, exclusions, restrictions and preferences made by a State Party to this convention between citizens and non-citizens, thus States may limit this right to citizens.¹¹³ Both CEDAW and the Convention on the Political Rights of Women recognise the right of women to hold public office and to exercise all public functions on equal terms with men.¹¹⁴

¹⁰⁵ UN HRC General Comment No 25 (n 87) para 14 and 17.

¹⁰⁶ UDHR, Article 21.2 and ICCPR, Article 25.c.

¹⁰⁷ UN HRC General Comment No 25 (n 87) para 23.

¹⁰⁸ *ibid.*, para 23.

¹⁰⁹ See e.g. Communication No R.7/32, *Touron v Uruguay* (1981) para 11, p 123-4; Communication No 9/35, *Aumeeruddy-Cziffra v Mauritius* (1981) para 9.2(c) 2, p 142; Communication No R.10/44, *Pietroroia v Uruguay* (1981) para 16, p 159; *Stalla Costa v Uruguay* (1987), para 10, p 173; and Communications No 442/1990, 423/1990 and 424/1990, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v Togo* (1996).

¹¹⁰ See Nowak (n 89) p 451.

¹¹¹ *ibid.*

¹¹² CERD, Article 5.c.

¹¹³ *ibid.*, Article 1.2.

¹¹⁴ CEDAW, Article 7.b and Convention on the Political Rights of Women, Article III.

Regional instruments, such as the ACHR, the ACHPR and the Arab Charter on Human Rights, also include the right of 'every citizen' to equal access to the public service of 'his' country.¹¹⁵ The American instrument states that the law may regulate the exercise of this right only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.¹¹⁶ However, the Arab Charter includes a more general clause stating that restrictions should be prescribed by law where they are necessary in a democratic society in the interests of national security or public safety, public health or morals or the protection of the rights and freedoms of others.¹¹⁷

Furthermore, the European Convention on Establishment 1955 provides for the right of the Contracting Parties to reserve for its own nationals the exercise of public functions or of occupations connected with national security or defence, or make the exercise of these occupations by aliens subject to special conditions.¹¹⁸

Hallmark 7 - Right to Protection

The international law of human rights imposes duties upon states as to the treatment of those within their jurisdiction, which may imply a right to protection upon those individuals. Hence, general protection of individuals and the family by the society and the State is recognised in international instruments, both general¹¹⁹ and regional.¹²⁰

The right of all to equal protection of the law, without any discrimination, is recognised generally in UDHR¹²¹, ICCPR¹²², CERD¹²³ and CEDAW.¹²⁴ This right is also proclaimed regionally in the ACHR¹²⁵, the ACHPR¹²⁶ and the Arab Charter on Human Rights¹²⁷. The right to judicial protection is conferred upon everyone within the jurisdiction of the State Parties in CERD¹²⁸, CEDAW¹²⁹, and regionally in the ACHR¹³⁰, the African Charter on Human and Peoples' Rights¹³¹ and the Arab Charter on Human Rights.¹³²

¹¹⁵ ACHR, Article 23.1(c); ACHPR, Article 13.2; and Arab Charter on Human Rights, Article 24.4.

¹¹⁶ ACHR, Article 23.2.

¹¹⁷ Arab Charter on Human Rights, Article 24.7.

¹¹⁸ European Convention on Establishment 1955, Article 13. See also the Convention on the Participation of Foreigners in Public Life at Local Level 1992 Article 6, and the Document of the Copenhagen Meeting, Part I (7.5), as cited.

¹¹⁹ ICCPR, Article 23.1; ICESCR, Article 10.1; and CERD, Article 5.b.

¹²⁰ American Declaration of the Rights and Duties of Man 1948, Article VI; ADHR, Article 17; ACHPR, Article 18.1 and 2; and Arab Charter on Human Rights, Article 33.2.

¹²¹ Article 7.

¹²² Article 26.

¹²³ Articles 5(b) and 6.

¹²⁴ Article 2(c).

¹²⁵ Article 24.

¹²⁶ Article 3.1 and 2.

¹²⁷ Article 11.

¹²⁸ Article 6.

¹²⁹ Article 2(c).

¹³⁰ Article 25.

Individuals may enjoy some limited protection from any denial or violation of right by the territorial sovereign through the mechanisms envisaged under any particular treaty regime.¹³³

Children have received special protection internationally. General instruments such as UDHR¹³⁴, ICCPR¹³⁵, ICESCR¹³⁶ and particularly the CRC, build upon the conception that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.¹³⁷ Regional instruments providing special protection to children include the American Declaration of the Rights and Duties of Man 1948¹³⁸, the ACHR 1969¹³⁹, the African Charter on the Rights and Welfare of the Child 1999¹⁴⁰ and the Arab Charter on Human Rights 2004¹⁴¹.

Migrant workers and members of their families are also entitled to effective protection by the State of employment against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions, according to the Migrant Workers Convention.¹⁴² State Parties of this convention shall also take appropriate measures to ensure the protection of the unity of the families of migrant workers.¹⁴³

Both the Convention on Refugees and the Convention on Stateless Persons declare that they shall have free access to Courts of law on the territory of all Contracting States and they shall enjoy the same treatment as nationals in matters relating to access to the courts of the country of habitual residence.¹⁴⁴ In countries other than that in which they have their habitual residence refugees and stateless shall receive the same treatment granted to a national of the country of his habitual residence.¹⁴⁵

¹³¹ Article 7.

¹³² Article 12.

¹³³ See e.g. ICCPR, Optional Protocol; ECHR, Article 25; and ACHR, Article 44.

¹³⁴ Article 25.2.

¹³⁵ Article 24.1.

¹³⁶ Article 10.3.

¹³⁷ See Preamble of the CRC.

¹³⁸ Article VII.

¹³⁹ Article 19.

¹⁴⁰ Article 18.3.

¹⁴¹ Article 33.3.

¹⁴² Migrant Workers Convention, Article 16.2.

¹⁴³ *ibid.*, Article 44.1.

¹⁴⁴ Convention on Refugees and Convention on Stateless, Article 16.1 and 2.

¹⁴⁵ *ibid.*, Articles 16.3.

With regard to diplomatic protection customary international law recognises that, while a State has the right to exercise diplomatic protection in respect of its nationals abroad, it has no obligation to do so.¹⁴⁶

Concerning this right of the States to exercise diplomatic protection, it is particularly remarkable the work of the International Law Commission in the elaboration of the Draft Articles on Diplomatic Protection aimed as a basis for a future international binding convention on diplomatic protection.¹⁴⁷ According to these draft articles, the State entitled to exercise diplomatic protection¹⁴⁸ is the State of nationality¹⁴⁹, although States may also exercise diplomatic protection in relation to stateless persons and refugees lawfully and habitually residing in their territory.¹⁵⁰ The draft articles also contain 'recommended practice' including that States should give due consideration to exercise diplomatic protection especially when a significant injury has occurred; they should take into account the views of injured persons and transfer to them any compensation obtained for the injury from the responsible State.¹⁵¹

Concerning diplomatic protection of dual nationals see 'Principles of Citizenship in International Law' section of this report.¹⁵²

Nevertheless, it should be borne in mind that 'customary international law recognises that a State has a right, though not a duty, of diplomatic protection in respect of its nationals abroad'.¹⁵³

Exceptionally, the Migrant Workers Convention 1990 states that migrant workers and members of their families shall have the right 'to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognised in the present Convention are impaired'.¹⁵⁴ Particularly, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.¹⁵⁵

¹⁴⁶ GIF Leigh, 'Nationality and Diplomatic Protection' (1971) 20 ICLQ 3, p 455.

¹⁴⁷ Draft Articles on Diplomatic Protection 2006. Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly. The General Assembly in its resolution 61/35 took note of the draft articles and invited Governments to submit their comments regarding the recommendation by the Commission to elaborate a convention on the basis of the draft articles.

¹⁴⁸ According to Article 1 of the Draft Articles, diplomatic protection 'consists of the invocation by a State, through diplomatic actions or other means of peaceful settlement, of the responsibility of another State for an injury caused by an international wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility'.

¹⁴⁹ Draft Articles on Diplomatic Protection, Article 3.1. According to article 4, State of nationality is a State whose nationality a person has acquired, in accordance with the law of that State, by any manner consistent with international law.

¹⁵⁰ *ibid.*, Articles 3.2 and 8.

¹⁵¹ *ibid.*, Article 19.

¹⁵² P. 65-66 of this report.

¹⁵³ The White Paper 77.

¹⁵⁴ Migrant Workers Convention, Article 23.

¹⁵⁵ *ibid.*

The Declaration on the Human Rights of Individuals Who Are Not Nationals Of The Country In Which They Live 1985 also declares that 'aliens shall be free at any time to communicate in the country where they reside with the consulate or diplomatic mission of the State of which he or she is a national, or with the consulate or diplomatic mission of any other State entrusted with the protection of the interest of the State of their nationality'.¹⁵⁶

Hallmark 8 - Right to Welfare Benefits

International concern with social security includes both social insurance (contributory) and social assistance (non-contributory).¹⁵⁷ UDHR proclaims the right of 'everyone' as a member of society, to social security.¹⁵⁸

ICESCR also recognises the right of 'everyone' to social security, including social insurance.¹⁵⁹ Special protection is accorded by ICESCR to mothers before and after childbirth and to all children and young persons.¹⁶⁰ According to the UN Sub-Commission on the Promotion and Protection of Human Rights, the right to social security recognised in ICESCR shall apply to everyone regardless of citizenship.¹⁶¹

The CRC declares the right of 'every child' to benefit from social security, including social insurance.¹⁶²

CERD stipulates that State Parties shall take all appropriate measures to guarantee the right of 'everyone', without discrimination, to social security and social services.¹⁶³ However, the language used is inconsistent, as the Convention shall not apply to distinctions, exclusions, restrictions and preferences made by a State Party to this Convention between citizens and non-citizens.¹⁶⁴

CEDAW stands for the elimination of discrimination against women in the field of employment in order to ensure, on equality between men and women, the right to social security, (particularly in cases of retirement, unemployment, sickness, invalidity, old age and other incapacity to work and also the right to paid leave), and family benefits.¹⁶⁵ Special mention is included in CEDAW to

¹⁵⁶ Declaration on the Human Rights of Individuals Who Are Not Nationals Of The Country In Which They Live, Article 10.

¹⁵⁷ The White Paper 84.

¹⁵⁸ UDHR, Article 22. See also Article 23 that provides for the right of everyone to protection against unemployment.

¹⁵⁹ ICESCR, Article 9.

¹⁶⁰ *ibid*, Article 10.

¹⁶¹ Special Rapporteur, Mr. David Weissbrodt, Sub-Commission on the Promotion and Protection of Human Rights, Final report on the rights of non-citizens, UN doc E/CN.4/Sub.2.2003/23, 26 May 2003, para 7, p 5.

¹⁶² CRC, Article 26.1.

¹⁶³ CERD, Article 5.e.iv.

¹⁶⁴ *ibid*, Article 1.2.

¹⁶⁵ CEDAW, Articles 11.1.e and 13.a.

maternity leave with pay or with comparative social benefits and child-care facilities, to ensure the effective right to work of women.¹⁶⁶

The Declaration on the Human Rights Of Individuals Who Are Not Nationals Of The Country In Which They Live, confers the right to social security and social services to aliens lawfully residing in the territory of a State, provided that they fulfil the requirements under the national laws for participation.¹⁶⁷ In order to ensure the enjoyment of this right, the Declaration states that such right may be specified by the Governments concerned in multilateral or bilateral conventions.¹⁶⁸

The work of the International Labour Organization has reflected international concern with the right to social security.¹⁶⁹ Thus, the Convention concerning Minimum Standards of Social Security establishes the minimum standard for the level of social security benefits and the conditions under which they are granted. It includes the nine principal branches of social security, namely medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivor's benefits.¹⁷⁰

Furthermore, the ILO Convention concerning Equality of Treatment of Nationals and Non-Nationals in Social Security declares the right of every national, within the territory of any other Member for which the convention is in force, to equality of treatment under its legislation with its own nationals both regarding coverage and right to social security benefits.¹⁷¹ The ILO has also produced instruments on the different branches of social security, including specific sectors.¹⁷²

The formulation of this right is not uniform in the regional instruments. The American Declaration of the Rights and Duties of Man recognises the right of 'every person' to social security, especially protection from employment, old age and any disabilities that make physically or mentally impossible for a person to earn a living.¹⁷³ However, the Arab Charter on Human Rights states that the State Parties shall ensure the right of 'every citizen' to social security, including

¹⁶⁶ *ibid*, Article 11.2.b and 11.2.c.

¹⁶⁷ Declaration on the Human Rights Of Individuals Who Are Not Nationals Of The Country In Which They Live, Article 8.1.c.

¹⁶⁸ *ibid*, Article 8.2.

¹⁶⁹ Philadelphia Declaration Concerning the Aims and Purposes of the ILO 1944, Annex, III para (f) states the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care.

¹⁷⁰ ILO Convention No 102: Convention concerning Minimum Standards of Social Security 1952.

¹⁷¹ ILO Convention No 118: Article 3.1 Convention concerning Equality of Treatment of Nationals and Non-Nationals in Social Security 1962.

¹⁷² See e.g. ILO Convention No 130: Medical Care and Sickness Benefits Convention 1969; ILO Convention No 128: Invalidity, Old Age and Survivor's Benefits Convention 1967; ILO Convention No 121: Employment Injury Benefits Convention 1964; Employment Promotion and Protection against Unemployment Convention 1988; ILO Convention No 157: Maintenance of Social Security Rights Convention 1982; and ILO Convention No 165: Social Security (Seafarers) Convention (Revised) 1987.

¹⁷³ American Declaration of the Rights and Duties of Man 1948, Article XIV. See also Additional Protocol to ACHR in the Area of Economic, Social and Cultural Rights 1988, Article 9.

social insurance.¹⁷⁴ Moreover, the ACHPR does not expressly proclaim the right to social security but it declares the duty of the State to assist the family and to protect the aged and the disabled.¹⁷⁵

European concern with the right of all workers and their dependents to social security is also apparent in a number of instruments, such as the European Social Charter 1961 and the European Code of Social Security (Revised) 1990.¹⁷⁶

Both the Stateless and the Refugees Conventions provide that the Contracting States shall accord to stateless persons and refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of social security (including employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency covered by a national social security scheme) with only few limitations.¹⁷⁷

Likewise, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals, provided they fulfil the requirements under the national legislation and the applicable bilateral and multilateral treaties.¹⁷⁸ Moreover, the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides for the possibility of reimbursing interested persons the amount of contributions made by them with respect to a particular benefit where the applicable legislation does not allow migrant workers and members of their families such benefit.¹⁷⁹

The ILO also provides for certain social security rights and benefits for migrant workers in the Migration for Employment Convention (revised) 1949¹⁸⁰, the Migrant Workers (Supplementary Provisions) Convention 1975¹⁸¹ and the Maintenance of Social Security Rights Convention 1982.

Entitlement to welfare benefits may be also conferred on a reciprocal basis via bilateral agreements between states.¹⁸² Entitlement is normally conferred upon the basis of residence

¹⁷⁴ Arab Charter on Human Rights, Article 36.

¹⁷⁵ ACHPR, Article 18.2 and 18.4.

¹⁷⁶ See also the European Interim Agreement on Social Security Schemes Relating to Old Age, Invalidity and Survivors 1953; European Convention on Social and Medical Assistance; European Code of Social Security 1964; and Protocol to the European Code of Social Security 1972.

¹⁷⁷ Convention on Stateless Persons and Convention on Refugees, Article 24.

¹⁷⁸ Migrant Workers Convention, Article 27.1.

¹⁷⁹ *ibid*, Article 27.2.

¹⁸⁰ Article 6.1.b.

¹⁸¹ Articles 9.1 and 10.

¹⁸² As an example, the UK has agreements, *inter alia*, with Austria, Barbados, Bermuda, Canada, Cyprus, Iceland, Israel, Jamaica, Malta, Mauritius, New Zealand, Philippines, Switzerland, Turkey and the USA. Information provided by the UK Department for Work and Pensions (online) [http://www.dwp.gov.uk/lifeevent/benefits/social_security_agreements.asp#uk, \[06/11/2007\]](http://www.dwp.gov.uk/lifeevent/benefits/social_security_agreements.asp#uk, [06/11/2007]).

within the territory of the Contracting States, but it may be also granted upon the basis of nationality or citizenship.¹⁸³ The agreements generally provide for the right of nationals and other persons entitled under the legislation of each State residing in the territory of the other State to equal treatment in respect of those social security benefits included in the agreement.¹⁸⁴

Hallmark 9 - Right to Health Care

UDHR recognises the right of 'everyone' to a standard of living adequate for the health and well-being of himself and of his family, including medical care.¹⁸⁵

ICESCR deals more extensively with this right, containing the commitment of the State Parties to recognise the right of 'everyone' to the enjoyment of the highest attainable standard of physical and mental health.¹⁸⁶ Steps that shall be taken by the State Parties include the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; and the assurance of medical service and medical attention to all in the event of sickness.¹⁸⁷

The UN Committee on Economic, Social and Cultural Rights has extensively dealt with the right to the highest attainable standard of health recognised in Article 12 of ICESCR.¹⁸⁸ According to it, 'the right to health is not to be understood as a right to be 'healthy''¹⁸⁹ but it contains both freedoms and entitlements. The freedoms include the right to control one's health and body and the right to be free from interference, whereas the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.¹⁹⁰

According to the Committee, restrictions to this right must be in accordance with the law, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued and strictly necessary for the promotion of the general welfare in a democratic society.¹⁹¹ Nevertheless, states must refrain themselves from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to

¹⁸³ See The White Paper 88.

¹⁸⁴ *ibid.*

¹⁸⁵ UDHR, Article 25.1.

¹⁸⁶ ICESCR, Article 12.1.

¹⁸⁷ *ibid.*, Article 12.2.

¹⁸⁸ UN Committee on Economic, Social and Cultural Rights General Comment No 14 (22nd Session) [UN Doc.E/C.12/2000/4].

¹⁸⁹ *ibid.*, para 8, p 2.

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*, para 28, p 8.

preventive, curative and palliative health services; and they must also abstain from enforcing discriminatory practices as a State policy, particularly relating to women's health status and needs.¹⁹²

The Committee cites the Alma-Ata Declaration¹⁹³ as containing compelling guidance on the 'core obligations'¹⁹⁴ of the State Parties of ICESCR, which include, among others, education concerning prevailing health problems and methods of preventing and controlling them; promotion of food supply and proper nutrition; and adequate supply of safe water and basic sanitation.¹⁹⁵ The Committee also cites as priority obligations of the States to ensure reproductive, maternal and child health care; to provide immunisation against the major infectious diseases occurring in the community; to take measures to prevent, treat and control epidemic and endemic diseases; to provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them; and to provide appropriate training for health personnel including education on health and human rights.¹⁹⁶

The Committee refers to as examples of violations by states of this right the denial of access to health facilities and services to particular individuals or groups as a result of *de jure* or *de facto* discrimination; the failure to discourage the continued observance of harmful traditional medical or cultural practices; and the failure to adopt or implement a national health policy designed to ensure the right to health for everyone.¹⁹⁷ However, the Committee highlights that 'it is important to distinguish the inability from the unwillingness' of a State Party to comply with its obligations under Article 12 ICESCR.¹⁹⁸

CERD provides for the elimination of racial discrimination in all its forms and for the guarantee of the right of everyone, without any distinction, to equality before the law in the enjoyment of the right to public health, medical care, social security and social services.¹⁹⁹ CEDAW declares that measures to eliminate discrimination against women in the field of health care shall be taken by the State Parties in order to ensure equality of men and women in access to health care services.²⁰⁰ Special attention to women during pregnancy, confinement and the post-natal period,

¹⁹² *ibid*, para 34, p 9.

¹⁹³ Alma-Ata Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, 6-12 September 1978.

¹⁹⁴ 'The minimum core concept holds that each State Party is obliged to satisfy, at the very least, minimum essential levels of each of the rights recognised in the Covenant'. D.M. Chirwa, 'The Right to health in International Law: its implications for the obligations of State and Non-State actors in ensuring access to essential medicine', *South African Journal on Human Rights* 19 (2003), p 548-549, referring to UN Committee on Economic Social and Cultural Rights General Comment No 3: The nature of State Parties obligations (Article 2, par.1) : . 14/12/90, para 10.

¹⁹⁵ Alma-Ata Declaration (n 193) VII (3).

¹⁹⁶ UN Committee on Economic, Social and Cultural Rights General Comment No 14 (n 188) paras. 43 and 44, p 11-12.

¹⁹⁷ *ibid*, paras. 50-52, p 12-13.

¹⁹⁸ *ibid*, para 47, p 12.

¹⁹⁹ CERD, Article 5.e.iv.

²⁰⁰ CEDAW, Article 12.1.

including adequate nutrition during pregnancy and lactation, granting free services when necessary, shall be provided by the State Parties of CEDAW.²⁰¹

International concern with the right to health is reflected in the work of the World Health Organisation (WHO)²⁰², which was the first international organisation to formulate access to health in terms of a right²⁰³, and whose objective shall be the attainment by all peoples of the highest possible level of health.²⁰⁴

There are a number of other international conventions dealing with particular questions such as the control of narcotic substances²⁰⁵, as well as reciprocal agreements within Europe to provide health care to those who qualify for medical care in the home State when either such care is unavailable in their home State or they are temporarily residing in the host State.²⁰⁶ There are also bilateral agreements between states intended to establish reciprocity in the area of access to health services.²⁰⁷ In addition, a variety of more general rights, such as to life²⁰⁸, to food²⁰⁹, to employment²¹⁰ and to social security²¹¹, impose obligations with implications for health care.²¹²

The right to health care is recognised regionally in the European Social Charter 1961²¹³, the American Declaration of the Rights and Duties of Man 1948²¹⁴, ACHPR 1981²¹⁵ and the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights 1988.²¹⁶

²⁰¹ CEDAW, Article 12.2.

²⁰² Conventions negotiated under the auspices of the WHO include the Nomenclature Regulations 1967, the International Health Regulations 1969, and the WHO Framework Convention on Tobacco Control which was adopted unanimously by the 56th World Health Assembly on 21 May 2003 and whose final text is contained in World Health Assembly Resolution 56.1.

²⁰³ See declaration of principles Constitution of the World Health Organisation that was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 (Off. Rec. Wld. Hlth Org., 2 100).

²⁰⁴ See Constitution of the World Health Organisation (n 203), Article 1.

²⁰⁵ See i.e. Single Convention on Narcotic Drugs 1961; Convention on Psychotropic Substances 1971; Protocol Amending the 1961 Single Convention on Narcotic Drugs 1972; European Agreement on the Exchange of Therapeutic Substances of Human Origin 1958; European Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and other Medical Institutions for Purposes of Diagnosis or Treatment 1960; European Agreement on the Exchanges of Blood-Grouping Reagents 1962; European Pharmacopoeia 1964; Convention for the Mutual Recognition of Inspections in Respect of the Manufacture of Pharmaceutical Products 1970; etc.

²⁰⁶ European Agreement on Mutual Assistance in the Matter of Special Medical Treatment and Climatic Facilities 1962; European Agreement Concerning the Provision of Medical Care to Persons During Temporary Residence 1980; Agreement for the Application of the 1980 European Agreement Concerning the Provision of Medical Care to Persons During Temporary Residence 1988.

²⁰⁷ For example, the UK has agreements, among others, with Australia, Bosnia and Herzegovina, Bulgaria, Croatia Hungary, Iceland, Israel, Macedonia, Malta, New Zealand, Romania and Serbia and Montenegro. Entitlement may be conferred upon the bases of ordinary residence within the UK, nationality or citizenship.

²⁰⁸ See e.g. UDHR, Article 3; ICCPR, Article 6; and ECHR, Article 2.

²⁰⁹ See e.g. ICESCR, Article 11; and ILO Convention No 117 Social Policy (Basic Aims and Standards) Convention 1962, Article 5(2).

²¹⁰ See e.g. Philadelphia Declaration Concerning the Aims and Purposes of the International Labour Organization 1944, para III (g); ILO No 139: Occupational Cancer Convention 1974; and ILO No 161: Occupational Health Services Convention 1985.

²¹¹ See hallmark 8 (Right to Welfare Benefits), p 33-36 of this report.

²¹² The White Paper 96.

²¹³ European Social Charter 1961, Articles 11 and 13.

²¹⁴ Article XI.

Special protection shall be accorded to children, ensuring that no child is deprived of his or her right to access to health care services, according to CRC.²¹⁷ Appropriate measures shall be taken by all states, inter alia, to diminish infant and child mortality, to combat disease and malnutrition and to abolish traditional practices prejudicial to the health of children.²¹⁸

Migrant workers and the members of their families shall enjoy, in the State of employment, equality of treatment with nationals of that State in relation to access to health services, provided the requirements for participation in the respective schemes are met.²¹⁹ Nevertheless, migrant workers and members of their families shall have the right to receive emergency medical care that shall not be refused by reason of any irregularity with regard to stay or employment.²²⁰

Indigenous and tribal peoples have also an equal right to the enjoyment of the highest standard of physical and mental health, without any discrimination.²²¹

Hallmark 10 - Right to Education

UDHR states that 'everyone' has the right to education, which shall be free, at least in the elementary and fundamental stages, and compulsory with regard to elementary education.²²²

ICESCR also confers this right universally, declaring that State Parties recognise the right of 'everyone' to education.²²³ It further states that primary education shall be compulsory and available free to all, secondary education shall be made generally available and accessible to all and higher education shall be made equally accessible to all.²²⁴ Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.²²⁵

²¹⁵ Article 16.

²¹⁶ Article 10.

²¹⁷ CRC, Article 24.1 and 25.

²¹⁸ *ibid*, Articles 24.1, 2 and 3, and 25.

²¹⁹ Migrant Workers Convention, Articles 43 and 45.

²²⁰ *ibid*, Article 28.

²²¹ UN Declaration on the Rights of Indigenous Peoples, Article 24. See also ILO Indigenous and Tribal Peoples Convention, 1989, No 169, Article 25.

²²² UDHR, Article 26.

²²³ ICESCR, Article 13.1.

²²⁴ *ibid*, Article 13.2.a to 13.2.c. The Convention also includes in Article 14 the compromise of those State Parties that at the time of becoming a Party have not been able to secure compulsory primary education free of charge, to work out and adopt within the following two years a detailed plan of action for the progressive implementation of this right

²²⁵ ICESCR, Article 13.2.d.

CERD provides for the elimination of any kind of discrimination in the exercise of the right of 'everyone' to education and training.²²⁶ According to CEDAW, State Parties 'shall take all appropriate measures to eliminate discrimination against women and ensure to them equal rights with men in the field of education'.²²⁷ The UNESCO Convention Against Discrimination in Education also asserts the principle of non-discrimination and proclaims that 'every person has the right to education'.²²⁸

The UN Committee on Economic, Social and Cultural Rights has recognised that the principle of non-discrimination regarding education extends 'to all persons of school age residing in the territory of a State Party, including non-nationals, and irrespective of their legal status'.²²⁹

The right of education is also universally conferred in regional instruments such as the ECHR²³⁰, American Declaration of the Rights and Duties of Man²³¹, the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights²³², the ACHPR²³³ and the Arab Charter on Human Rights²³⁴.

Specifically, the Refugees Convention states that contracting states shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education, and in any event, not less favourable than that accorded to aliens with respect to education other than elementary education.²³⁵ The same provision is included in the Stateless Persons Convention.²³⁶

Migrant workers and the members of their families shall also enjoy equality of treatment with nationals of the State of employment in relation to access to educational institutions and services, and vocational training, subject to the admission requirements of the institutions and services concerned.²³⁷ This provision only applies to documented migrants.²³⁸

Indigenous individuals have the right to all levels and forms of education of the State without discrimination.²³⁹ In addition, they have the right to establish and control their own educational

²²⁶ CERD, Article 5.e.v.

²²⁷ CEDAW, Article 10.

²²⁸ Preamble UNESCO Convention Against Discrimination in Education 1960.

²²⁹ UN Committee on Economic, Social and Cultural Rights General Comment No 13 (21st Sess., 8 Dec. 1999), 309.

²³⁰ First Protocol, Article 2.

²³¹ Article XII.

²³² Article 13.

²³³ Article 17.

²³⁴ Article 41.

²³⁵ Convention on Refugees, Article 22.

²³⁶ Convention on Stateless, Article 22.

²³⁷ Article 43.1.a and 43.1.b, and Article 45.1.a and 45.1.b.

²³⁸ M Van den Bosch and W Van Genugten, 'International Legal Protection of Migrant Workers, National Minorities and Indigenous Peoples' (2002) *International Journal on Minority and Group Rights* 9, 212.

²³⁹ UN Declaration on the Rights of Indigenous Peoples, Article 14.2.

systems according to their cultural methods of teaching and learning²⁴⁰ and states shall take effective measures to provide indigenous individuals access, when possible, to an education in their own culture.²⁴¹

The ILO Indigenous and Tribal Peoples Convention also provides for the right of the peoples concerned to acquire education on equal terms with the rest of the national community.²⁴² Education programmes and services for these peoples shall take into consideration their special needs and shall incorporate their histories, values and aspirations.²⁴³

With regard to national minorities, the Universal Declaration on Cultural Diversity states that 'all persons should be entitled to quality education and training that fully respects their cultural identity'.²⁴⁴ According to the UN Declaration on Minorities, 'states should take measures in the field of education to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory'.²⁴⁵ Persons belonging to minorities should also have the opportunity to gain knowledge of the society as a whole.²⁴⁶

The right of education has received special protection in international law with regard to children. The CRC recognises the right of the child to education and states that State Parties shall make primary education compulsory and available free to all, shall make secondary education available and accessible to every child and shall make higher education accessible to all on the basis of capacity.²⁴⁷ International cooperation shall be encouraged in matters relating to education, in particular with a view to eliminating ignorance and illiteracy throughout the world.²⁴⁸

The right to free and compulsory education, at least in the elementary phase, is also recognised regionally in the Additional Protocol to ACHR in the Area of Economic, Social and Cultural Rights and in the African Charter on the Rights and Welfare of the Child.²⁴⁹

Children of migrant workers, regardless of the legality of either parent's situation with respect to stay or employment, or the child's stay in the State of employment, have the basic right of access to education on the basis of equality of treatment with the nationals of the State.²⁵⁰ Therefore, this

²⁴⁰ *ibid*, Article 14.1.

²⁴¹ *ibid*, Article 14.3.

²⁴² ILO Indigenous and Tribal Peoples Convention, no 169, Article 26.

²⁴³ *ibid*, Article 27.

²⁴⁴ Universal Declaration on Cultural Diversity 2001, Article 5.

²⁴⁵ UN Declaration on Minorities, Article 4.4.

²⁴⁶ *ibid*.

²⁴⁷ CRC, Article 28.1.a to 28.1.c.

²⁴⁸ *ibid*, Article 28.3.

²⁴⁹ Additional Protocol to ACHR in the Area of Economic, Social and Cultural Rights 1988, Article 16; and African Charter on the Rights and Welfare of the Child 1990, Article 11.

²⁵⁰ Migrant Workers Convention, Article 30.

provision applies to the children of both, documented and undocumented parents.²⁵¹ States shall also facilitate the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language as well as facilitating the teaching of their mother tongue and culture.²⁵²

Special mention to the right of children to all levels and forms of education without discrimination and access to education, when possible, in their own culture and provided in their own language is included in the UN Declaration on the Rights of Indigenous Peoples.²⁵³

There are also a number of international instruments concerned with mutual recognition of educational qualifications.²⁵⁴

Hallmark 11 - Right to Employment

UDHR declares the right of 'everyone' to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.²⁵⁵ Furthermore, everyone has the right to just and favourable remuneration and equal pay for equal work without any discrimination.²⁵⁶ The right of everyone to form and to join trade unions for the protection of his interests is also recognised.²⁵⁷

ICESCR deals more extensively with this right generally proclaiming the right to work, which includes the right of 'everyone' to the opportunity to gain his living by work freely chosen or accepted.²⁵⁸ The State Parties of this covenant also recognise the right of 'everyone' to the enjoyment of just and favourable conditions of work that include fair wages and equal remuneration for work of equal value without distinction of any kind, in particular between men and women, that provide all workers for a decent living for themselves and their families, safe and healthy working conditions, equal promotion opportunities for everyone, rest, leisure and reasonable limitation of working hours as well as remuneration for public holidays.²⁵⁹ Likewise, State Parties shall guarantee the right of everyone to form trade unions and join the trade union

²⁵¹ Van den Bosch and Van Genugten (n 238) 212.

²⁵² Migrant Workers Convention, Article 45.2, 3 and 4.

²⁵³ UN Declaration on the Rights of Indigenous Peoples, Article 14.2 and 3.

²⁵⁴ See e.g. European Convention on the Equivalence of Diplomas leading to Admission to Universities 1953; European Convention on the Equivalence of Periods of University Study 1956; European Convention on the Academic Recognition of University Qualifications 1959; UNESCO Conventions on the Recognition of Studies, Diplomas and Degrees in Higher Education in: (i) Latin America and the Caribbean 1974; (ii) Arab and European States Bordering the Mediterranean 1976; (iii) Arab States; (iv) States Belonging to the European Region 1979; (v) Asia and the Pacific 1983.

²⁵⁵ UDHR, Article 23.1.

²⁵⁶ *ibid*, Article 23.2 and 3.

²⁵⁷ *ibid*, Article 23.4.

²⁵⁸ ICESCR, Article 6.1.

²⁵⁹ *ibid*, Article 7.

of his choice and the right to strike.²⁶⁰ No mention is included as to the legitimacy of restrictions on the access to employment for non-nationals or non-union members.²⁶¹

According to the UN Sub-Commission on the Promotion and Protection of Human Rights, measures for the protection of the right to work and to just and favourable working conditions recognised in ICESCR shall apply to everyone regardless of citizenship.²⁶²

CERD provides for the elimination of any kind of discrimination and the guarantee of equality before the law in the enjoyment of the right of 'everyone' to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration.²⁶³ CEDAW reproduces the obligation of State Parties to assure, on a basis of equality of men and women, the exercise of the right to work, as an inalienable right of all human beings.²⁶⁴

More specifically, the UN Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, declares that aliens lawfully residing in the territory of a State shall also enjoy, in accordance with the national laws, 'the right to safe and healthy working conditions, to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work', as well as the right to join trade unions.²⁶⁵

International concern with the right of employment has particularly featured in the work of the International Labour Organization, which affirms that 'all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'.²⁶⁶ The ILO elaborated the Declaration on Fundamental Principles and Rights at Work 1998 and has also produced instruments on, inter alia, wages, working time, equality of opportunity and treatment, and employment policy and promotion, which protect the rights of all workers irrespective of citizenship.²⁶⁷

²⁶⁰ *ibid*, Article 8.

²⁶¹ M Craven, *The International Covenant on Economic, Social and Cultural Rights*, (Clarendon Press, Oxford, 1998), 225.

²⁶² Final report on the rights of non-citizens, (n 161), para 7, p 5.

²⁶³ CERD, Article 5.e.i.

²⁶⁴ CEDAW, Article 11.1.a.

²⁶⁵ UN Declaration on the Rights of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, Article 8.1. a and b.

²⁶⁶ Philadelphia Declaration Concerning the Aims and Purposes of the ILO 1944, Annex, III.

²⁶⁷ See e.g. Protection of Wages Convention 1949; Minimum Wage Fixing Convention 1970; Protection of Workers' Claims (Employer's Insolvency) Convention 1992; Weekly Rest (Industry) Convention 1921; Weekly Rest (Commerce and Offices) Convention 1957; Part-Time Convention 1994; Equal Remuneration Convention 1951; Workers with Family Responsibilities Convention 1981 and Employment Policy Convention 1964.

International concern with forced labour is reflected in the work of the ILO, with the Forced Labour Convention 1930 (No. 30), and the Abolition of Forced Labour Convention 1959 (No. 105), as well as in ICCPR²⁶⁸.

Several regional instruments also recognise the right to work in its general dimension, including the European Social Charter²⁶⁹, the Additional Protocol to ACHR in the Area of Economic, Social and Cultural Rights²⁷⁰ and ACHPR²⁷¹.

With regard to children, ICESCR states that their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law.²⁷² States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.²⁷³

More specifically, the CRC declares 'the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with his education or to be harmful to the health or physical, mental, spiritual, moral or social development of the child'.²⁷⁴ To this end State Parties shall in particular provide for a minimum age for admission to employment, for appropriate regulation of the hours and conditions of employment and for appropriate penalties or other sanctions to ensure the effective enforcement of these provisions.²⁷⁵ The same text is included regionally in the African Charter on the Rights and Welfare of the Child.²⁷⁶

The ILO has shown its special concern with children in the Minimum Age Convention²⁷⁷ and the Worst Forms of Child Labour Convention²⁷⁸.

Regarding migrant workers, the ILO Convention concerning Migration for Employment 1947 conferred this right only to immigrants lawfully within the territory of a State member, stating that they shall not receive treatment less favourable than that which it applies to its own national as regards remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons,

²⁶⁸ ICCPR, Article 8.3.a.

²⁶⁹ Article 1.

²⁷⁰ Article 6.

²⁷¹ Article 15.

²⁷² ICESCR, Article 10.3.

²⁷³ *ibid.*

²⁷⁴ CRC, Article 32.1.

²⁷⁵ *ibid.*, Article 32.2.

²⁷⁶ African Charter on the Rights and Welfare of the Child, Article 15.

²⁷⁷ Minimum Age Convention, 1973 (No 138).

²⁷⁸ Worst Forms of Child Labour Convention, 1999 (No 146).

membership of trade unions and enjoyment of the benefits of collective bargaining, accommodation social security, employment taxes and legal proceedings relating to the matters referred to in this Convention.²⁷⁹

The ILO Migrants Workers (Supplementary Provisions) Convention 1975 also refers to migrant workers lawfully residing in the territory of a State, although it provides for the right of those migrant workers, in cases in which the laws and regulations of the country of employment have not been respected and in which his position cannot be regularised, to enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.²⁸⁰

However, the Migrant Workers Convention states that, regardless of the legality of the migrant workers' stay or employment,²⁸¹ they shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and conditions of work such as overtime, hours of work, weekly rest, holidays with pay, safety, health and termination of the employment relationship.²⁸² Furthermore, any derogation in private contracts of employment from the principle of equality of treatment with regard to these conditions of work shall not be lawful.²⁸³

The Convention on Stateless Persons stipulates that 'the contracting states shall accord to stateless lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with regard to the right to engage in wage-earning employment'.²⁸⁴ The Convention on Refugees tightens up this provision, stating that the most favourable treatment shall be accorded to nationals of a foreign country in the same circumstances as regards this right.²⁸⁵

The Refugees Convention stipulates that restrictive measures imposed on aliens shall not apply to refugees provided certain conditions, such as the refugee's residence in the country for three years, or having a spouse or one or more children possessing the nationality of the country of residence.²⁸⁶ Both Conventions state that sympathetic consideration shall be given to assimilating the rights of all stateless and refugees with regard to wage-earning employment to those of nationals.²⁸⁷ Provisions regarding the practice of liberal professions for those refugees and

²⁷⁹ ILO Convention concerning Migration for Employment (Revised 1949), Article 6.1.

²⁸⁰ ILO Migrants Workers (Supplementary Provisions) Convention 1975, Article 10 and 9.1.

²⁸¹ Migrant Workers Convention, Article 25.3.

²⁸² *ibid*, Article 25.1.

²⁸³ *ibid*, Article 25.2.

²⁸⁴ Convention on Stateless, Article 17.1.

²⁸⁵ Convention on Refugees, Article 17.1.

²⁸⁶ *ibid*, Article 17.2.

²⁸⁷ Convention on Stateless, Article 17.2; and Convention on Refugees, Article 17.3.

stateless persons lawfully residing in the territory of a State who hold diplomas recognised by the competent authorities of that State are also included in both conventions.²⁸⁸

With regard to indigenous and tribal peoples, they have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.²⁸⁹

Hallmark 12 - Right to Housing

The right of housing is usually subsumed within the general right to an adequate standard of living conferred upon 'everyone' by UDHR.²⁹⁰

Similarly, ICESCR declares the right of 'everyone' to an adequate standard of living for himself and his family, including housing, recognising the essential importance of international co-operation based on free consent to ensure the realisation of this right by the State Parties.²⁹¹ The UN Committee on Economic, Social and Cultural Rights has underlined a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute 'adequate housing' for the purposes of the Covenant.²⁹² It has also paid particular attention to forced evictions.²⁹³

Both CERD and CEDAW provide for the elimination of any kind of discrimination, particularly between men and women in the latter, and the guarantee of equality before the law in the enjoyment of the right of everyone to housing.²⁹⁴

International concern with the right of housing is also reflected in some other international instruments.²⁹⁵

²⁸⁸ Convention on Stateless and Convention on Refugees, Article 19.

²⁸⁹ UN Declaration on the Rights of Indigenous Peoples 2007, Article 17.1 and 3.

²⁹⁰ UDHR, Article 25.1.

²⁹¹ ICESCR, Article 11.1.

²⁹² They include the following: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability (including adequate space and physical safety of occupants; accessibility; location; and cultural adequacy. See ICESCR General Comment 4. The right of adequate housing (Article 11 (1)), (Sixth session, 1991).

²⁹³ See The UN Committee on Economic, Social and Cultural Rights General Comment 7, (Sixteenth Session, 1997, p 3: 'Whereas some evictions may be justifiable, such as in the case of the persistent non-payment of rent or the damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected'.

²⁹⁴ CERD Article 5.e.iii and CEDAW, Article 14.2.h.

²⁹⁵ Inter alia, Declaration on Social Progress and Development 1969, Articles 6 and 10(f); Declaration on the Rights of Disabled Persons 1975, Article 9; Vancouver Declaration of Human Settlements 1976, Section III.8 and Chapter II.A.3; United Nations Educational, Cultural and Scientific Organization Declaration on Race and Racial Prejudice 1978, Article 9.2; Declaration on the Right to Development 1986, Article 8.1; Global Strategy for Shelter to the Year 2000, 1988, Point 13; and Vienna Declaration and Programme of Action 1993 Paragraph 31.

Regional instruments such as the Charter of the Organization of American States 1948²⁹⁶, the American Declaration of Rights and Duties of Man 1948²⁹⁷, the European Social Charter 1961²⁹⁸, and the Arab Charter on Human Rights 2004²⁹⁹ also include provisions recognising this right.

The ILO includes amongst its solemn obligations the duty to further among the nations of the world programmes which will achieve the provision of adequate housing.³⁰⁰ Concern about ascertaining the minimum standards of living for the families of the workers is also reflected in the ILO Social Policy (Basis Aims and Standards) Convention.³⁰¹

International concern with living conditions of children is evident in the CRC, which states that State Parties shall take appropriate measures to assist parents and others responsible for the child to implement this right.³⁰² The same provision is included regionally in the African Charter on the Rights and Welfare of the Child.³⁰³

With regard to migrant workers, the Migrant Workers Convention 1990 recognises the right to equality of treatment with nationals of the State of employment in relation to access to housing.³⁰⁴ Regionally, the European Convention on the Legal Status of Migrant Workers 1977, contains a similar provision with regard to access to housing and rents of migrant workers.³⁰⁵

Both the Refugees and the Stateless Conventions declare that, as regards housing, the contracting states shall accord to refugees and stateless lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.³⁰⁶

Indigenous peoples have also the right, without discrimination, to the improvement of their economic and social conditions including housing.³⁰⁷

Hallmark 13 - Linguistic Rights

Although no special mention to linguistic rights is included in UDHR, the Universal Declaration on Linguistic Rights 1996 considers, amongst others, the right to be recognised as a member of a

²⁹⁶ Article 33.k.

²⁹⁷ Article XI.

²⁹⁸ Articles 16, 19.4.c.

²⁹⁹ Article 38.

³⁰⁰ Philadelphia Declaration Concerning the Aims and Purposes of the ILO 1944, Annex, III para (i).

³⁰¹ ILO Social Policy (Basis Aims and Standards) Convention 1962, No 117, Article 5.2.

³⁰² CRC, Article 27.3.

³⁰³ African Charter on the Rights and Welfare of the Child, Article 20.2.a.

³⁰⁴ Article 43.1.d.

³⁰⁵ Article 13.

³⁰⁶ Convention on Refugees and Convention on Stateless, Article 21.

³⁰⁷ UN Declaration on the Rights of Indigenous Peoples, Article 21.1.

language community, the right to the use of one's own language, both in private and in public, and the right to maintain and develop one's own culture, as inalienable personal rights which may be exercised in any situation.³⁰⁸

The Declaration of 1996 covers a wide range of issues including concepts and rights, general principles, public administration and official bodies, education, proper names, communications media and new technologies, culture and the socio-economic sphere. According to this instrument, all people have the right to a diversity of languages. This includes the right to express themselves and have access to information in their own language³⁰⁹ and the right to use their own languages in educational institutions funded by the State.³¹⁰

The Universal Declaration of Cultural Diversity 2001 declares the right of all persons to express themselves and to create and disseminate their work in the language of their choice, particularly in their mother tongue.³¹¹

There is no special mention to linguistic rights generally in regional instruments, apart from the provision included in the ECHR 1950³¹², the ACHR 1969³¹³ and the Arab Charter on Human Rights 2004³¹⁴ about linguistic rights in legal proceedings and the right of those accused of a criminal offence or arrested, respectively, to be assisted, without charge, by an interpreter or translator.

The Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live 1985 states that aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligations of the State in which they are present, the right to retain their own language, culture and tradition.³¹⁵

ICCPR states that persons belonging to ethnic, religious or linguistic minorities living in a State shall not be denied the right to use their own language.³¹⁶ Nevertheless, linguistic rights of minorities have received more extensive coverage in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992, which is more explicit in requiring positive action.

³⁰⁸ UNESCO Universal Declaration on Linguistic Rights 1996, Article 3.1.

³⁰⁹ *ibid*, Articles 40, 44, 50 and 51.

³¹⁰ *ibid*, Section II.

³¹¹ Universal Declaration on Cultural Diversity, Article 5.

³¹² ECHR, Articles 6.3.a and 6.3.e, 5.2 and 5.4. See also Application 2689/65, *Delcourt v Belgium* (1967); Application 3040/67, *X v Federal Republic of Germany* (1967); *X v United Kingdom* (1981), para 66, p 28; and *Van der Leer v Netherlands* (1990), para 28, p 13; as cited in The White Paper, p 128, footnote 28.

³¹³ Article B.2.a.

³¹⁴ Article 14.3.

³¹⁵ Article 5.1.f.

³¹⁶ ICCPR, Article 27.

The Declaration of 1992 recognises that 'persons belonging to national or ethnic, religious and linguistic minorities have the right to use their own language, in private and in public, freely and without interference or any form of discrimination'.³¹⁷ The Declaration further declares that states 'shall take measures to enable persons belonging to minorities to express their characteristics and to develop their own language'.³¹⁸ Furthermore, states should take appropriate measures to provide to persons belonging to minorities adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.³¹⁹ The UN Sub-Commission on the Promotion and Protection of Human Rights has interpreted the latter provision stating that pre-school and primary school education should, ideally in cases where the language of the minority is a territorial language traditionally spoken and used by many in a region of the country, be in the child's own language, i.e. the minority language. Nevertheless they also need to learn the official or State language that should gradually be introduced at later stages.³²⁰

The right of minorities to use their own language is recognised regionally in the Arab Charter on Human Rights.³²¹ Concern with the protection of minority languages is also reflected in the European Charter for Regional or Minority Languages 1992.

With regard to indigenous and tribal peoples, the UN Declaration on the Rights of Indigenous Peoples 2007 recognises 'their right to revitalise, use, develop and transmit to future generations, inter alia, their languages, oral traditions, writing system and literatures'.³²² States shall take effective measures to ensure that this right is protected and also to ensure indigenous peoples can understand and be understood in political, legal and administrative proceedings, providing interpretation where necessary.³²³ Indigenous peoples have also the right to establish their own media in their own language.³²⁴

According to the CRC, children belonging to minorities or who are indigenous shall not be denied the right to use their own language and State Parties shall encourage the mass media to have particular regard to the linguistic needs of these children.³²⁵

³¹⁷ UN Declaration on Minorities, Article 2.

³¹⁸ *ibid*, Article 4.2.

³¹⁹ *ibid*, Article 4.3.

³²⁰ See UN Sub-Commission on the Promotion and Protection of Human Rights Commentary to the UN Declaration on Minorities, UN Doc.E/CN.4/Sub.2/AC.5/2001/2, 2 April 2001, p 283. See also the 1990 Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE, para 34, which similarly includes the need to learn the official language or languages of the State concerned. According to Van den Bosch and Van Genugten (n 238) 229, the message is clear: 'Although persons belonging to national minorities and indigenous peoples have the right to be educated in their mother tongue- and the same goes mutatis mutandis for migrant workers- such a system should not lead to the creation of 'languages enclaves', knowing that this would lead to disconnection from the society as a whole'.

³²¹ Arab Charter on Human Rights, Article 25.

³²² UN Declaration on the Rights of Indigenous Peoples, Article 13.1.

³²³ *ibid*, Article 13.2.

³²⁴ *ibid*, Article 16.1.

³²⁵ CRC, Articles 30 and 17(d).

The UN Declaration on the Rights of Indigenous Peoples 2007 also provides for the right of indigenous individuals, particularly children, to have access, when possible, to an education in their own culture and provided in their own language, as mentioned in Hallmark 10 (Education).³²⁶

The ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989 states that ‘children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language’, falling in any case to the competent authorities the adoption of measures to achieve this objective.³²⁷

As aforementioned³²⁸, the UN Convention on Migrant Workers 1990 declares that the states of employment shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and, in this regard, states of origin shall collaborate whenever appropriate. States of employment may also provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the states of origin.³²⁹

There are other more general rights which impose obligations with implications for linguistic rights, such as the rights to non-discrimination³³⁰, to expression³³¹, to liberty and security of the person³³², to a fair criminal trial³³³ and to participate in the cultural life of the community³³⁴.

Hallmark 14 - Non-Discrimination

International law is especially concerned with the prohibition of discrimination thus, the imposition of all duties and the enjoyment of all rights is, save exceptionally, subject to an underlying requirement of non-discrimination.³³⁵ In fact, promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, is one of the purposes of the United Nations.³³⁶

UDHR proclaims that ‘all’ are equal before the law and are entitled without any discrimination to equal protection of the law. Protection to all is also provided against any discrimination in violation of this Declaration and against any incitement to such discrimination.³³⁷

³²⁶ UN Declaration on the Rights of Indigenous Peoples, Article 14.3.

³²⁷ ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989, Article 28.1.

³²⁸ Hallmark 10 (Right to Education) p. 39-42 of this report.

³²⁹ Migrant Workers Convention, Article 45.3 and 4.

³³⁰ See hallmark 10 (Right to Education) p. 39-42 of this report.

³³¹ ICCPR, Article 19.

³³² Migrant Workers Convention, Articles 16.5, 16.8 and 22.3.

³³³ ICCPR, Article 14.3(a) and (f); CRC, Article 40(b)(vi); and Migrant Workers Convention, Articles 18.3(a) and (f).

³³⁴ UDHR, Article 27.1; ICESCR, Article 15.1(a); CERD, Article 5(e)(vi); CEDAW, Article 13(c); CRC, Articles 29.1(c) and 31; and Migrant Workers Convention, Article 31.

³³⁵ See references to non-discrimination included in all hallmarks.

³³⁶ United Nations Charter, Article 1.3.

³³⁷ UDHR, Article 7.

ICESCR includes the compromise of the State Parties to guarantee that the rights articulated in the Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³³⁸ An exception to the general rule of equality relates to developing countries, which may determine to what extent they would guarantee the economic rights recognised in the Covenant to non-nationals.³³⁹ Apart from this, States may not draw distinctions between citizens and non-citizens as to social and cultural rights.³⁴⁰

ICCPR is more explicit declaring that 'each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.³⁴¹ 'Derogation from the obligations of the States under this Covenant in time of public emergency shall not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.³⁴² ICCPR also declares that 'all' persons are equal before the law and are entitled without any discrimination to equal protection of the law, which shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any of the grounds before mentioned.³⁴³

According to the UN HRC, the general rule is that each of the rights enunciated in ICCPR must be guaranteed without discrimination between citizens and aliens, although exceptionally some of the rights are expressly applicable only to citizens, such as political rights (right to participate in public affairs, to vote and to hold office, and to have access to public service) and freedom of movement.³⁴⁴

International instruments dealing specifically with discrimination on grounds such as race, sex or religion, include CERD, CEDAW, and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981, respectively.³⁴⁵ Customary international law also prohibits discrimination on grounds of race.³⁴⁶

³³⁸ ICESCR, Article 2.2.

³³⁹ *ibid*, Article 2.3.

³⁴⁰ Final report on the rights of non-citizens, (n 161) p 9, para 19.

³⁴¹ ICCPR, Article 2.1.

³⁴² *ibid*, Article 4.1.

³⁴³ *ibid*, Article 26.

³⁴⁴ UN HRC General Comment No 15 (n 31), para 2, and Final report on the rights of non-citizens (n 161) para 18, p 9.

³⁴⁵ With regard to the prohibition of discrimination on education see Hallmark 10.

³⁴⁶ See e.g. *Barcelona Traction Case*, 1970, ICJ Rep 32, para 34, p 32 and *Namibia Advisory Opinion*, 1971, ICJ Rep 6, para 131, p 57.

With regard to CERD, states may make distinctions between citizens and non-citizens provided they do not discriminate against any particular nationality and treat all non-citizens similarly.³⁴⁷ According to the UN Committee on the Elimination of Racial Discrimination, 'under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim'.³⁴⁸

Distinctions against non-citizens or discrimination based on nationality would be permissible provided the discrimination is based upon objective and reasonable justifications.³⁴⁹ Accordingly, the Inter-American Court of Human Rights stated that 'non-discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things'.³⁵⁰

The ILO has also reflected its concern with the non-discrimination principle declaring that 'all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'.³⁵¹ The Discrimination (Employment and Occupation) Convention 1958 aims to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.³⁵² The ILO Equal Remuneration Convention 1951 specifically pleads for application of the principle of equal remuneration for men and women workers for work of equal value, without discrimination base on sex.³⁵³ Provisions against discrimination are also included in its legislation on working hours³⁵⁴, unemployment benefits³⁵⁵ and maternity cover³⁵⁶.

As regards regional instruments, ACHR³⁵⁷, its Additional Protocol in the Area of Economic, Social and Cultural Rights³⁵⁸ and ACHPR³⁵⁹, declare that State Parties shall guarantee the enjoyment of the rights and freedoms recognised in these instruments without discrimination of any kind for

³⁴⁷ CERD, Article 1.1 to 1.3.

³⁴⁸ UN Committee on the Elimination of Racial Discrimination General Recommendation XXX on Discrimination Against Non-Citizens (Adopted at the 65th session, 2005) [UN Doc.HRI/GEN/1/Rev7/Add.1], para 4, p 608.

³⁴⁹ Final report on the rights of non-citizens (n 161) para 23, p 10.

³⁵⁰ *ibid.*

³⁵¹ Philadelphia Declaration Concerning the Aims and Purposes of the ILO 1944, para II(a).

³⁵² ILO Discrimination (Employment and Occupation) Convention 1958, (No 111), Article 2.

³⁵³ ILO Equal Remuneration Convention 1951, (No 100), Article 2.

³⁵⁴ ILO Part-Time Work Convention, 1994 (No 175), Article 4(c).

³⁵⁵ ILO Employment Promotion and Protection against Unemployment Convention, 1988 (No 168), Article 6.1.

³⁵⁶ ILO Maternity Protection Convention, 2000 (No 183), Articles 1 and 9.

³⁵⁷ Article I.1.

³⁵⁸ Article 3.

³⁵⁹ Articles 2 and 18.3.

reasons related to race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition. The ECHR also includes the ground of association with a national minority³⁶⁰ whereas the American Declaration of the Rights and Duties of Man does not include the ground of colour or status but uses a general form comprising 'any other factor'³⁶¹.

More specifically, the rights enunciated in the CRC 'shall be respected and ensured by the State Parties, without discrimination of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.³⁶² In addition, children 'shall be protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinion, or beliefs of the child's parents, legal guardians, or family members'.³⁶³

The provisions contained in both the Refugees and the Stateless Conventions shall apply to refugees and stateless, respectively, without discrimination as to race, religion or country of origin.³⁶⁴

The Convention on Migrant Workers is even more explicit providing 'for the application of the Convention to all migrant workers and members of their families within the territory of the State Parties or subject to their jurisdiction, without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status'.³⁶⁵

According to the Declaration on the Rights of Indigenous Peoples, they shall be free of any discrimination, particularly based on their indigenous origin or identity, in the exercise of their rights.³⁶⁶ The rights and freedom recognised in this instrument are equally guaranteed to male and female indigenous individuals.³⁶⁷

Persons belonging to minorities shall also be free to exercise their human rights and fundamental freedoms without any discrimination and in full equality before the law.³⁶⁸

³⁶⁰ Article 14.

³⁶¹ Article II.

³⁶² CRC, Article 2.1.

³⁶³ *ibid*, Article 2.2.

³⁶⁴ Convention on Refugees and Convention on Stateless, Article 3.

³⁶⁵ Migrant Workers Convention, Article 7.

³⁶⁶ UN Declaration on the Rights of Indigenous Peoples, Articles 2 and 9.

³⁶⁷ *ibid*, Article 44.

³⁶⁸ UN Declaration on Minorities, Articles 3.1 and 4.1.

Hallmark 15 - Duty of Allegiance

Loyalty or obligation to the State is fundamentally a concept of municipal law, as opposed to a concept of international law. Therefore, there is no relevant international law affecting this hallmark, apart from the provisions included in some international instruments, both general³⁶⁹ and regional³⁷⁰, that impose a duty on individuals to obey the law of the State where they are. This obligation is also imposed on migrant workers³⁷¹, refugees³⁷² and stateless³⁷³.

Nationals may be under the duty not to compromise the security of their State and they can also be deprived of their nationality when, acting inconsistently with their duty of loyalty, they render services or take an oath of allegiance to another State, or repudiate their allegiance to or conduct themselves in a manner prejudicial to the vital interests of their State.³⁷⁴

Hallmark 16 - Duty to Undertake Military or Alternative Service

Although it is primarily a matter of municipal law, international law accepts that States may impose obligations of military or alternative service on their nationals. Thus, ICCPR states that any service of a military character and, any national service required by law of conscientious objectors in countries where conscientious objection is recognised, as well as any work or service which forms part of normal civil obligations, shall not be considered as 'forced or compulsory labour'.³⁷⁵ The same provision applies regionally in ECHR³⁷⁶ and ACHR 1969.³⁷⁷

The ILO also excludes from the term 'forced or compulsory labour' any work or service exacted in virtue of compulsory military service laws for work of a purely military character, any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country and any work or service exacted in cases of emergency.³⁷⁸

In the same exclusionary context to the term 'forced or compulsory work' the International Convention on Migrants includes any service exacted in cases of emergency or calamity threatening the life or well-being of the community and any work or service that forms part of normal civil obligations so far as it is imposed also on citizens of the State concerned.³⁷⁹

³⁶⁹ See ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87), Article 8.1.

³⁷⁰ American Declaration of the Rights and Duties of Man 1948, Article XXXIII and ACHPR, Article 29.3.

³⁷¹ Migrant Workers Convention, Article 34.

³⁷² Convention on Refugees, Article 2.

³⁷³ Convention on Stateless, Article 2.

³⁷⁴ Convention on the Reduction of Statelessness 1961, Article 8.3(a) and (b).

³⁷⁵ ICCPR, Article 8.3(c)(ii), (iii) and (iv).

³⁷⁶ Article 4(4)(b), (c) and (d).

³⁷⁷ ACHR, Article 6.2 and 3(b) and (d).

³⁷⁸ ILO Forced Labour Convention 1930 (No 29), Articles 1.1 and 2.2(a), (b) and (d).

³⁷⁹ Migrant Workers Convention, Article 11.4 (b) and (c).

Nevertheless, a general limitation to this right is included in the CRC, which provides for the refrain of the State Parties from recruiting any person who has not attained the age of fifteen years into their armed forces and to give priority to the oldest among those between fifteen and eighteen years old.³⁸⁰

With regard to the duty to undertake military service of dual nationals all three of the major multinational conventions applicable prohibit double conscription of dual nationals of State Parties.³⁸¹ Therefore, dual nationals shall be required to fulfil their military obligations in relation to one of those Parties only.³⁸² In the absence of bilateral treaties³⁸³ the habitual residence test applies to determine the country of service.³⁸⁴ Nevertheless, states shall not conscript a dual national who has voluntarily enlisted in the armed forces of the other State of nationality.³⁸⁵

Hallmark 17 - Duty to Pay Taxes

Although the right to impose obligations to pay taxes lies within the exclusive jurisdictions of states, there are some regional instruments, such as the American Declaration of the Rights and Duties of Man and ACHPR that include the duty of individuals to pay the taxes established by law for the support of public services in the interest of the society.³⁸⁶

In connection with the principle of non-discrimination, both the Refugees and the Stateless Conventions stipulate that the contracting states shall not impose upon stateless persons and refugees duties charges or taxes of any description whatsoever, other or higher than those imposed upon their nationals in similar situations.³⁸⁷

International law provides mechanisms to facilitate agreement between states to avoid double liability to tax resulting from states imposing obligations to pay taxes on residents, on all their

³⁸⁰ CRC, Article 38.3.

³⁸¹ Protocol Relating to Military Obligations in Certain Cases of Double Nationality 1930 (the 1930 Hague Protocol); the 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality; and the 1997 European Convention on Nationality.

³⁸² Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality 1963, Article 5.1.

³⁸³ As an example, there are bilateral treaties on military service and dual nationality between the following countries: Denmark and France; UK and Chile; UK and Denmark; Belgium and Netherlands; Norway, Denmark and Sweden; Denmark and Italy; UK and France; Denmark and Chile; Italy and Chile; UK and Brazil; Sweden and Argentina; Israel and France; Netherlands and Italy; Denmark and Argentina; Finland and Argentina; Argentina and UK; Argentina and Belgium; France and Italy; France and Spain; Spain and Italy; France and Tunisia; Spain and Argentina.

³⁸⁴ Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, Articles 5.2 and 6.

³⁸⁵ 1977 Protocol to the 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality and 1997 European Convention on Nationality.

³⁸⁶ American Declaration of the Rights and Duties of Man 1948, Article XXXVI; and ACHPR, Article 29.6.

³⁸⁷ Refugees and Stateless Persons Conventions, Article 29.1.

income, and non-residents, on income arising within the taxing State.³⁸⁸ Double taxation treaties³⁸⁹ are generally intended to prevent liability to tax arising twice by providing a variety of reliefs by exemption, thus some categories of otherwise taxable income are simple exempt in one of the contracting states.³⁹⁰

Hallmark 18 - Duty to Pay National Insurance Contributions

Similar to the duty to pay taxes, the power to impose and enforce liability to pay national insurance contributions is an essential attribute of the sovereignty of states; thus, it is not a matter generally regulated by international law. However, the American Declaration of the Rights and Duties of Man establishes the duty of 'every person to cooperate with the State and the community with respect to social security and welfare, in accordance with his ability and with existing circumstances'.³⁹¹

Agreements between states may impose liability or entitlement to pay contributions on a reciprocal basis.³⁹² Generally, liability to contribute is conferred upon the basis of residence within the territory of the contracting states³⁹³, but it may also be conferred upon the basis of nationality or citizenship.³⁹⁴ The agreements are generally intended to prevent dual liability to contribute arising from persons insured under the legislation of one State Party but working in the territory of another party.³⁹⁵

From this analysis of the international instruments and case law relating to rights and duties of citizens, some international principles of citizenship would be extracted in the following section.

³⁸⁸ The White Paper 169.

³⁸⁹ As an example, the UK has concluded double taxation treaties with one hundred and twenty countries. See HM Revenue & Custom (online), <http://www.hmrc.govuk/international/in-force-t-z.htm>, [12 November 2007].

³⁹⁰ See The White Paper 169.

³⁹¹ American Declaration of the Rights and Duties of Man, Article XXXV.

³⁹² See The White Paper 178.

³⁹³ See e.g. Convention on Social Security between the UK and Cyprus 1982 and Agreement on Social Security between the UK, on behalf of Jersey and Guernsey, and New Zealand 1994.

³⁹⁴ See e.g. Convention on Social Security between UK and Switzerland 1969, Articles 1(b) and 5.

³⁹⁵ As an example, the UK has concluded agreements with Barbados, Bermuda, Canada, Cyprus, Guernsey, Isle of Man, Israel, Jamaica, Japan, Jersey, Korea, Malta, Mauritius, Philippines, Switzerland, Turkey and the US.

Principles of Citizenship in International Law

As an introduction to the principles that govern citizenship internationally, a distinction should be made between the legal status of citizen, and the concept of nationality. It is said that 'the idea of nationality is used to connote the relationship between an individual and a nation, regardless of the legal citizenship held by the person'³⁹⁶, the nation being defined as 'a collection of people having some kind of corporate identity recognised by themselves and others, a history of association and a name'.³⁹⁷ The ICJ in the *Nottebohm* case described nationality as a:

Legal bond having as its basis a social fact of attachment, a genuine connection of existence interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.³⁹⁸

By contrast, the status of citizen is used to denote 'the link between an individual and a State, a form of political organisation with territorial boundaries which may encompass more than one nation'.³⁹⁹ Therefore, it may be the case that an individual holds the legal citizenship of one State, but perceives his status as deriving principally from his attachments to a nation which may not be necessarily part of the State whose citizenship is held.⁴⁰⁰

Oppenheim argues that while a distinction between nationality and citizenship might be drawn under domestic laws, especially for the purpose of distinguishing the legal standing of citizens, residents and non-citizens, for international purposes such distinctions 'have neither theoretical nor practical value' and are therefore 'synonymous so far as international law is concerned'.⁴⁰¹ It is also said that 'municipal laws that distinguish between categories of nationals or citizens are of no importance to international law, as it is nationality in the wider sense, as opposed to specific rights of citizenship, which is relevant internationally'.⁴⁰²

Boll raises the good point, however, that individuals can have the status of non-citizen nationals in international law, especially in the context of colonial territories whose populations are accorded the nationality of the State without the corresponding rights of citizenship. The British

³⁹⁶ H Lardy, 'Citizenship and the Right to Vote', *Oxford Journal of Legal Studies* (1997) 75, vol. 17, p 76.

³⁹⁷ *ibid.*

³⁹⁸ *Nottebohm* case, 23.

³⁹⁹ *ibid.*

⁴⁰⁰ *ibid.*

⁴⁰¹ Quoted in AM Boll, *Multiple Nationality and International Law*, (Martinus Nijhoff, Leiden, 2007) 59.

⁴⁰² *ibid.*, 98.

nationality of residents of Hong Kong, for example, does not give the holder corresponding rights of residence or entry to Britain (i.e. rights to the freedom of movement hallmark). He differentiates the two terms as follows: 'For the purposes of international law, the connection that links individuals to a particular State is labelled a link of 'nationality', notwithstanding a particular individual's ethnic background or origin, or identity. The word 'citizenship' on the other hand should be used to denote that an individual possesses particular rights under a State's municipal law'.⁴⁰³

Given that the task at hand is to find principles of international law relating to citizenship/citizens, however, this does not seem to be a useful distinction to explore. The principles of international law governing citizenship are the principles of international law governing nationality. The opposite is not the case – all nationals are not in fact citizens (i.e. non-citizen nationals), but what we can say is that all citizens are nationals. This is the important fact for the present purposes, which allows us to conclude that the international legal principles of citizenship – whatever they involve – at least include the legal principle of nationality.

Having said that, Guild states that 'in law, citizenship is expressed as a relationship between identity, in the form of citizen vs. foreigner, borders, as the container within which State institutions operate, and legal order, which provides the rules of the relationship'.⁴⁰⁴ This provides a useful framework for defining what might constitute an international legal principle of citizenship. International legal principles of citizenship might therefore be:

- a. General international principles of citizenship (i.e. principle of exclusivity; principle of international effect; principle of respect for international human rights law).
- b. International principles which determine who may be regarded as a citizen, who may acquire citizenship and who may relinquish or be stripped of citizenship (i.e. general principles of nationality, genuine connection).
- c. International principles which draw the line between the rights and obligations enjoyed by citizens and those of non-citizens (i.e. obligation of states to admit and allow residence for nationals, diplomatic protection).

⁴⁰³ Boll (n 401) 58.

⁴⁰⁴ E Guild, *The legal elements of European Identity: EU citizenship and migration law* (Kluwer Law International, The Hague and Boston, 2004) 14.

General international principles of citizenship

The need to infer rather than simply collate the international legal principles of citizenship is necessitated by the uncertain and inchoate nature of the international law concerning citizenship and nationality.⁴⁰⁵ This is explained by the first and most basic international principle of citizenship: the principle of exclusivity, which means that nationality is within the domestic jurisdiction of each State. This principle, which explains why there is no settled and authoritative list of principles of citizenship in international law, can be extracted from the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws which affirms that 'it is for each State to determine under its own laws who are its nationals'⁴⁰⁶ and that 'any questions to whether the person possesses the nationality of a particular State may be determined in accordance with the law of that State'.⁴⁰⁷

The International Court of Justice in the *Nottebohm* case further clarifies this principle, saying:

[I]t is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalisation granted by its own organs in accordance with that legislation . . . Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants or imposes upon its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.⁴⁰⁸

In order to prevent the contradiction that would arise from the application of this principle to issues such as diplomatic protection, dual nationality and immigration, a second principle is active: that international law has jurisdiction in situations where there is an international effect. The *Nottebohm* case is the most important source for this principle, as it is the first to provide an exception to the principle of exclusivity. It will be discussed further below, in relation to the principle of genuine connection. For the moment it is sufficient to note that the result of the principle of international effect is that the principles of citizenship relevant to international law might seem to operate only where the hallmarks of citizenship force a conflict between states.⁴⁰⁹

⁴⁰⁵ I Brownlie, *Principles of Public International Law* (6th ed, Clarendon Press, Oxford, 2003) 384.

⁴⁰⁶ 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, (The Hague Convention hereinafter), Article 1; see also *Nottebohm* case, p 20; Brownlie (n 405) 377 ; Boll (n 401) 278; Brownlie notes that the committee at the Hague convention stated that though nationality is 'primarily a matter for the municipal law of each State, it is nevertheless governed to a large extent by principles of international law'. Unfortunately, given our present purposes, the committee could not agree on which principles they were referring to.

⁴⁰⁷ The Hague Convention, Article 2.

⁴⁰⁸ *Nottebohm* case 20.

⁴⁰⁹ *Nottebohm* case, summary.

The ICJ concluded that where a State invokes its right to diplomatic protection over its nationals the question becomes one of international law. In the Court's words,

The issue of nationality being decided did not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place one-self on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.⁴¹⁰

However, the growing importance and status of international human rights law has created an alternative to this principle. Under international human rights law, in order to be considered relevant to the international sphere a question need not merely relate to a conflict between states, or the right of a State to invoke diplomatic protection for one of its nationals.⁴¹¹ It might also relate to the failure of states to abide by their international human rights obligations. In other words, 'international effect' under international human rights law may now be regarded as including a failure of states to protect citizens' rights to those hallmarks of citizenship protected by international law.

Hence, the third general principle that can be cited is the principle of respect for international human rights. In this respect, the discrepancy between the theory and practice of the international law relating to citizenship is important. International law, in principle, prevents states from contravening international human rights, including with regard to the principle of non-discrimination on the basis of nationality⁴¹², even if this is not always the case in practice. But the framework which would ensure the international protection of rights – both of citizens and humanity as a whole – is still insufficient.⁴¹³ States, for better or worse, remain the focal point of those principles guiding the international rights and obligations of citizenship, because States are best placed to ensure the protection of these rights. This is to say that the principles of international law that relate to citizenship will tend to be secondary rules (Article 15 of the Universal Declaration of Human Rights relating to nationality provides some exceptions). The primary rules of international law that set out the rights of individuals attach to individuals regardless of nationality or citizenship status - excluding those political rights explicitly guaranteed to citizens under Article 25 ICCPR and relating to the 'legitimate objective' of the State. These primary rules of international law, properly considered, are therefore not principles of citizenship.

⁴¹⁰ *ibid*, judgment 1955, 21.

⁴¹¹ See *ibid*, 21: 'In most cases arbitrators have not strictly speaking had to decide a conflict of nationality as between States, but rather to determine whether the nationality invoked by the applicant State was one which could be relied upon as against the respondent State, that is to say, whether it entitled the applicant State to exercise protection.'

⁴¹² See CERD, Articles 1.3 and 5.

⁴¹³ JA Goldston, 'Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Non-citizens' (2006), *Ethnic and International Affairs*, Vol 20 No 3, p 323.

They are subsumed within the principle of respect for international human rights law. The international principles of citizenship are secondary rules, relating to the enforcement of primary rules by states.

This is to say that defining the international principles of citizenship requires the establishment of a duty-bearer. Human rights law – to the extent that it is understood as a system of primary rules – does not place the same emphasis on identifying who is in a position to enforce these rules. This is one of the central objections often made against the human rights framework – that it is not justiciable.⁴¹⁴ Individuals, it is argued, possess more rights under international law than at any time in history, but this is not to say that they enjoy e.g. the right not to be tortured with any more certainty now than before this putative right was enshrined in international law. The nature of citizenship, however, and its relationship to international law, is such that the State – not the international human rights framework – is necessarily defined as the duty-bearer. This is clearly illustrated by the above principle of respect for international human rights law which places the onus on the State to ensure that national citizenship laws do not conflict with international human rights law.

However, the principles of international human rights law are based on the fundamental equality of persons whereas the principles of citizenship are necessarily exclusionary of non-citizens. There are therefore conflicting principles here: on the one hand, there is the international legal principle within human rights law saying that human rights are for everybody – they are universal principles. On the other hand, there are those principles which are based on the exclusivity of citizenship to the domestic realm. Because these principles admit that it is reasonable to be discriminatory on the basis of membership of a community (i.e. citizenship of the State), the question is what kind of discrimination is permissible.⁴¹⁵ These exceptions or justifiable discriminations seem to be limited to the right to vote, hold public office, and to exit and enter at will.⁴¹⁶ International law therefore recognises that in some cases it is reasonable to make discriminations, especially on the basis of citizenship or nationality. This is the central challenge of identifying the principles underlying the rights and responsibilities of citizenship in international law.⁴¹⁷

⁴¹⁴ e.g. J Raz, 'Human Rights Without Foundations' (March 2007). Oxford Legal Studies Research Paper No 14/2007. Available at SSRN: <http://ssrn.com/abstract=999874>.

⁴¹⁵ The Permanent Court stated in the *Oscar Chinn* case, PCIJ (1934), ser. A/B, No 63, 65, that 'the form of discrimination which is forbidden is, therefore, discrimination based on nationality and involving differential treatment as between persons belonging to different national groups'.

⁴¹⁶ UN Committee on the Elimination of Racial Discrimination General Recommendation XXX (n 348), 608, para 4.

⁴¹⁷ Helton et al, 'Protecting the World Exiles: the Human Rights of non-citizens' (2000) Human Rights Quarterly 22, 280 – 297.

International principles which determine who may be regarded as a citizen, who may acquire citizenship and who may relinquish or be stripped of citizenship

Nationality is defined as 'the manifestation of the strongest connection between the person and the State'.⁴¹⁸ However, due to the sanctification of the principle of State sovereignty and non-intervention on the part of a one State on the criteria for conferring nationality of another State, there is no clear international law for defining how the connection between an individual and the State is created and when a State is required to grant nationality.

Nevertheless, the first general international principle in this respect is that contained in the Universal Declaration of Human Rights that everyone has the right to a nationality.⁴¹⁹ However, according to some authors, this right 'has not been given internationally a very convincing, legally binding, follow-up'⁴²⁰, apart from the Convention on the Reduction of Statelessness 1961, the CEDAW⁴²¹, and the CRC⁴²². The right to a nationality is recognised in similar terms regionally.⁴²³ The UDHR also contains the provision that no one shall be arbitrarily deprived of his nationality nor denied the right to change it⁴²⁴, although it is questionable whether this statement is in fact an international principle of nationality.

The principle that everyone has the right to nationality may be regarded as primary principle of international law. Although there are no specific rules of international law regulating the criteria for acquisition of nationality, there are secondary principles which determine how this right works in practice. These are:

- i. Jus sanguinis: nationality by blood.
- ii. Jus soli: nationality by birth on the territory of the State (this principle has also been extended to include births on ships or aircraft registered under the flag of the State in question).
- iii. Voluntary naturalisation (e.g. by residence).
- iv. Involuntary naturalisation by marriage, legal recognition or legitimation, or adoption.
- v. No application of nationality without an expression of individual consent.⁴²⁵

⁴¹⁸ Y Zilbershats, 'Reconsidering the Concept of Citizenship', (2001) Texas International Law Journal vol 36, part 4, 691.

⁴¹⁹ UDHR, Article 15.1.

⁴²⁰ Van den Bosch and Van Genugten, (n 238) 204.

⁴²¹ Article 9.

⁴²² Article 7.1.

⁴²³ See the American Declaration on the Rights and Duties of Man which states in Article 19 that 'every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it him'. See also the ACHR, Article 20, which declares the right of every person 'to the nationality of the State in whose territory he was born if he does not have the right to any other nationality'.

⁴²⁴ *ibid*, Article 15.2.

⁴²⁵ P Weiss, *Nationality and Statelessness in International Law* (Sijthoff & Noordhoff, Alphen aan den Rijn, 1979), 110.

The source of these principles is national legislation. They have the status of customary international law/general principles of law.

Similar to the grant of nationality, it is at the discretion of the states to determine the grounds upon which individuals lose their nationality.⁴²⁶ However, withdrawal of nationality by a State means that the individual in question becomes, as Boll says, 'someone else's problem'⁴²⁷ on the international sphere. Affirming that the general principle of exclusivity of the states may be limited by an obligation to avoid statelessness may exceed the requirements of international law⁴²⁸. However, what seems clear is that there is uniform agreement that stateless is undesirable for states and individuals, which seems to cause 'a certain greater hesitation in terms of states' discretion to withdraw nationality'.⁴²⁹

With regard to renunciation, there is no strong principle of international law allowing a person to renounce an existing nationality, except where the desire to renounce is driven by fear of persecution.⁴³⁰ In fact, the 1930 Hague Convention recognises a limited capacity for those who involuntarily acquire dual nationality to renounce one of them (where both citizenship are acquire involuntarily)⁴³¹ with the authorisation of the State.⁴³² State practice is that a large number of states refuse to recognise the right of their citizens to give up citizenship.⁴³³ In relation to the right to renounce an existing nationality in favour of another Weiss states that 'while consistent treaty practice is not sufficient to establish the principle of automatic loss of nationality by acquisition of a new nationality as a principle of international law, the practice has, it is believed, restricted the right of states to refuse release from their nationality on acquisition of a new nationality'.⁴³⁴

As stated thus far, it is an accepted general principle of law that matters relating the determination of nationality are unreservedly within the purview of each State's municipal law, with some limitations. However, when the consequences of such determination are raised to the international level, then it becomes a subject of international law to determine whether an attribution or withdrawal of nationality must be recognised by other states.⁴³⁵ This provision is

⁴²⁶ Common modes of withdrawal include: (1) release or renunciation, (2) deprivation, and (3) expiration, according to Boll (n 401) 101.

⁴²⁷ Boll (n 401) 102.

⁴²⁸ The Convention on the Reduction of Statelessness generally states that deprivation of nationality should not result in statelessness, but allows for exceptions in relation to naturalised persons and those born outside of the State. See Article 7.4 and 5.

⁴²⁹ *ibid.*, 103.

⁴³⁰ See Z Deen-Racsmany, 'The Nationality of the Offender and the Jurisdiction of the International Criminal Court' (2001) 95 *American Journal of International Law* 16, 606-608, as cited in C Forcese, 'Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law' (2005) 37 *George Washington International Law Review* 488-9.

⁴³¹ Forcese (n 430) 490.

⁴³² Article 6.

⁴³³ Forcese (n 430) 489.

⁴³⁴ Weiss (n 425) 133, as cited in Boll (n 401) 105.

⁴³⁵ Boll (n 401) 107.

contained in Article 1 of the 1930 Hague Convention, which states that 'it is for each State to determine under its own law who are its nationals. This law shall be recognised by other states in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'.

Thus, as an exception to this principle of exclusivity, the national determination of nationality may be challenged 'where there is insufficient connection between the State of nationality and the individual or where nationality has been improperly conferred'.⁴³⁶

On the international plane, matters of nationality normally arise in relation to the exercise of diplomatic protection. Examples of where a State may refuse to exercise this right over a national on the grounds of insufficient connection include cases of naturalisation of all persons of a given religious faith or political persuasion, speaking a given language, or being of a given race; automatic attribution of nationality upon marriage; and attribution of nationality upon acquisition of real state.⁴³⁷

The *Nottebohm case*⁴³⁸ is the leading case that involved the right of a State not to recognise another State's attribution of nationality, in a case of dual nationality. From this arose the principle of genuine connection, which basically states that:

Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of a State conferring nationality than with that of any other State.⁴³⁹

Whether (for the purposes of assigning nationality) a 'genuine and effective link' exists between a person and a State is determined by considering factors laid out in the *Nottebohm case*, including the 'habitual residence of the individual concerned but also the centre of interests, his family ties,

⁴³⁶ First Report on Diplomatic Protection by Mr. John R. Dugard, Special Rapporteur, UN GAOR, International Law Commission, 52d Session, at 11, UN Doc. A/CN.4/506 (2000), as cited in Forcese (n 430) 481.

⁴³⁷ See Boll (n 401) 109.

⁴³⁸ *Nottebohm* was originally a German national but resided for thirty-four years in Guatemala. On the 13th October 1939 he was nationalised as a citizen of Liechtenstein, bypassing the normal three year residency requirement. He had only the most peripheral of contacts with Liechtenstein both prior to his application for citizenship and subsequent to the granting of this application. Soon after *Nottebohm* acquired Liechtenstein nationality, Guatemala treated him as a German alien national - the national of a belligerent nation during WW II - expelling him from the country and seizing his property without compensation. This caused *Nottebohm* to seek diplomatic protection from Liechtenstein, a neutral State.

⁴³⁹ *Nottebohm case*, 23.

his participation in family life, attachment shown by him for a given country and inculcated in his children, etc.’⁴⁴⁰

The Court found that where no genuine connection or link exists between the person and the protecting State, the bestowal of nationality need not be respected by outside states, excluding the protecting State from exercising a right of diplomatic protection.⁴⁴¹ It is necessary to specify, however, that Nottebohm’s genuine/effective link test should only apply to dual nationality situations where nationality is conferred via naturalisation (i.e. not jus soli or jus sanguinis).⁴⁴²

The principles set out so far may be found in the European Convention on Nationality of 1997, the most recent comprehensive treaty on nationality.⁴⁴³

International principles which draw the line between the rights and obligations enjoyed by citizens and those of non-citizens (i.e. diplomatic protection, obligation of states to admit and allow residence for nationals)

In order to differentiate the consequences of nationality which operate at municipal level than those at international level, it is necessary to extract those elements that ‘presuppose the co-existence of states, which confer rights or impose duties on the State in relation to other subjects of international law’⁴⁴⁴. Nationality on the international sphere mainly implies entitlement to exercise diplomatic protection; State responsibility for nationals; duty of admission; allegiance; and the right to refuse extradition, among others.

Diplomatic protection seems to be the most relevant consequence of nationality on the international plane. This means that states may exercise the right to protect or act on behalf of their nationals where they are harmed by other states.⁴⁴⁵ According to Professor Henkin ‘under customary international law, a State is obligated to treat foreign nationals in accordance with and international standard of justice, and is responsible to the State of the person’s nationality for any violations of the standard’.⁴⁴⁶

⁴⁴⁰ *ibid.*, 22.

⁴⁴¹ On these grounds the Court concluded that the claims of Liechtenstein with respect to compensation for the treatment of Nottebohm were inadmissible.

⁴⁴² See Boll (n 401) 111.

⁴⁴³ Article 4 states: ‘The rules on nationality of each State Party shall be based on the following principles: a. everyone has the right to a nationality; b. statelessness shall be avoided; c. no one shall be arbitrarily deprived of his or her nationality; d. neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.’

⁴⁴⁴ Weiss (n 425) 32 as cited in Boll (n 401) 113.

⁴⁴⁵ Boll (n 401) 114.

⁴⁴⁶ A D’Amato, ‘Human Rights as Part of Customary International Law: A Plea for Change of Paradigms’ (1995-1996) 25 Ga. J. Int’l & Comp L. 48.

This is a right of customary international law and states may exercise it at their complete discretion.⁴⁴⁷ Nonetheless, there is an international law requirement to the effect that local remedies be exhausted before diplomatic protection may be resorted to.⁴⁴⁸ There is also 'the rule continuous nationality' which states that 'a State may only exercise such (diplomatic) protection if the person injured has been its national from the date of injury to the time at which the claim is presented before the international tribunal'.⁴⁴⁹

Although there is no specific opposition to dual nationality internationally, there is no obligation either to recognise any multiple nationality of their own nationals in municipal law.⁴⁵⁰ However, an issue of international law arises where the individual to be protected also possesses the nationality of the State against which protection is sought. In this case, two international principles are at stake. According to the principle of equality enunciated in the 1930 Hague Convention '[a] State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses'.⁴⁵¹ This principle has been criticised for being 'hard and fast'⁴⁵² involving no appreciation of 'the quality of the tie between a State and the person it claims to be its national'.⁴⁵³

To resolve the situation where a third State is on stage, the 1930 Hague Convention articulated the principle of effective or dominant nationality further applied in Nottebohm, which means that the multiple national is to be treated as only possessing 'either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected'.⁴⁵⁴ The application of this principle is however limited by the principle of the unopposability of the nationality of a third State, which 'permits the dismissal of the nationality of a third State, even when it should be considered as predominant in the light of the circumstances'.⁴⁵⁵

Furthermore, the UN Italian-US Conciliation Commission in Mergé Claim case⁴⁵⁶ stated that:

⁴⁴⁷ *ibid.*

⁴⁴⁸ Leigh (n 146) 455.

⁴⁴⁹ *ibid.*, 456.

⁴⁵⁰ Boll (n 401) 282.

⁴⁵¹ Article 4.

⁴⁵² Boll (n 401) 119.

⁴⁵³ *ibid.*

⁴⁵⁴ Article 5.

⁴⁵⁵ Flegenheimer Claim Italian-United States Conciliation Commission, International Law Reports (1958), vol 91, 149 and the Mergé Claim, Italian-United States Conciliation Commission International Law Reports (1955), vol 22, 443, as cited in Boll (n 401) 118.

⁴⁵⁶ Mrs. Mergé, an American national, had married an Italian in 1933 and by operation of the law acquired Italian nationality. She had also subsequently made extensive use of this nationality, although she kept on renewing her American passport. In 1948 she asserted claims against Italy, based on a peace treaty, due to the loss of property in Italy resulting from acts of war. When the Italian government rejected all of Mrs. Mergé's claims on grounds of her dual nationality, the American government asked for arbitration. The arbitration commission ruled in Italy's favour, holding that the US has prevented from exercising diplomatic protection because the American nationality could not be regarded as predominant.

The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognised and may constitute a criterion of practical application for the elimination of any possible uncertainty.⁴⁵⁷

This view was reflected in the draft articles on diplomatic protection elaborated by the International Law Commission (ILC) in 2004, which used it as the basis for the elaboration of a more general principle of predominance, as follows: 'A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim'.⁴⁵⁸

Nevertheless, Boll wonders whether determining a State with which a person is more closely connected is an easy task in a current world where international developments facilitate contacts to more than one State.⁴⁵⁹ Furthermore, State practice does not shed any light on this as it does not seem to particularly support either the principle of equality or the principle of effective or dominant nationality.⁴⁶⁰

Another characteristic of nationality that may exceed the municipal level and have effects internationally is the duty of states to admit nationals and to allow residence as well as the obligation not to expel them.⁴⁶¹ It is 'an accepted rule of international law that States are not-unless bound by treaty obligations- under an obligation to grant to aliens an unconditional and unlimited right of residence, though they may not expel them arbitrarily and without just cause'.⁴⁶² Some tribunals and writers have also asserted the existence of limitations on the discretion of the states to expel aliens⁴⁶³, stating that expulsion 'must be exercised in good faith and not for an ulterior motive'.⁴⁶⁴

This principle of freedom of movement of citizens within their own country also means that should aliens be expelled from a country for sufficient reason, their State of nationality is obligated to

⁴⁵⁷ *Mergé Claim* (n 455) 455, as cited in Boll (n 401) 120.

⁴⁵⁸ Article 7.

⁴⁵⁹ Boll (n 401) 118.

⁴⁶⁰ *ibid.*, 283.

⁴⁶¹ Weis (n 425) 45, as cited in Boll (n 401) 123.

⁴⁶² *ibid.*

⁴⁶³ See generally cited in Brownlie (n 405) 499.

⁴⁶⁴ *ibid.*

receive them. Actually, it can be said that State practice is almost without exception to allow nationals entry and residence.⁴⁶⁵

The interrelation between human rights and the exclusivity of the states in granting citizenship rights constantly referred to thus far, would be further considered in the following section.

Interface Between Human Rights and National Discretion of the States

It is said that 'citizenship is a legal status that serves, in practice, as a precondition to the enjoyment of many rights, including voting, property ownership, health care, education, and travel outside one's own country'.⁴⁶⁶ In fact, international instruments confer special rights to only those who have membership of a political community via citizenship, such as the right to vote, the right to a referendum, to stand as a candidate in local elections, right of access to public office and public service.

In the same way that both privileges and obligations are extended to citizens by virtue of their territorial link to the State, as opposed to a personal link 'there seems to be no barrier in international law however, to the revocation of privileges extended to resident non-nationals under municipal law, with the exception of vested rights, which applies to all persons regardless of alienage'.⁴⁶⁷ This is where the 'international standard of minimum treatment'⁴⁶⁸ and the 'standard of national treatment'⁴⁶⁹ collide.

However, there are still many people whose fundamental rights are not protected because of their lack of citizen status and/or their inability to obtain citizenship.⁴⁷⁰ It is said that 'the normal empathy that human suffering engenders can be diminished when the victims at issue are non-citizens'.⁴⁷¹ As a result 'citizenship creates a giant loophole in the international human rights framework'.⁴⁷² 'The challenge is to use human rights law to combat the worst effects of citizenship denial and the ill-treatment of non-citizens'.⁴⁷³

⁴⁶⁵ Boll (n 401) 286.

⁴⁶⁶ Goldston (n 413) 321.

⁴⁶⁷ Boll (n 401) 155.

⁴⁶⁸ It means that aliens may expect and require from the organs of a State a certain standard of treatment regardless of what the nationals of the State may enjoy.

⁴⁶⁹ It means that aliens may only expect to receive equality of treatment with nationals.

⁴⁷⁰ Godston (n 413), 321.

⁴⁷¹ *ibid.*, 324.

⁴⁷² *ibid.*

⁴⁷³ *ibid.*, 322.

As a general rule, 'international human rights law requires the equal treatment of citizens and non-citizens, and exceptions to this principle may be made only if they are to serve a legitimate State objective and are proportional to the achievement of that objective'⁴⁷⁴.

In fact, international human rights law provide rights to all persons, irrespective of nationality, with the exception of the rights of public participation, of movement, and of economic rights in developing countries.⁴⁷⁵

According to its wider scope, international human rights may also impose obligations on the states limiting their national discretion with regard to citizenship. In fact, it is said that 'the protection of non-citizens by international human rights instruments represents an even greater challenge to national sovereignty'⁴⁷⁶.

In line with this emerging international consensus that nationality laws and practice must be consistent with general principles of international law— particularly human rights law, the Inter-American Court of Justice held:

Despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manner in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the State are also circumscribed by their obligations to ensure the full protection of human rights.

Consequently, it is said that:

State discretion in the granting of nationality is not completely unfettered. Thus, international law has established two principal restrictions on State sovereignty over the regulation of citizenship: first, the prohibition against racial discrimination, discussed above; and second, the prohibition against statelessness. Each of these is buttressed by the prohibition on arbitrary deprivation of citizenship.⁴⁷⁷

⁴⁷⁴ Final Report on the rights of non-citizens (n 161) para 1.

⁴⁷⁵ According to the 'Final Report on the rights of non-citizens' (n 161) 2, non-citizens should enjoy, for example, 'freedom from arbitrary killing, inhuman treatment, slavery, forced labour, child labour, arbitrary arrest, unfair trial, invasions of privacy, refoulement and violations of humanitarian law. They also have the right to marry, protection as minors, peaceful association and assembly, equality, freedom of religion and belief, social, cultural, and economic rights in general, labour rights, (for example, as to collective bargaining, workers' compensation, social security, appropriate working conditions and environment, etc.) and consular protection'.

⁴⁷⁶ Helton et al (n 417) 297.

⁴⁷⁷ Godston (n 413) 339.

However, although the right to a nationality is recognised in the UDHR⁴⁷⁸ and nationality should be granted where the alternative is statelessness, it remains unclear whether this constitutes an obligation of customary international law.⁴⁷⁹ It should be noted that the principal conventions against statelessness have to date secured a limited number of ratifications.⁴⁸⁰

On the other hand and very relevant is the fact that the principle of jus soli has been generally accepted as part of international law, due to the almost universal ratification of the CRC. That means that states that otherwise would apply the *ius sanguinis* principle, have to apply the principle of *ius soli* to children born on their territory who would otherwise be stateless.⁴⁸¹

A further example of the limitation of the principle of exclusivity is the customary law obligation to allow the entry of those fleeing from persecution.⁴⁸² Likewise, the principle of non-refoulement articulated in many international instruments means that non-citizens also enjoy the right not to be deported to a country where he or she may be subjected to persecution or abuse.⁴⁸³

Another example is the element of compulsion in primary education included in ICESCR, which means that 'neither the parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education'.⁴⁸⁴

To summarise this section it could be said that international human rights may impose certain limits to the national discretion of the states, clearly placing the onus on the State to ensure that national citizenship laws do not conflict with international human rights law. However, whether States comply with these limitations remains to be seen, as State practice is not completely unanimous.

⁴⁷⁸ Article 15.

⁴⁷⁹ Godston (n 413) 339.

⁴⁸⁰ As of 1 November 2007, sixty-two had ratified the 1954 Convention on Stateless, and thirty-four had ratified the 1961 Convention on the Reduction of Statelessness.

⁴⁸¹ See Van den Bosch and Van Genugten, (n 238) 200.

⁴⁸² Goodwin-Gill (n 73) 160.

⁴⁸³ See, e.g. Convention on Refugees, Article 33; Protocol relating to the Status of Refugees, Article VIII; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3.

⁴⁸⁴ UN Committee on Economic, Social and Cultural Rights, General Comment 11 (1999), Plans of action for primary education (Article 14): 10/05/99, E/C.12/1999/4, paragraph 6.

Citizenship of the European Union

Introduction

The importance of the TEU citizenship provisions lies not in their content but rather in the promise they hold out for the future'.¹

Formally established in 1993, citizenship of the European Union is a relatively new legal construct. However, theories of an integrated citizenry of Europe have been in circulation for decades, and as such, the idea of the European Citizen is not new. Yet what is meant by 'European Citizenship' is a question to which there is no clear answer. One can point to the respective rights laid down in Treaties, and the case law of the European Court of Justice, and yet still not be able to define what constitutes a unified, heterogeneous population. Indeed, the question of what is citizenship on a national, or even sub-national level, appears to raise more questions than answers. Theories of nationality, residence, cultural ties, familial bonds, political belief, and so on have all been used to justify various notions of modern citizenship, but expound this commentary to a supranational entity such as the European Union, and the vast majority of theories require a complete rethink. The Union, firstly, is not a State, and secondly, has no identifiable *demos*. How can citizenship be constructed within this framework?

This paper, while not hoping to offer any conclusions on this discussion, aims to examine the principal arguments in this area. First, however, a more practical overview of the legal aspects of EU citizenship is necessary. Section 1 undertakes a brief account of the historical development of citizenship in the EU, from concept, through proposal, and into legislation. It further charts the series of updates promulgated by successive Treaties. The section then moves on to establish a definition of what, in subsequent sections, is referred to by the term 'citizenship'. At this stage, however, the object is nothing more than an explanation of terminology and does not consider the various aspects of citizenship in a non-State setting. Section 2 sets out the rights that were granted to nationals of Union Member States prior to the introduction of citizenship rights. This section aims to provide a comprehensive overview of the level of rights enjoyed before citizenship, thereby allowing a fuller appreciation of the impact of citizenship provisions. Section 3 examines the hallmarks of Union citizenship, looking at legislation, case law, and analysis, while Section 4 charts the numerous other legislative documents that aim to protect and enhance rights within Europe.

¹ D O'Keeffe and PM Twomey, *Legal Issues of the Maastricht Treaty*, London, Chancery Law, 1994.

Section 5 discusses some of the main problems with Union citizenship, not just with matters of unfair application, but of legitimacy of rule and the treatment afforded to third country nationals within the European Union. Section 6 undertakes a discussion of the limits of citizenship, and examines further the relationship between nationality, residence, and citizenship. Drawing on the rise of global theories of rights, this section asks whether the nation-state, and citizenship thereof, has a limited lifespan.

Section 1 – The History

The Historical Setting

Signed in Maastricht on 7th February 1992, the Treaty on European Union (TEU) came into force on 1st November 1993. The Treaty changed the European Economic Community to simply the European Community, which became the first pillar of the established 'three pillar' structure. This also included co-operation on Common Foreign and Security Policy (pillar 2) and Justice and Home Affairs (pillar 3). The three pillars sit under a common 'umbrella' of the European Union. The Treaties of Amsterdam² and Nice³ updated and reformed the TEU, and the Treaty establishing a Constitution for Europe was aimed at replacing all existing Treaties. Following the rejection of the Constitution by France and The Netherlands in 2005, and a two year period of reflection, the Intergovernmental Conference⁴ agreed on a mandate to draw up a new Treaty on Institutional Reform by the end of 2007. As a comprehensive analysis of Union citizenship is the task of this paper, focus will remain on the most relevant provisions of the Treaties.

Concrete steps were first taken towards the establishment of a European citizenship in 1974 at the Paris Summit with the establishment of a working group to study the conditions under which 'citizens of the Member States could be given special rights as members of the Community'.⁵ The Tindemans Report subsequently advocated the grant of certain civil and political rights to nationals of Member States, including the right to vote and stand for public office. Reports such as the European Parliament's Scelba Report, and the Addonino Reports on 'A People's Europe' discussed rights of citizens, though the term 'citizenship' was much used, but seldom defined. The importance of free movement of citizens for the enhancement of the economic development of the Union was recognised early on in the proceedings, and the Commission's guidelines for a Community Policy on Migration suggested that freedom of movement for citizens should go beyond that extended to workers for the purposes of employment.⁶ The first traceable reference to the concept of citizenship in the European context is to be found in a letter of the Prime

² The Treaty of Amsterdam was signed on 2nd October 1997 and entered into force on 1st May 1999.

³ The Treaty of Nice was signed on 26th February 2001 and entered into force on 1st February 2003.

⁴ Mandate agreed on 23rd June 2007.

⁵ Bull EC 12-1974, point 111, as quoted in O'Keefe, 'Union Citizenship' in O'Keefe and Twomey, *Legal Issues of the Maastricht Treaty* 87.

⁶ Supplement 9/85. Bull EC 5; O'Keefe, *ibid*.

Minister of Spain to the President in Office of the Council prior to the Dublin summit in June 1990.⁷ The summit endorsed Spain's proposal, and submitted to the Council for consideration the question 'How will the Union include and extend the notion of Community citizenship carrying with it specific rights (human, political, social, the right of complete free movement and residence, etc) for the citizens of the Member States by virtue of these States belonging to the Union?'⁸ The Spanish government further submitted a Memorandum on European Citizenship,⁹ which was designed to address the problem of Member State nationals being treated as no more than 'privileged foreigners'. The proposals included the granting to all citizens of the Union the rights to full freedom of movement and residence including political participation in the host Member State, specific rights in the areas of health, social affairs, education, culture, the environment and consumer protection, rights to assistance and diplomatic protection by other Member States, rights to petition the European Parliament, and other rights to be agreed in the future. The Commission opinion of 21st October 1990 made clear its agreement with Spain's proposals, stating that it saw the creation of citizenship of the Union as a way of counteracting democratic deficit in the Union, and strengthening democracy. This was seconded by the Danish government's proposal of the right of Community nationals to vote in local elections in the Member State in which they were resident. The issue of the protection of citizens' rights eventually resulted in the creation of the office of Ombudsman. While the Council did not consider human rights to be part of the provisions on citizenship, the Commission and Parliament rejected this stance, arguing for the inherent inclusion of fundamental rights within the Treaty to be invoked by citizens, and the need for the Community to accede to the European Convention on Human Rights. The citizenship provisions that were finally approved by the personal representatives of the Heads of State and Government, at ministerial level, and at the Luxembourg European Council, and which were inserted into the TEU, largely resembled the outline given at the Rome Summit. The sole reference to human rights was contained in a separate provision under Article F(2) TEU.

The preamble to the TEU set out that the High Contracting Parties 'resolved to establish a citizenship common to the nationals of their countries'. This was followed up in Article B of the Common Provisions, stating one of the objectives of the Union as 'to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union'. The fact that provisions on citizenship are contained in a separate Part of the Treaty has been interpreted by some commentators as significant, indicating the relative importance of the measures and their implementation.¹⁰

⁷ *Europe* no 5252, 11th May 1990 at 3; O'Keeffe, *ibid*.

⁸ Bull EC 6-1990, Annex 1, p 15; O'Keeffe, *ibid*.

⁹ Towards a European Citizenship, *Europe Documents*, no 1653, 2nd October 1990; O'Keeffe, *ibid*.

¹⁰ O'Keeffe, *ibid* 90.

The Philosophy of Citizenship

Citizenship has long been a political matter. In 1847, Don (David) Pacifico, a Portuguese Jew born on the island of Gibraltar and therefore a British subject, saw his property in Athens, Greece, destroyed by a mob. This mob had allegedly included sons of a government minister, who had plundered Pacifico's residence while the Police looked on. Having appealed unsuccessfully to the Greek government for compensation, Pacifico brought the matter to the attention of the British government. Liberal British Foreign Secretary Palmerston, took unilateral action in the matter, at once sending a Royal Navy squadron into the Aegean in 1850 to seize Greek ships to the value of Pacifico's damaged property. Since Greece was under the joint protection of Russia, France and Great Britain, protests from the French administration and the removal from Britain of the French ambassador soon put an end to the incident, with Britain withdrawing her troops in exchange for a promise from the Greek government to compensate Pacifico for his losses. Heated debates in Parliament followed, prompting Palmerston to deliver his famous five-hour speech. He stated;

As the Roman, in days of old, held himself free from indignity, when he could say, *Civis Romanus sum* [I am a Roman citizen], so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England will protect him from injustice and wrong.¹¹

Before moving on, a note about the duties of citizenship. 'Rights and duties' of citizenship are commonly lumped together almost as a sound-bite, yet while a series of Treaty Articles are devoted to the rights conferred on citizens of the Union, relevant duties are conspicuous by their absence from the Treaty. The only deduction that can be made is that these are left to the sole competence of Member States to impose and enforce, be they military service, jury service, etc. Indeed, it will be interesting to see if such duties will become part of the duties associated with Union citizenship. At present, however, it should be noted that Union citizenship can confer duties on individuals other than those imposed by their national citizenship. Rights of residence are not necessarily included within citizenship status. As Section 5 discusses, this leads to some situations in which an inequality of rights arises where those of a different nationality within the Union who have exercised their right to freedom of movement are able to take advantage of citizenship rights that are inaccessible to nationals of that country. Thus the situation arises in which German students, for example, enrolled at a university in Scotland, are exempt from paying tuition fees, while an English student is subject to such fees. Furthermore, duties deriving from

¹¹ Hansard CXII (3d Ser) 380-444, *Retrieved 28 March 2006*.

national citizenship are currently only seen to apply to nationals of that country, leaving non-national Union citizens lawfully resident in that country exempt.

It remains to be seen whether this is dependant on direct democracy and whether enabling this in the Union and improving democratic accountability will see the introduction of Union duties.

Section 2 – Non-citizenship Rights

Pre-existing Rights

Before embarking on a discussion of the development of citizenship rights within the Union, it may be useful to provide a brief outline of the rights of Member State nationals as they currently stand under the Treaty. In this way, the rights conferred by citizenship provisions can then be understood in greater context, and the extent to which such rights broaden citizens' interests can be examined. However, this is not the place for a full discussion of the current case law of the European Court of Justice (ECJ). As such, this section will be confined to the general principles of Community law, the relevant provisions and case law on free movement of workers and students, and the freedom of establishment, rights of residence, and access to education and social benefits.

General Principles of Community Law

Community law has been recognised, both academically and by the ECJ, as drawing not only on principles laid down in international treaties, but also on 'general principles' of the national laws of Member States. It was such an exercise that likely counterbalanced the surprising lack of fundamental rights in the original Treaties. Ideas such as legal certainty, proportionality, equality, subsidiarity and human rights came to be seen as integral to the interpretation of Community legislation by the ECJ. In the case of *Stauder v City of Ulm*,¹² the court stated that the contested measure contained 'nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court'. Moreover, Mancini J, speaking in 1989, noted that '[r]eading an unwritten Bill of Rights into Community law is indeed the most striking contribution the Court has made to the development of a Constitution for Europe'. Indeed, it has long been understood that the ECJ has drawn on provisions of the European Convention of Human Rights in determining the correct balance of rights and duties under Community law, and that a non-verbal 'dialogue' has developed between the two judicial institutions.¹³ In the case of *Carpenter*,¹⁴ any decision to deport the third country national wife of a UK citizen, who had failed

¹² *Erich Stauder v City of Ulm – Sozialamt* Case C-29/69 [1969].

¹³ Article 8 ECHR is explicitly cited in *Akrich*, Case C-109/01 2003 by the ECJ.

¹⁴ *Mary Carpenter v Secretary of State for the Home Department*, Case C-60/00 [2002].

to renew her residence permit, was held to interfere 'with the exercise by Mr. Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms [...] which is among the rights which [...] are protected in Community law'.^{15,16}

In addition to the development of a 'Bill of Rights' within the European legislative framework, the ECJ has also been directly responsible for improving harmonisation and implementation across Europe through the development of direct effect. While European Regulations become part of national law in the Member States without the need for any legislative action on their part,¹⁷ Directives were originally only binding on the Member State as the results to be achieved. In other words, as long as a certain end was reached, the Member State had discretion as to how this was to be accomplished. However, the Court introduced the direct effect of Decisions in the case *Grad v Finanzamt Traunstein*¹⁸. In the later case of *Van Duyn v Home Office*,¹⁹ the ECJ for the first time allowed a provision of a Directive to have direct effect within the Member State, meaning that individuals could rely directly on the Directive before their national court.²⁰ This, however, only extended to so-called 'vertical direct effect', in other words that the applicant can only use the provision against the Member State and not against another person. In the case of *Faccini Dori v Recreb Srl*,²¹ the court stressed that an unimplemented Directive could not confer rights on individuals enforceable against other private individuals, as was originally set out in *Marshall*.²² However, in the case of *Francovich*²³ the ECJ clarified this position, providing for State liability for breach of Community law. An individual, while not able to rely on a Directive against another individual, could bring an action against the State for non-implementation of an EU Directive. This allowed the Court to move away from the horizontal/vertical direct effect dichotomy. Yet, as Advocate General Lenz stated in *Faccini Dori*,²⁴ the introduction of a Union citizenship 'raises the expectation that citizens of the Union will enjoy equality, at least before Community law'²⁵ and thereby stands in favour of the horizontal direct effect of Directives. Predictably, the Court declined to follow the arguments of the Advocate General, stating that such an extension of direct effect would 'be to recognise a power in the Community to enact obligations with immediate effect',²⁶ thus working against legal certainty and legitimate expectations so

¹⁵ Reference for Preliminary Ruling by the UK in the case of *Carpenter*, Case C-60/00 at 41.

¹⁶ Now also incorporated in Article 6 TEU.

¹⁷ Article 249 EC.

¹⁸ *Grad v Finanzamt Traunstein* (Case 9/70) [1970] ECR 825.

¹⁹ *Van Duyn v Home Office* [1974] Ch 358 ECJ.

²⁰ However, this was revisited by the Court in the case of *Becker*, where the Court found that an individual could rely directly on a Directive before their national court only if the relevant provisions were clear and sufficiently precise.

²¹ *Faccini Dori v Recreb Srl*. [1994] Case C-91/92.

²² *Marshall v Southampton and South West Area Health Authority, no1* [1986] Case C-152/84.

²³ *Francovich & Bonifaci v Italy*, Cases C-6 & C-9/89 [1991] ECR I-5637.

²⁴ Op. cit. at 22.

²⁵ Quoted in *European Union Law* Margot Horspool; Matthew Humphreys, Oxford University Press, 4th Ed. 2006, at 165.

²⁶ *ibid.*

central to Community. In an interesting development, however, the Court in *Werner Mangold*,²⁷ in considering a contract between two private parties, appears to have been teetering on the brink of horizontal direct of Directives. The Court also noted that Member States should refrain from the imposition of legislation contrary to the aims of a Directive, even if the implementation date of such had not passed. In conclusion, the Court stated,

it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.²⁸

Independent Rights

Certain rights set out in the EC Treaty can be termed 'independent' rights, or rights which do *not* derive from the status of an individual as a Union citizen. This section will offer a brief outline of these rights, before turning to the current status of these rights under citizenship provisions.

The right of residence, as set out under Article 39(3) EC, has been consistently given a broad interpretation by the ECJ. The Court has stated that the right to enter and reside in the territory of the Member States for the purposes set out in the Treaty is a right conferred directly by the Treaty, and acquired independently of a residence permit.²⁹ Indeed, failure to comply with national requirements for obtaining a residence permit should not, according to the Court, lead to imprisonment or deportation.³⁰ Furthermore, while Member States can require evidence of residence in order to consider access to social assistance, Directive 2004/38/EC no longer obliges Member States to confer entitlement to such assistance in the first three months of residence, or for longer in the case of job-seekers.³¹ Considering that the right to reside under the Treaty is still dependent on the person's status as a worker, the definition of 'worker' in Community law is crucial to the scope of residence.

A Worker

The ECJ has held that the term 'worker' is a Community term, and as such, is not open to interpretation by Member States. Work undertaken must amount to an 'effective and genuine economic activity'³² as opposed to 'marginal and ancillary'³³ occupation. Interestingly, employment undertaken on a part-time basis in order to fulfil Treaty requirements and acquire a

²⁷ *Werner Mangold v Rüdiger Helm*, Case C-144/04, [2005].

²⁸ *ibid* at operative part.

²⁹ *Procureur du Roi v Royer*, Case C-48/75.

³⁰ *R v Stanislaus Pieck* [1980] Case C-157/79.

³¹ Article 24(2).

³² *Levin v Staatssecretaris van Justitie* [1982] Case 53/81.

³³ *ibid*.

right of residence is sufficient.³⁴ In the later case of *Lawrie Blum*³⁵ a fuller definition was laid down, outlining the characteristics of a worker as 'the performance of services, for or under the direction of another, in return for remuneration during a certain period of time'.³⁶ Furthermore, it is seemingly irrelevant if such remuneration falls short of the minimum wage,³⁷ and covers only 'pocket money',³⁸ or that hours worked were irregular and not guaranteed.³⁹ However, should the primary purpose of the work be of a social nature, such subsidised, non-economic work will not be sufficient to categorise the person as a worker.⁴⁰ Persons seeking employment are also covered by the Court's purposive interpretation of Article 39(3), as the absence of such a right would frustrate the free movement of workers within the Union.⁴¹

In the cases of *Raulin*⁴² and *Bernini*,⁴³ the Court stated that a person leaving his employment to become a student on a vocational course may still retain his status as a worker even if he left employment voluntarily, if there is an evident link between the employment and the course of study. However, this was conditioned in the case of *Brown*,⁴⁴ who was held not to be able to benefit from social advantages enjoyed by Community workers, because the work had been undertaken after he had been accepted for his degree at Cambridge. Thus the work was preparation for further study, not for further work.⁴⁵ In the case of *Baumbast*,⁴⁶ the Court laid down the principle that not only should children of migrant workers who are not Union citizens be allowed to continue their education in the host Member State, but that their primary carer should also be given residence in order to give effect to the right of residence of the children. Furthermore, children of Member State nationals who fulfill the criteria for a 'worker', have access to courses of general education, apprenticeship, and vocational training under the same conditions as children of nationals under Article 12 of Regulation 1612/68⁴⁷. The question of access to education will be returned to later in this section.

Social Advantages

Access to social and financial advantages are often cited as enabling factors for the exercise of rights to freedom of movement and residence. However, such access remains controversial, and

³⁴ *ibid.*

³⁵ *Lawrie-Blum v Land Baden-Wurttemberg* [1986] Case 66/85.

³⁶ *ibid.*

³⁷ *Kempf v Staatssecretaris van Justitie* [1986] Case 139/85.

³⁸ *Steymann* [1988] Case C-196/87.

³⁹ *Raulin v Minister van Onderwijs en Wetenschappen* [1992] Case C-357/89.

⁴⁰ *Batray* [1989] Case 344/87.

⁴¹ For statute and case law notes, see following sections.

⁴² *Raulin v Minister van Onderwijs en Wetenschappen* [1992] Case C-357/89.

⁴³ *M.J.E. Bernini v Minister van Onderwijs en Wetenschappen* [1992] Case C-3/90.

⁴⁴ *Brown v Secretary of State for Scotland* [1988] Case C-197/86.

⁴⁵ Interestingly here, the purpose of the work was deemed relevant, in contrast to the case of *Levin*, Case C-53/81.

⁴⁶ *Baumbast v Secretary of State for the Home Department* [2003] Case C-413/99.

⁴⁷ See *Michel S v Fonds National de Reclassement* [1973] Case C- 9/74.

largely for the present still under the competence of Member States. However, the Court has stated that, in light of the developing notions of citizenship within the Union, and the right to equal treatment of such citizens, the exclusion of financial benefits from the scope of Article 39(2) was no longer sustainable.⁴⁸ Social advantages, though, should not be confused with social security benefits, which are governed by Regulation 1408/71. While the former cannot be exported, the latter can, as demonstrated in *Reina*,⁴⁹ where an Italian couple in Germany were held to be entitled to a German childbirth loan.

Provided for under Article 7 of Regulation 1612/68, social advantages are to be accorded to workers. Once again, a purposive interpretation by the Court has extended this advantage to the family of a worker, including benefits that have nothing to do with the employment itself.⁵⁰ The Court further defined social advantages as including 'all the advantages, which, whether or not linked to a contract of employment, are generally granted to national workers...as workers...or by virtue of the mere fact of their residence on the national territory'.⁵¹ Furthermore, conditions for access to such benefits which might indirectly discriminate against non-nationals, such as a residence requirement over a period of years, would infringe Article 7(2), and are therefore precluded.⁵² However, requirements of nationality for benefits available to a certain group, for example former prisoners of war, was not an infringement on Article 7, as the benefit was not available to the population as a whole.⁵³

In 1987, the Court ruled that job-seekers were not entitled to the same rights as workers, except on equal access to employment, and ruled that Regulation 1612/68 should not apply to job-seekers, thereby denying them of social and tax advantages available to workers.⁵⁴ However, later citizenship provisions have turned this around, and will be discussed further in the section on citizenship.

Three Limitations

As with the provision on citizenship, the rights and freedoms laid out in the Treaty are subject to limitations on the grounds of public policy, public security and public health.⁵⁵ While comprehensive definitions of these are set out in the context of citizenship rights, it is still useful to look at the extent to which these limitations can be relied upon in the field of Treaty rights.

⁴⁸ *Collins v Secretary of State for Work and Pensions* [2002] Case C-138/02.

⁴⁹ *Francesco Reina and Letizia Reina v Landeskreditbank Baden-Württemberg*, Case C-65/81 [1982].

⁵⁰ *Cristini v SNCF* [1975] Case 32/75.

⁵¹ *Martinez Sala v Freistaat Bayern* [1998] Case 85/96.

⁵² *Commission v Luxembourg* [2001] Case C-299/01.

⁵³ *Josef Baldinger v Pensionsversicherungsanstalt der Arbeiter*, Case C-386/02, [2004].

⁵⁴ *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon*, Case C-316/85, [1987].

⁵⁵ As set out in Directive 64/221, now absorbed into Directive 2004/38.

In the case of *Van Duyn*,⁵⁶ it was left to the UK court to determine whether the applicant could be refused entry on grounds of affiliation with a certain organisation, even though this organisation was not banned in the UK. However, in subsequent cases the ECJ took a more stringent approach, stating that unless a Member State takes action to combat an activity, it cannot expel Member State nationals for conducting such an activity.⁵⁷ In the case of *Adoui and Cornuaille*⁵⁸ the Court found that unless an activity is specifically prohibited by law in a Member State, that State cannot justify a restriction on entry by reference to the activity. Furthermore, previous criminal convictions were held to be relevant only insofar as they 'manifest a present or future intention to act in a manner contrary to public policy or public security'.⁵⁹ In other words, entry to another Member State can only be denied when 'a sufficiently serious threat [...] affecting one of the fundamental interests of society' is found to exist.^{60,61} Other factual matters should also be taken into consideration by the national Court when deciding on an expulsion order⁶² while the failure of a Member State national to possess the relevant permits should not attract a disproportionate penalty.⁶³

While a relatively cautious approach was taken by the Court in *Rutili*⁶⁴ with regard to Member State reliance on public policy derogations, the post-September 11th global climate was reflected in the case law of the ECJ. The case of *Olazabal*⁶⁵ saw an appeal against an order restricting movement placed on a Spanish national resident in France. The appellant had known links with the Basque separatist group ETA, and relying on the public security derogation from rights granted by Article 39, the government requested that the appellant not leave the *département* of his residence without prior consent. The ECJ noted that no Community legislation providing for the free movement of workers precludes a Member State from imposing,

in relation to a migrant worker who is a national of another Member State, administrative police measures limiting that worker's right of residence to a part of the national territory, provided (1) that such action is justified by reasons of public order or public security based on his individual conduct; (2) that, by reason of their seriousness, those reasons

⁵⁶ *Yvonne van Duyn v Home Office*, Case C-41/74, [1974].

⁵⁷ *Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State*, Joined cases 115 and 116/81, [1982].

⁵⁸ *ibid.*

⁵⁹ *Regina v Pierre Bouchereau*, Case C-30/77 [1977].

⁶⁰ *ibid.*

⁶¹ See also *Regina v Secretary of State for Home Affairs, ex parte Mario Santillo*, Case C-131/79 [1980] and *Criminal proceedings against Donatella Calfa*, Case C-348/96 [1999].

⁶² *Georgios Orfanopoulos and Others (C-482/01) and Raffaele Oliveri (C-493/01) v Land Baden-Württemberg*, Joined cases C-482/01 and C-493/01, [2004].

⁶³ *Regina v Stanislaus Pieck*, Case C-157/79 [1980]. See also *Jean Noël Royer*, Case C-48/75, [1976], and *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie*, Case C-215/03 [2005], in which the Court stated that failure to show a valid ID card by a Member State national who posed no threat to public security should not attract detention. However, if the individual cannot produce evidence of his lawful residence in the host State, that State may undertake deportation, subject to the limits imposed by Community law. There appears to be a case for arguing that the citizenship right of freedom of residence within the territories of the Member States negates the requirement for the individual to prove that his residence is lawful – this will simply follow as a corollary of proof that he is a national of an EU Member State.

⁶⁴ *Roland Rutili v Ministre de l'Intérieur*, Case 36/75 [1975].

⁶⁵ *Ministre de l'Intérieur v Aitor Oteiza Olazabal*, Case C-100/01 [2001].

could otherwise give rise only to a measure prohibiting him from residing in, or banishing him from, the national territory; and (3) that the conduct which the Member State concerned wishes to prevent gives rise, in the case of its own nationals, to punitive measures or other genuine and effective measures designed to combat it.⁶⁶

The State was able to restrict the movements of the appellant, a Union citizen, while still complying with Community provisions on non-discrimination.

In the case of *Reyners*,⁶⁷ a Dutch national who had trained and qualified as a lawyer in Belgium was prevented from practising law in that country by Belgian legislation restricting the practice of law to Belgian nationals. The Court stated that

[h]aving regard to the fundamental character of freedom of establishment and the rule on equal treatment with nationals in the system of the treaty, the exceptions allowed by the first paragraph of Article 55 [public security derogation] cannot be given a scope which would exceed the objective for which this exemption clause was inserted.⁶⁸

The Court later stated that 'the exception to freedom of establishment [...] must be restricted to those of the activities referred to in Article 52 which in themselves involve a direct and specific connection with the exercise of official authority'.⁶⁹ In this instance, the practice of law in general was held not to involve the exercise of official authority.

Public Service Exemption

In addition to the three public limitations outlined above, there is also a public service exception, as set out under Article 39(4) EC. This exception only applies to certain activities connected with the exercise of official authority⁷⁰ and does not necessarily cover posts involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State.⁷¹ This is apparently explained by reference to the special relationship of allegiance to the State and reciprocity of rights and duties that form the foundation of the bond of nationality inherent to the safe and efficient conduct of such jobs. Whether this underlines the Court's unwillingness to promote the supranational citizenship of the Union, or whether Member State sovereignty is simply too great a hurdle to overcome, remains to be seen. A caveat to the public security exception was outlined in *Lawrie Blum*,⁷² in which the Court stated that access to posts should not be restricted simply because of the fact they had civil servant status, rendering teachers, for example, outside the ambit of Article 39(4).

⁶⁶ at 45.

⁶⁷ *Jean Reyners v Belgian State*, Case C-2/74, [1974].

⁶⁸ *ibid* 43.

⁶⁹ *ibid* 54.

⁷⁰ *Giovanni Maria Sotgiu v Deutsche Bundespost*, Case C-152/73 [1974].

⁷¹ *Commission v Belgium, Commission v Belgium (no 2)*.

⁷² *Deborah Lawrie-Blum v Land Baden-Württemberg*, Case C-66/85, [1986].

Section 3 – The Hallmarks of EU Citizenship

The Treaty of Maastricht in 1993 set out to establish a '*citizenship common to nationals*' of Member States.⁷³ The resulting Section II of the EC Treaty, introduced at Maastricht, encompasses a series of provisions on citizenship rights. Article 17 EC sets out citizenship of the European Union;

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

The Treaty of Amsterdam, at the behest of Denmark, qualified this to avoid misunderstanding, adding: 'Citizenship of the Union shall complement and not replace national citizenship.'⁷⁴

Thus all nationals of a Member State enjoy dual citizenship. The possession of nationality of a Member State was dealt with by a Declaration on nationality of a Member State attached to the TEU. As such, the Intergovernmental Conference (IGC hereinafter) laid down that the question of nationality of a Member State can be resolved by recourse to the laws of that Member State alone. The exclusive competence of Member States to determine who can and who cannot access rights as a citizen of the Union is in line with Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws, a position that was upheld by the European Court of Justice in the case of *Micheletti*.⁷⁵ The Court in this case found that the conditions governing the acquisition and loss of nationality were matters which under international law fell within the exclusive competence of the Member State concerned. As the Member State must still exercise its competence in compliance with Community law, this still represents an anomaly, considering the ECJ's pains in most instances to attribute 'Community' definitions to such terms.⁷⁶ Considering that citizenship provisions were inserted into the Treaty with the aim of creating a comprehensive body of rights and a special status for citizens of the Union, it is interesting to note that only a few years prior to Maastricht, three Directives came into force, namely the Pensioner's Directive, 90/364/EC, the Rich Person's Directive, 90/365/EC, and the Student's Directive, 93/96/EC. These three Directives all set out rights pertaining to the respective persons which were then reiterated in the Treaty, raising the question of the need for the Directives beyond mere

⁷³ The original proposal was from Spain.

⁷⁴ Article 17 EC.

⁷⁵ *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, Case C-369/90 [1992].

⁷⁶ An example of this is the term 'worker', the definition of which the ECJ has developed as a Community term.

preliminary harmonisation. Conversely, if such rights were guaranteed under Community law by Directives, the citizenship provisions under the Treaty were left with no more purpose than 'filling in the gaps' between the various Directives.

Of note at this juncture is what the provisions on citizenship of the Union are *not*. This is to say that the provisions do not contain any fundamental or human rights. While the Charter of Fundamental Rights contained within the EU Reform Treaty, to which this section later turns, does encompass other categories of rights, current citizenship provisions stemming from the TEU focus solely on economic and political rights. As such, the TEU provisions can be compared to the Council of Europe Convention of 5th February 1992 on the Participation of Foreigners in Public Life at Local Level, guaranteeing to all foreign residents rights to freedom of expression, assembly and association, as well as active and passive voting rights in local elections.⁷⁷ It will be remembered, however, that the Council of Europe was responsible for the European Convention on Human Rights and Fundamental Freedoms, a statutory equivalent of which is currently absent within the European Union.⁷⁸ The following discussions will examine the rights guaranteed by citizenship provisions of the Union, including legislation, case law, and analysis.

The Right to Move and Reside Freely

Legislation

Articles 18-21 lay down the four main citizenship rights. Article 18 sets out the right to move and reside freely within the Union:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act in accordance with the procedure referred to in Article 251.

Following the Inter-Governmental Conference at Nice in 2002, certain amendments were made to the EC Treaty, including the addition to Article of a third paragraph in which it was stated:

'3. Paragraph 2 shall not apply to provisions on passports, identity cards, residence permits or any other such document or to provisions on social security or social protection.'

While commendable in spirit, Article 18 as a whole initially appeared to add relatively little to the sum of rights previously enjoyed by Member State nationals, considering that free movement of

⁷⁷ Although this is dependent on Member State agreement.

⁷⁸ Although a Charter of Fundamental Rights is to be included in the Reform Treaty, see below.

workers within the Member States is guaranteed under Article 39. Jessurun d'Oliviera stated at the time, 'the mobility of economically active persons has now been elevated to the core of European citizenship and expanded into mobility for persons generally. In other words, the economically irrelevant people have been promoted to the status of persons'.⁷⁹ However, more recent analysis of the rights granted by Article 18 as interpreted by the Court have been seen as a progressive expansion of a universal principle to all citizens of the Union. Catherine Barnard, for example, sees the citizenship provisions, in particular Article 18 EC, as having 'potentially revolutionized rights for citizens lawfully resident in the host Member State but not economically active'.⁸⁰ Barnard also establishes that there may be a 'sliding scale' of citizenship rights. By contrasting the cases *Martinez Sala*⁸¹ and *Grzelczyk*⁸² she establishes that according to the level of integration reached by the applicant within the host society, the right to be treated the same as a national of the host State can vary accordingly.⁸³ However, even Barnard is forced to admit the reluctance of the ECJ to rely solely on citizenship provisions for the enforcement of rights when the same end can be achieved by recourse to Articles 39, 43 and 49 EC. She gives two possible explanations for this. Firstly, the established treaty provisions and secondary legislation have a more fully developed body of case law, and secondly, if there applicant is a legal person it is unlikely that the citizenship provisions will apply to it.⁸⁴ While the second reason may be possible in a minority of cases, the first seems a circular argument; there is little case law on the citizenship provisions, so therefore let's try not to use them. As such, citizenship provisions contained within the Treaty have been used predominantly to uphold human rights, although more recent case law may suggest that the Court is taking a more hands-on approach to the interpretation of the provisions.⁸⁵

Although the ideal of citizenship was introduced by the Treaty of Maastricht in 1993, it was not until 2004 that the concept found its way into a Directive. The result was a comprehensive review of Community legislation regulating free movement of Union citizens within the territory of Member States. Directive 2004/38/EC amended and replaced a substantial list of Directives as well as Articles 10 and 11 of Regulation 1612/68, condensing the relevant provisions into one document.⁸⁶ However, considering the expansionist scope taken by the Court with regards to the free movement of persons within the Union, Directive 2004/38 was seen by some as a retrograde

⁷⁹ HU Jessurun d'Oliviera 'Union Citizenship: Pie in the Sky?', in Rosas and Antola, *A Citizens' Europe: In Search of a New Order*, London Sage, 1995 at 66.

⁸⁰ C Barnard *The Substantive Law of the EU; The Four Freedoms*, Oxford University Press, 2004, at 407.

⁸¹ *Martinez Sala v Freistaat Bayern* [1998] Case C-85/96.

⁸² *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, Case C-184/99 [2001].

⁸³ See below for a full discussion of these cases.

⁸⁴ C Barnard, 2004 at 421.

⁸⁵ See in particular *Baumbast v Secretary of State for the Home Department* [2003] Case C-413/99, *Mary Carpenter v Secretary of State for the Home Department*, Case C-60/00 [2002], *Akrich*, Case C-109/01 [2003]. See below for a fuller discussion of this.

⁸⁶ Directive 2004/38/EC amended Articles 10 and 11 of Regulation 1612/68, and replaced Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

step. The Directive boasts a comprehensive preamble that sets out the principal changes brought in and confirms the primacy of citizenship as a nexus of social cohesion and integration within the Union. It not only added to the legislative provisions on free movement and residence of citizens, but collected together various other pieces of legislation in this area. Paragraph 1 of the preamble states: 'Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect'.

Subsequently in paragraph (11) of the same: 'The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures'.

The language cited appears to indicate that the citizenship rights of movement and residence are now 'fundamental' rights to all those holding Member State nationality. This appears to be a contradiction in terms. A fundamental right cannot be subject to the fulfilment of certain criteria. This being the case, a new breed of European rights seems to have appeared.

Section III of Directive 2004/38/EC sets out rights of residence. Article 6 states that 'Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport'.

Note that whereas provisions previously outlining freedoms of movement applied only to workers and self-employed persons (under the relevant Community definitions), Directive 2004/38/EC, like Article 18 EC, extends this to all citizens of the Union. Article 7 of the Directive details the right of residence of Union citizens for a period of between three months and five years, setting out four categories of person who can enjoy such a right. Once again, workers or self-employed persons are covered, but also any Union citizen having 'sufficient resources'⁸⁷ for themselves and their family members not to become a burden on the social security system of the host Member State can also exercise their right to residence under Article 7.⁸⁸ Persons are further required to have comprehensive sickness insurance cover. Finally, those enrolled at public or private establishments for the purposes of study or vocational training may exercise a right of residence,

⁸⁷ Directive 2004/38/EC, Article 7(1)(b). However, note Article 8(4); 'Member States may not lay down a fixed amount which they regard as 'sufficient resources', but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State'. This is relative in the extreme. The chances of a British national meeting the minimum requirement for 'sufficient resources' to live in Romania are far higher than those of a Romanian national meeting the minimum requirement to reside in the UK, once again delineating two 'classes' of Union citizens.

⁸⁸ Directive 2004/38/EC, Article 7(1)(b).

however this is again subject to requirements of sufficient resources not to become a burden on the welfare system of the host State, and comprehensive sickness insurance cover.⁸⁹ Family members of a Union citizen satisfying any of the above three requirements are also covered,⁹⁰ including those not holding the nationality of a Member State.⁹¹ While sounding commendable, it must be noted that, for a fundamental right, there remains a significant portion of the population of the Union who are unable to take advantage of this right. Those without 'sufficient resources' - the section of the population least likely to exercise their freedom of movement under Article 39 EC as workers, are effectively barred from a period of residence of anything more than three months.⁹²

This can also be inferred from Articles 14 and 24 of the Directive. Article 14, in setting out provisions on the retention of the right of residence, states in paragraph 3 that '[a]n expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State'.⁹³ Furthermore, paragraph 4 continues that,

[...] [a]n expulsion measure may in no case be adopted against Union citizens or their family members if: (a) the Union citizens are workers or self-employed persons, or (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case the Union citizens and their family members may not be expelled for as long as Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

This appears the embodiment of a lofty ideal – the maxim of free movement of persons within the Community made real, although it must be noted that the emphasis here still remains firmly on the free movement of economic actors. However, Article 24 soon dampens any enthusiasm. It reads:

2. By way of derogation from paragraph 1 [equal treatment provisions], the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence, or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to

⁸⁹ *ibid*, Article 7(1)(c).

⁹⁰ *ibid*, Article 7(1)(d).

⁹¹ *ibid*, Article 7(2). Articles 9, 10 and 11 set out provisions for residence card requirements for family members of a Union citizen who are not nationals of a Member State.

⁹² Although the Court in *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen*, Case C-292/89 [1991] took a more expansive view, opting instead for six months.

⁹³ Although Article 27 sets out provisions for the expulsion of Union citizens and their family members on the grounds of public policy, public security and public health. Article 28 adds that when considering an expulsion order on these grounds, the host Member State must take into account various factors including how long the individual has resided in the host Member State, their age, health, social integration, etc.

grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

This absence of any obligation to provide social support mirrors the requirement that those persons exercising their right of free movement and residence within the Union have 'sufficient resources' to prevent them becoming a burden on the host Member State. The lack of financial assistance to Union citizens wishing to study in another Member State appears to contradict the aims of the Union to encourage free movement of persons for the purposes of undertaking education and underlines the resistance of Member State sovereignty vis-a-vis EU competence. Paragraph 3 of Article 7 provides for Union citizens who are no longer workers or self-employed, but who should, in certain circumstances, retain the same status of a worker or self-employed person. If the person is 'temporarily unable to work'⁹⁴ resulting from illness or accident, or are involuntarily unemployed after having pursued employment for over a year, worker status is to be retained. Moreover, if involuntary unemployment follows employment of less than one year, and the person has registered as a job seeker with the relevant office, the status of a worker is to be maintained for a minimum of six months.⁹⁵ Finally, the status of worker is to be retained if the person embarks on vocational training, although unless unemployment was involuntary, this must relate to previous employment.⁹⁶

Article 8 provides for Member States to require registration of those exercising their freedom of movement residence following a period of three months, for which citizens are required to prove their identity and demonstrate comprehensive sickness cover and either sufficient resources or enrolment at an institution.

Case Law

Prior to the enactment of Directive 2004/38, it was unclear to what extent a right of residence would be granted to Member State nationals, and whether this right would be enabled by the provision of social security and health care in the host State. Article 18 EC is made 'subject to the limitations and conditions already laid down by Community law', thereby allowing derogations from duty on the basis of, amongst others, public security, public health, and public welfare. Further uncertainties surrounded the extent to which these provisions allowed for family members, some of which may be third country nationals, to reside within an EU Member State. Additionally, the issue of whether children born within a Member State to parents of non-Member

⁹⁴ Directive 2004/38/EC, Article 7(3)(a).

⁹⁵ *ibid*, Article 7(3)(c).

⁹⁶ *ibid*, Article 7(3)(d).

State nationality acquire citizenship of the Union raised some interesting questions. This section examines the case law of the ECJ in this area, inevitably concluding that many problems that have arisen regarding the attribution of citizenship rights stem in part from the lack of cross-Union harmonisation in areas of the acquisition of nationality and therefore citizenship.

The first important case of the consideration of citizenship by the ECJ is perhaps that of *Martinez Sala*.⁹⁷ The case was brought by a Spanish national residing in Germany, who had been refused social security on the grounds that she had no residence permit, only a certificate stating that she had applied for one. This was held to be discrimination under Article 12 EC. However, Germany argued that since the appellant was neither a worker nor a job-seeker, and could not therefore *ratione personae* rely on the Treaty, she could not therefore rely on Article 12. The Court, by contrast, held that as a national of a Member State lawfully residing in another Member State, the appellant came within the scope *ratione personae* of the Treaty provisions on EU citizenship, in particular Article 17(2). She was therefore entitled to social security. Indeed, AG Jacobs, in the case of *Konstantinidis*, suggested that citizenship rules might be construed to constitute the fundamental right of EU citizens to move freely anywhere in the Union.^{98,99} While his opinions were not acted on in the case at issue, it remains to be seen whether such 'fundamental' citizenship rights will be declared by the Court. In the case of *Garcia Avello*,¹⁰⁰ a request to change the surnames of minors was rejected. However, drawing on Articles 12 and 17 EC, the Court found that a refusal to change the name of a minor to that by which he was known in another Member State was precluded. The Court reasoned that refusal to allow such a change would contribute to levels of confusion that could pose a barrier to the exercise of freedom of movement by EU citizens.

The Court finally found in favour of the direct effect of Article 18(1) EC in the case of *Baumbast*.¹⁰¹ The case concerns two separate families, that of Mr. B, a German national and his Columbian wife, living in the UK with their children, and Mr. and Mrs. R, a French man and an American woman, living and working in the UK with their children. Mr. B was working for German companies outside the EU, and the UK Home Office therefore refused to renew his residence permit. Under Regulation 1612/68, the rights of residence of Mrs. B and their children were derived from the status of Mr. B as a worker, and consequently their residence permits were also not renewed. Following Mr. and Mrs. R's divorce, the wife's residence permit was not renewed, although the children were given indefinite leave to remain in the UK to continue their education,

⁹⁷ *Martínez Sala v Freistaat Bayern* [1998] Case C-85/96.

⁹⁸ Jacobs AG in *Konstantinidis*, Case C-168/91, 1993. He also suggested that this right should encompass the right to correct transcription of one's name.

⁹⁹ However note that the right to freedom of movement can still be subject to internal border checks, as long as nationals of the Member State are also subject to such checks, *Wijzenbeek*, Case 378/97 [1999].

¹⁰⁰ *Garcia Avello*, Case C-148/02, [2003].

¹⁰¹ *Baumbast and Other v Secretary of State for the Home Department*, Case C-413/99 [2003].

according to their right as children of a worker. The ECJ was faced with three questions. Firstly, do the children of a worker from another Member State retain the right of residence even though the worker is no longer economically active? Secondly, does a parent of such children, who is not an EU national, retain a right of residence following a divorce from an EU national? Finally, does an EU national retain the right of residence under Article 18 EC even if he is not entitled to residence under any other provision of EC law? The Court dealt with each of these questions in turn. In answer to the first the Court referred to Article 12 of Regulation 1612/68 which requires that Member States provide children of workers education 'in the best possible conditions'. Taking a teleological approach to interpretation the Court concluded that in the spirit of the Regulation, children of Member State nationals should enjoy a right of residence to continue their education regardless of whether the worker is economically active. In regard to the second question, an even more teleological approach was taken by the Court in order to give a purposive reading to Regulation 1612/68. The conclusion that followed was that in order for the children of workers to enjoy their right of residence, it becomes necessary that the primary carer of those children be allowed also to reside in the Member State. It is likely that a large part of this answer was based on Article 8 of the European Convention on Human Rights which sets out the Right to Family Life. However, perhaps the most surprising of the three answers was the affirmative response given to the third question. Mr. B, while no longer economically active in the host Member State, retained a right to residence by virtue of his citizenship of the Union under Article 18(1). Mr. B had had no recourse to social security in the host Member State, and held comprehensive medical insurance in Germany, and could not therefore be held to constitute a burden on the State. Mr. B therefore retained his residence permit.

The question of co-habiting partners was raised in the case of *Netherlands v Reed*,¹⁰² in which Ms. Reed asserted her right to remain in the Netherlands. While she was not married to her partner, the Court deemed her a 'social advantage' under Article 7(2) of Regulation 1612/68, reasoning that – even though they were both British citizens, a Dutch national in the place of her partner would have been entitled to have his/her non-national partner reside in the Netherlands. Article 3(2)(b) of Directive 2004/38, however, has clarified the position on this, and '*durable relationships*', duly attested, as well as registered partnerships are now recognised as the equivalent of marriage.

The right of residence still applies solely to the spouse or partner of the citizen, however any family member 'where serious health grounds strictly require the personal care by the Union citizen' should have entry to the Union 'facilitated'.¹⁰³ Furthermore, the family of a Union citizen who has worked in another Member State before returning to his Member State of origin, retain

¹⁰² *Netherlands v Reed*, Case 59/85 [1986].

¹⁰³ Article 3(2)(a).

their community law rights.¹⁰⁴ However, any third-country national spouse of a Union citizen must have been lawfully resident within the territory in order to take advantage of Community rights of residence.¹⁰⁵

These principles were further developed in the joint case *Zhu and Chen*. Mr. and Mrs. Chen had travelled to Ireland to give birth to their second baby, in order to avoid the one child policy of the CPC and also to gain Irish nationality for the child. Such nationality thus meant that the child acquired an automatic right of residence within the EU. While a right of residence for dependent relatives is recognised under Directive 90/364 (now Directive 2004/38) for dependent relatives in ascending line, Mrs. Chen's case was the exact opposite. The Court found that to deprive the mother of residence would be to effectively deprive the child of its right to residence under Article 18(1) EC of any useful effect, regardless of the motives of the individuals concerned in travelling to Ireland.

Dependent rights of third country nationals were considered further in *MRAX*,¹⁰⁶ where the Court was asked for a preliminary ruling on the right of residence of third country nationals married to Member State nationals, who had either entered the Member State unlawfully, or who had entered lawfully but had failed to renew their residence permit. Citing proportionality, the Court found that expulsion from the territory of a Member State on the sole ground that a visa had expired would be 'manifestly disproportionate'¹⁰⁷ to the breach of the sanctions concerned. Once again, unless the third country national poses a threat to public policy, security or health, proof of identity and marriage to a Member State national should suffice to preclude expulsion.

As has been hinted earlier, there appears little distinction between the rights listed in Article 18(1), and other free movement Articles such as Articles 39, 43 or 49. This appears to have been picked up by the ECJ in some more recent cases.¹⁰⁸ This appears to confirm that the Court views citizenship of the Union as complementary to the freedoms already laid out in the Treaty. The fact that any useful rights garnered by Article 18(1) could be found elsewhere in the Treaty leaves Articles 17-22 in a dangerous situation, and intimates that, where they can be found under freedom of movement articles, the Court will choose to invoke these rights to justify a decision as opposed to citizenship rights. The case followed on from a preliminary ruling under Article 234 in the case of *Schwartz v Finanzamt Bergisch Gladbach*,¹⁰⁹ and concerned the refusal of Germany

¹⁰⁴ *The Queen v Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department* Case C-370/9 [1992].

¹⁰⁵ *Akrich* Case C-109/01 [2003].

¹⁰⁶ *MRAX v Belgian State*, Case C-459/99, [2002].

¹⁰⁷ *ibid* 90.

¹⁰⁸ See in particular *Commission v Germany*, Case C-441/02 [2005].

¹⁰⁹ *Schwartz v Finanzamt Bergisch Gladbach*, Case C-76/05, [2007].

to consider tax relief on private school fees where the school was in another Member State. At paragraph 124, however, the Court does turn to the issue of Article 18(1), stating at paragraph 131 that:

By linking the grant of tax relief for school fees to the condition that the latter be paid to a private school fulfilling certain conditions in Germany, and causing that relief to be refused to parents of children attending a school established in another Member State, the national legislation at issue disadvantages the children of certain nationals purely because they have exercised their freedom of movement by going to school in another Member State.¹¹⁰

This was found to be disproportionate to the aims of the legislation, and left Germany in the position of failing to fulfil its obligations under Article 18(1) EC. Once again, in *Commission v Belgium*,¹¹¹ the ECJ considered national legislation that constituted an obstacle to the freedom to provide services. While stoutly declaring at the end of the judgement that Belgium had failed to fulfil its obligations under Article 18 EC, nowhere in the judgement is this Article discussed in relation to the case.

The Reference for a Preliminary Ruling brought by the Finnish Supreme Court in relation to proceedings brought by *Pirkko Marjatta Turpeinen*,¹¹² concerned questions of residence and citizenship more directly. Mrs. Turpeinen, a Finnish national who had retired to Spain, claimed that she should be taxed progressively on her pension, as would have been the case were she resident in Finland. Instead, she paid a fixed rate of tax far exceeding the level under progressive taxation, due to her Spanish residence. While pointing out that direct taxation remained within the competence of Member States, the Court stated that even so, this had to be carried out in a way that complied with Community law. Having found that the case did not fall under Article 39 EC due to the appellant's retired status, the Court turned to Article 18 EC. Stating that legislation which places at a disadvantage citizens who have exercised their freedom to move, the Court stated that this ran counter to the principle of equality that underpinned the development of Union Citizenship, and that where the pension constituted all or most of the appellant's income, legislation leading to unequal taxation based on residence was unlawful.¹¹³

¹¹⁰ *Commission v Germany*, Case C-318/05, [2007].

¹¹¹ *Commission of the European Communities v Kingdom of Belgium* Case C-522/04, [2007].

¹¹² *Pirkko Marjatta Turpeinen*, Case C-520/04, [2006].

¹¹³ See also *Commission of the European Communities v Portuguese Republic* Case C-345/05 26th October 2006 concerning the non-compatibility of Portuguese legislation requiring that exemption from capital gains tax be put toward reinvestment in property in Portugal. Also *Commission of European Communities v Kingdom of Belgium* Case C-522/04, 3rd October 2006 concerning tax legislation providing less favourable treatment of occupational pension schemes paid to insurance undertakings established abroad.

The question of residence was raised once again in the Reference for Preliminary Ruling under Article 234 EC brought by the Centrale Raad van Beroep (Netherlands) in relation to the case *Tas-Hagen*.¹¹⁴ The appellant claimed to be entitled to a war pension. However, due to their residence in Spain at the time of the application, this was denied. The Court found that Article 18(1) was indeed to be interpreted as precluding national legislation requiring residence in the Member State at the time of the application. Furthermore the Court found that the setting of a residence requirement was insufficient to determine the integration of the individual within that society, leaving such a provision as falling short of the proportionality requirement. The legislation was found to be incompatible. However, this should be contrasted with the recent Preliminary Ruling under Article 234 EC in the case of *De Cuyper v Office national de l'emploi*.¹¹⁵ The question at issue here was the legitimacy of a residence requirement for the purposes of access to unemployment benefit when, under national law, the appellant was not required to sign on to show availability for work, due to his age. The Court noted that, while Article 18 EC confers on every citizen of the Union the right to move and reside freely within the Union, this right is not unconditional. Furthermore, Article 10 of Regulation 1408/71 does not include access to unemployment benefit to be made available to nationals resident in other Member States. A residence requirement would, according to the Court, limit the right of Union citizens to move and reside freely within the Union under Article 18 EC, and could only be justified therefore by reference to 'objective considerations of public interest independent of the nationality of the persons concerned and proportionate to the legitimate objective of the national provisions'.¹¹⁶ The reasons given by Belgium for the imposition of such requirements were in order for that State to monitor closely the developing situation of the applicant. This was deemed reasonable by the Court.

The Right to Vote and Stand as a Candidate in Local and European Elections

'Political participation in society through exercise of the right to vote is generally seen as an inherent right of citizenship [...]'¹¹⁷

While the right to vote in European Parliamentary elections has been relatively straightforward for citizens of the Union, those at a local level have caused more problems. Active and passive voting rights in local elections were proposed as early as 1975 in the Tindemans Report as one of the 'special rights' that should be granted to Community citizens. The Scelba and Macciochi Reports also emphasised the importance of participation in political life at the local level for the

¹¹⁴ Reference for Preliminary Ruling in *Tas-Hagen v Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, Case C-192/05, [2005].

¹¹⁵ *Gérald De Cuyper v Office national de l'emploi*, Case C-406/04 [2006].

¹¹⁶ at 40.

¹¹⁷ O'Keefe and Twomey, *Legal Issues of the Maastricht Treaty* London, Chancery Law, 1994.

purposes of creating a European society, while the Addonino Report, considering that there was no basis in EEC law for voting rights at the local level, concluded that the matter was one of Member State competence. A Danish proposal put before the ICG leading up to the Single European Act on passive and active voting rights in the EC, while carefully considered, was not adopted.

The 1988 draft directive on voting rights for Community nationals in local elections in their Member State of residence was based on Article 235 EEC, and restated the conclusion that such rights did not impinge on sovereignty. Indeed, the TEU provisions set out clear legal provisions for local voting rights. However, squaring this circle with one of national sovereignty was illustrated by the French, among others, whose Constitutional Court rules that in order to satisfy the provision of Community law, constitutional reform would be needed in France.¹¹⁸ As Jessurun d'Oliviera has pointed out,¹¹⁹ the requirement of constitutional change in a number of Member States could be construed as antithetical to Article F(1) TEU, which states that the Union shall respect the national identities of Member States.

Legislation

Article 19 provides;

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 190(4) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the

¹¹⁸ Indeed, Constitutional reform was undertaken in France in order to bring domestic into line with Community law, in this case to allow for the election of non-nationals as Mayor. See Article 88(3) of the Constitution of France.

¹¹⁹ Quoted in *ibid*.

Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Thus some form of democratic legitimacy underpinning Union citizenship is established. It must be noted at this point, however, that while enfranchisement at the local and European level is provided, rights for democratic participation at the national level are conspicuous by their absence. Given that the majority of decisions likely to affect the individual are taken at the national level, both domestically and at the Council of Ministers, Article 19 begins to appear no more than a token gesture.

The right to stand as a candidate in local and European elections is also granted to Union citizens by Article 19. This has caused some discomfort in several Member States, who have been forced to amend constitutional documents to allow non-nationals to stand for election within their territories.

Case Law

In the Preliminary Ruling concerning the case of *Eman & Sevinger v College van burgemeester en wethouders van Den Haag*,¹²⁰ the Court considered the scope of voting rights devolving from citizenship of the Union, and whether such rights were applicable to nationals resident in overseas countries and territories (OCTs). In particular, could nationals of Member States residing in OCTs vote and stand as candidate in European Parliamentary elections under Article 19(2) EC?

First, it should be noted that the OCTs are subject to the special association arrangements set out in Part Four of the Treaty (Articles 182 EC to 188 EC) with the result that, failing express reference, the general provisions of the Treaty do not apply to them. [...] Since the provisions of the Treaty do not apply to the OCTs, the European Parliament cannot be regarded as their 'legislature' within the meaning of that provision. On the other hand, it is within the bodies created within the framework of the association between the Community and the OCTs that the population of those countries and territories can express itself, through the authorities which represent it.¹²¹ However, a definition of who can rely on citizenship rights is absent from Article 17 EC, the only requirement being nationality of a Member State. The Court therefore found that 'persons who possess the nationality of a Member State and who reside or live in a territory which

¹²⁰ *Eman & Sevinger v College van burgemeester en wethouders van Den Haag*, Case C-300/04, [2006].

¹²¹ at 46.

is one of the overseas countries and territories referred to in Article 299(3) EC may rely on the rights conferred on citizens of the Union in Part Two of the EC Treaty.¹²²

The Court refused to be drawn on the practice of other Member States who maintained particular relations with their OCTs. Having examined the situation within the Netherlands as regards election to the national Parliament, the Court continues: 'the provisions of Part Two of the Treaty relating to citizenship of the Union do not confer on citizens of the Union an unconditional right to vote and to stand as a candidate in elections to the European Parliament.'¹²³

While the Court considers it appropriate for a Member State to define who can vote and stand as a candidate in European Parliamentary elections by reference to residence status, the resulting discrimination in the present case could not be objectively justified. This is due to the fact that a national of the Netherlands residing in a non-Member State would be eligible to vote and stand as a candidate, while nationals of the Netherlands residing in the Netherlands Antilles or Aruba would not. This dichotomy would suggest unequal treatment of citizens. However, the Court refrained from ruling further, stating that the delineation of those who are or are not eligible to vote and stand as a candidate in European Parliamentary elections falls within the competence of Member States.

A similar question of voting rights arose in *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland*. Spain sought a ruling from the Court that in granting rights to vote and stand as a candidate in European Parliamentary elections to residents of Gibraltar (a British Crown Colony not forming part of the United Kingdom), the United Kingdom infringed Articles 189 EC, 190 EC, 17 EC and 19 EC. The Court noted that it was in order to comply with the ruling in a case brought before the European Court of Human Rights in *Matthews v United Kingdom*, that the UK adopted the current contested legislation. While the Court reiterated that Articles 17 and 19 EC are problematically unspecific in setting out precisely who is covered, Articles 189 and 190 EC detailing EU Parliamentary election procedure also fails to provide detail, using the word 'peoples' which as the Court states, has a different inference in every Community language. The Court further notes that the provisions on citizenship are not exhaustive in their allocation of rights. For example, the right to petition the Parliament is available to all natural and legal persons having their principal place of residence within the territory of the Member States – EU citizen or not. Thus Article 17 EC – even were a definition to exist – could not be taken as defining the persons to whom rights contained elsewhere in the Treaty, apply. The Court concluded that:

¹²² at Operative Part no1.

¹²³ at 52.

in the current state of Community law, the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law, and that Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory.¹²⁴

There was therefore no evidence that UK legislation extending the right to vote and stand as a candidate in elections to the European Parliament were contrary to Community law.

Questions of nationality, however, clearly remain firmly within the competence of Member States. This was confirmed by the ECJ in *Kaur*,¹²⁵ where a citizen of the United Kingdom and Colonies, renamed a British Overseas Citizen by the 1981 British Nationality Act, was refused leave to remain in the UK. The Court firmly stated that such residence, being dependent on the nationality afforded to the person, was to be determined with reference to the 1982 UK Declaration on Nationality, thus leaving interpretation to the national court.

Interestingly, the 1982 Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the Definition of the Term 'Nationals', defines a British national as, '(a) British citizens'.¹²⁶ As Union citizenship is defined by nationality, this becomes a circular definition with no external reference – as such, of little help.

The Right to Diplomatic or Consular Protection

Legislation

Article 20 EC provides that:

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.

¹²⁴ at 78.

¹²⁵ *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur*, Case C-192/99 [2001].

¹²⁶ Declaration of the United Kingdom of Great Britain and Northern Ireland on the Definition of the Term 'Nationals', 1983.

While this right cannot be faulted in its aims, Siofra O'Leary¹²⁷ has pointed out that the lack of information disseminated to Union citizens has meant that very few are aware of their rights in this regard, making those rights useless.

The Right to Petition the European Parliament

Legislation

Finally, Article 21 EC sets out petitioning provision: 'Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 194'.

Additionally, any citizen, acting individually or jointly with others, may at any time exercise his right of petition to the European Parliament under Article 194 of the EC Treaty, which grants the right of petition to all natural or legal persons residing within the Union. This includes third country nationals, and as such, the scope of Article 194 is significantly broader than that of Article 21. As Article 194 EC is still in operation, the need for Article 21 EC is questionable.

The Right to Apply to the European Ombudsman

Legislation

Article 21 EC further states: 'Every citizen of the Union may apply to the Ombudsman established in accordance with Article 195'.

A similar argument can be extended to this provision.

The Right to Address European Institutions in a Listed Language and Receive and Answer in that Language

Legislation

Article 21 EC finally states: 'Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language.'

¹²⁷ S O'Leary, *European Union Citizenship: Options for Reform* London, IPPR, 1996.

While commendable in spirit, Article 21 arguably adds nothing new to the bundle of rights available to Member State nationals. Indeed, third country nationals also have the right to petition the European Parliament, leading to the question of whether Article 21 has taken a reverse step by including only those with Member State nationality.

The Right to Social Security

As we saw above, the ECJ had set out an original position whereby job-seekers were denied access to social advantages afforded to workers. However, the advent of provisions on citizenship of the Union, and their development by the Court, has had a significant impact expanding the ability of citizens to exercise rights. In the case of *Collins*¹²⁸, the applicant, of American and Irish nationality, as refused jobseeker's allowance in the UK while he was looking for work. While this clearly followed the *Lebon* line, the Court found that in light of Article 17 EC and the development of the right to equal treatment for citizens, it was no longer sustainable to exclude from Article 39(2) financial benefits which would facilitate access to employment. While the Court agreed that it was proportionate for the Member State to require the applicant to demonstrate a link with the country, or a degree of integration, the ruling marked a shift towards a position where there is no justification for discrimination in access to any benefits. In the case of *Trojani*,¹²⁹ the Court ruled that it was for the Member State to determine whether or not the applicant qualified as a worker. However, were the applicant to fail the worker test, as a Union citizen lawfully resident in another Member State, he could not be discriminated against with regard to the Minimex subsistence allowance – a social benefit guaranteeing a basic standard of living.

Interestingly, while *Collins* appears to open the doors to social benefits to all, Directive 2004/38 set out the antithesis. Article 24(2) sets out that 'the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided [for job-seekers]...'.

More recently, in the case of *Hendrix*,¹³⁰ the Court considered whether incapacity benefit to disabled young people could be based on a requirement of residence within the territory of the Member State concerned. The Court, noting at 61 that: 'According to settled case-law, Article 18 EC, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 39 EC in relation to freedom of movement for workers' went on to determine the case with reference only to Article 39

¹²⁸ *Collins*, Case C-138/02 [2004].

¹²⁹ *Trojani*, Case C-456/02 [2004].

¹³⁰ *D. P. W. Hendrix v Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen*, Case C-287/05 [2007].

EC and relevant Regulations. While the benefit could be granted only to those resident within the territory of the Member State, the court reminded the national court at Operative part 2 that this:

[M]ust not entail an infringement of the rights of a person in a situation such as that of the applicant in the main proceedings which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. It is for the national court, which must, so far as possible, interpret the national legislation in conformity with Community law, to take account, in particular, of the fact that the worker in question has maintained all of his economic and social links to the Member State of origin.

Right to Education

Legislation

The most extensive rights to education are, in keeping with the economic aims of the Community, to be enjoyed by workers and children of workers under Articles 12 and 7(3) of Regulation 1612/68. The ECJ has repeatedly stated that a worker who becomes voluntarily unemployed in order to take up a course of full-time education should not lose her status as a worker if there exists a connection between the previous career and the area of study.¹³¹ Social advantages, such as maintenance grants, are available to workers under Article 7(2) of the Directive, and therefore could be claimed. However, as discussed earlier, the Court set out that work taken after the confirmation of future studies, and which was preparatory for the studies and not for further employment could not classify the individual as a worker for the purposes of access to maintenance grants.¹³² Furthermore, as regards fee levels, the ECJ has stated that discrimination on the grounds of nationality is prohibited by Article 12 EC,¹³³ which is to be read in conjunction with the Treaty provisions concerning citizenship in order to determine the sphere of application.¹³⁴ Thus inequality regarding tuition fees is prohibited under the general rights of students in the Treaty and discrimination on the basis of nationality was 'contrary to the principles which underpin the status of citizen of the Union'.¹³⁵ However, access to maintenance grants will depend on the individual's status as a worker, and a difference in treatment could only be justified under Article 12 if the treatment was based on objective considerations independent of the nationality of the person concerned, and was proportionate to the legitimate aim of the national provisions.¹³⁶

¹³¹ Most notably in *Lair*, Case C-39/86, [1988], although see *Raulin v Minister van Onderwijs en Wetenschappen* Case C-357/89 [1992], and *Bernini v Minister van Onderwijs and Wetenschappen*, C-3/90 [1992]. This requirement does not apply if the worker becomes involuntarily unemployed and has to retrain for a new career.

¹³² *Brown*. Note that it is unlikely that this case would be decided in the same way now considering the more recent ECJ case law.

¹³³ *Forcheri v Belgium*, Case C-152/82 [1983]. See also *Gravier v Liege*, Case C-293/83 [1985].

¹³⁴ *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, Case C-184/99 [2003].

¹³⁵ *D'Hoop v Office national de l'emploi* [2004], ICR 137, (Case C-224/98).

¹³⁶ *The Queen (Bidar) v London Borough of Ealing*, Case 209/03 [2005], *D'Hoop v Office national de l'emploi* [2004], ICR

Case Law

In the recent case of *Morgan and Bucher*¹³⁷ the Court was asked whether the 'first-stage studies condition' was a legitimate restriction on the eligibility of students for education or training grants. The German legislation at issue required that in order to qualify for such a grant, the student wishing to study in another Member State must have completed one year of their course in Germany. Finding that Articles 17 and 18 EC precluded such a requirement, the Court ruled measures demanding that one year of an educational course be followed in the Member State of origin incompatible with the Treaty. Indeed, the Court has generally found in favour of those wishing to exercise their rights to freedom of movement for the purposes of undertaking education. In particular, the rights of children to remain within the Union to complete their education have been consistently upheld by the Court. The case of *Baumbast* saw the Court allowing the children of a Member State national and a third country national to remain within the Union while finishing their education by nature of the fact that the Member State national had exercised his right of free movement for economic purposes, even though at the time of the case he was no longer economically active. Furthermore, by reference to Article 8 of the European Convention on Human Rights which lays down the right to family life, the mother, a third country national, was allowed to remain within the EU to care for the children. The Court reasoned that the grant of a right to remain in the EU for the purposes of education was meaningless unless the children were able to exercise such by being cared for within the Union.

In the case of *Bidar*,¹³⁸ the Court ruled that it was permissible for a Member State to ensure that a maintenance grant for students from other Member States did not become an unreasonable burden on the host Member State by only granting such assistance to students who could demonstrate a certain degree of integration into the host Member State. It was, however, disproportionate to require students of other Member States to demonstrate that they were 'settled' in the host Member State, a requirement that would necessarily have precluded nationals of other Member States and would have constituted discrimination on the grounds of nationality.

¹³⁷, (Case C-224/98), *Garcia Avello*, Case C-148/02 [2003].

¹³⁷ *Rhiannon Morgan v Bezirksregierung Köln (C-11/06) and Iris Bucher v Landrat des Kreises Düren (C-12/06)* [2007].

¹³⁸ *The Queen (Bidar) v London Borough of Ealing*, Case 209/03 [2005].

The Right of Permanent Residence

Legislation

Chapter IV of Directive 2004/38/EC sets out provisions on the right of permanent residence, Article 16 stating:

1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

[...]

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

However, workers or self-employed persons who have worked in the host Member State for at least one year, and resided there for at least three years, upon reaching the national retirement age can acquire permanent residence in the host Member State. Likewise, workers or self-employed persons who have resided in the host Member State for a minimum of two years when they stop working due to a permanent incapacity are also entitled to permanent residence.¹³⁹ Similarly, family members of a worker or self-employed person are entitled to permanent residence upon the acquisition of such by the worker.¹⁴⁰ Moreover, should the worker die following at least two years employment in the host Member State, or from an occupational accident, the surviving family automatically qualify for permanent residence.¹⁴¹

Thus, while some rights have been made more accessible – such as that to permanent residence – free movement of Union citizens remains the preserve of wealthier Europeans. Member State sovereignty in the realm of social security and welfare remains intact under the Directive, mirroring the tendency of Member States to contest qualification for benefits as opposed to residency or expulsion requirements. It has been suggested that the resulting situation sees a floating underclass of European citizens who, while being free to move anywhere within the Union, cannot qualify for social security. The fact that they probably cannot be deported is unlikely to help State intervention against their begging and theft, which remain as the only means by which to forge an existence. Directive 2004/38 does little to improve this situation.

¹³⁹ Directive 2004/38/EC, Article 17(1)(b).

¹⁴⁰ *ibid.*, Article 17(3).

¹⁴¹ *ibid.*, Article 17(4)(a),(b).

The Right Not to be Discriminated Against

Legislation

Article 12 (ex Article 6) of the EC Treaty prohibits 'any discrimination on grounds of nationality' thereby guaranteeing Member State nationals who choose to exercise their right to freedom of movement or establishment treatment equal to that received by nationals of the host Member State. Hence, a Member State national is entitled, under only Articles 12 and 39 EC, to exercise a right to freedom of movement for the purposes of work to any other Member State, and receive the same treatment as any national of that Member State. The provisions under Chapter II of the Treaty – those on citizenship – clearly do not add much (if anything) to this.

Case Law

The Court in *K. Tas-Hagen and R. A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad*¹⁴² considered the interpretation of a Dutch national law in light of Article 18 EC. The national law precluded the expatriation of a civilian war pension to those who were not resident in the Netherlands at the time of applying for the allowance. The Court found that Article 18 had to be interpreted such that it precluded discrimination based on residence within the Union.

The ECJ relied on Article 12 EC, amongst other provisions, to uphold the applicant's right not to be discriminated against in the case of *Konstantinidis*.¹⁴³ The case concerned the translation of the applicant's name into German, which was carried out in such a way as to be a barrier to the adequate recognition of the individual. While his opinion was not followed by the Court in this case, AG Jacobs found that incorrect translation of one's name could constitute a barrier to the freedom of movement of workers within the Union, and as such was prohibited by Article 12. Once again in *Garcia Avello*,¹⁴⁴ the Court considered the refusal by one Member State to allow a change of family name of two minors. Spanish custom required the usage of a different family name to that which the children were known by in Belgium. An application made by the parents to change the children's family name to the same as that used in Spain was refused by the Belgian authorities. The Court found that such a refusal not only gave rise to confusions, but posed a barrier to the exercise of their rights to freedom of movement. As such, Articles 12 and 17 EC prohibited such a refusal.

¹⁴² *K. Tas-Hagen and R. A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, Case C-192/05 [2006].

¹⁴³ *Katsikas v Konstantinidis*, Case C-168/91 [1993].

¹⁴⁴ *Garcia Avello*, Case C-148/02 [2003].

Again, the Court found in the case of *Bickel & Franz*¹⁴⁵ that preclusion of use of the German language in court in a German-speaking area of Italy was contrary to Article 12 EC, and could not be justified with regard to the objective pursued, since there was no evidence that the protection of ethno-cultural minorities would be undermined by the inclusion of the German-speaking minority.

However, the more recent case of *Geven*¹⁴⁶ has indicated a more restrictive interpretation of Community law. Mrs. Geven, a Netherlands national, lived and worked in the Netherlands. After the birth of her son, she took a part time job in Germany, working between 3 and 14 hours per week. Her application for child raising allowance for the first year of her son's life was refused by the Land of North Rhine-Westphalia on the grounds that Mrs. Geven did not have her permanent residence in Germany and was not in a contractual employment relationship of at least 15 hours per week. The Court found that Article 7(2) of Regulation 1612/68 does not preclude exclusion from receiving a social advantage with the characteristics of the German child raising allowance of a national of one Member State who resides in that State and who is in minor employment in another Member State. This is on the grounds that the person does not have their permanent or ordinary residence in the Member State of employment. This case followed that of *Hartmann*.¹⁴⁷ Ms. Hartmann, an Austrian national had married a German national, who worked in Germany. The family resided in Austria. The case concerned an appeal against the refusal of Germany to grant child raising allowance on the grounds of residence. The Court, at 27, found that:

Article 7(2) of Regulation No 1612/68 provides that a migrant worker is to enjoy the same social and tax advantages in the host Member State as national workers. Since child-raising allowance is a 'social advantage' within the meaning of that provision, a migrant worker in a situation such as that of Mr Hartmann, and consequently his spouse, must [...] be able to enjoy it on the same basis as a national worker.

Thus the Court ruled that a national of a Member State who had remained in employment within that Member State but who resided in another Member State, could not be excluded from access to social advantages to which nationals in the Member State of origin were entitled.

¹⁴⁵ *Bickel & Franz*, Case C-274/96 [2007].

¹⁴⁶ *Wendy Geven v Land Nordrhein-Westfalen*, Case C-213/05, [2007].

¹⁴⁷ *Gertraud Hartmann v Freistaat Bayern*, Case C-212/05 [2007].

Section 4 – Supplementary Rights

The European Social Charter

Signed originally in 1961 and updated in 1996, the European Social Charter (the Charter) sets out rights and freedoms of a social nature and establishes regulatory mechanisms to guarantee their respect by Member States. The rights guaranteed by the Charter cover such areas as housing, health, education, employment, social protection, movement of persons and non-discrimination, and concern all individuals in daily life. Of the forty-six Council of Europe Member States who have signed the Treaty, thirty-eight States have signed and ratified the Charter, making the rights set out therein of widespread significance.¹⁴⁸ The European Committee on Social Rights (ECSR), the body charged with monitoring compliance by the States with the Charter, is composed of thirteen independent, impartial members, who are elected by the Council of Europe's Committee of Ministers for a period of six years, renewable once. As the ECSR interprets and informs of the compatibility of national law with the statements set out in the Charter, its role has been described as juridical.¹⁴⁹ Furthermore, the material overlap of rights set in the Charter with those found in other Charters and Conventions implies that ECSR has an even broader juridical scope than is immediately apparent.¹⁵⁰ Indeed, the jurisprudence of the ECSR has been described as a 'plea in favour of the indivisibility of human rights; or, better than a plea, as an illustration of that indivisibility at work'.¹⁵¹ However, the ECSR treats social rights as fully-fledged human rights, thereby affording such the same status as the inalienable fundamental rights found in documents such as the European Convention on Human Rights. Moreover, decisions rendered within the context of collective complaints are often based upon the jurisprudence formed upon examination of national reports, which as has been seen from earlier discussions, are not immune from the impact of Community law.¹⁵² Thus, while the ECSR is primarily tasked with the protection of social rights, the idea – apparent in most European constitutions that these are secondary, or lesser rights – has been disregarded by the Committee. Civil, social, and borderline rights have thus all been upheld by the ECSR, a position that has led to the inevitable blurring of any clear delineation between the two.¹⁵³

¹⁴⁸ The United Kingdom signed and ratified the Charter on 11th November 1962. The UK has accepted 60 of the Charter's 72 paragraphs, but has not signed or ratified Protocol 1 which adds new rights, and does not agree to be bound by the collective complaints procedure. The United Kingdom has signed, but not yet ratified, the Protocol reforming the supervisory mechanism and the Revised Charter. For more information see http://www.coe.int/T/E/Human_Rights/Esc/5_Survey_by_country/.

¹⁴⁹ J Akandji-Kombé, 'The Material Impact of the Jurisprudence of the European Committee of Social Rights', in de Búrca and de Witte, *Social Rights in Europe*, Oxford University Press, 2005 p 89.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.* 90.

¹⁵² *ibid.*

¹⁵³ Indeed, the European Court of Human Rights, in *Airy v Ireland*, acknowledged for the first time that there was no strict boundary between civil rights on the one hand and social rights on the other. In *ibid.* 92.

Violations of Charter provisions can be brought to the attention of the ECSR in two ways. Each State must submit an annual report to the Committee detailing the ways in which rights guaranteed under the Charter have been upheld, and where more work is needed. Secondly, under the 1995 Additional Protocol which provides for a system of Collective Complaints, alleged violations of the Charter may be brought to the ECSR.

Freedom of Movement

Articles 1-17 and 20-31 of the Charter, while not specifically mentioning them, applies to foreigners provided they are nationals of Parties and lawfully resident or working regularly within the territory of the Party concerned. More specifically however, Articles 18 and 19 of the Charter grant rights exclusive to the migrant workers and their families. Article 18 sets out the right to engage in gainful occupation in the territory of another Party, while Article 19 secures the right of migrant workers and their families to protection and assistance. Interestingly, those entitled to rights are not 'workers' but 'persons', as the ECSR has found that job-seekers are also to be included. Article E of the Appendix sets out that '[t]he enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground...'.¹⁵⁴ Included in this equal treatment provision are freedom of access to information, equal treatment concerning taxes, language training, social assistance, etc.

Right to Education

Article 17 of the Charter, in addition to Articles 10 and 15, sets out a general right to education, requiring of States that a free education system is set up and maintained. While no age has been set, the ECSR has made clear that education should be compulsory for a reasonable period, generally until the minimum age of employment.¹⁵⁵ Additionally, the right to vocational training is guaranteed under Article 9, both at school and in the workplace.

Equal Treatment of Men and Women

Article 17 of the Charter, in addition to Articles 10 and 15, sets out a general right to education, requiring of States that a free education system is set up and maintained. While no age has been set, the ECSR has made clear that education should be compulsory for a reasonable period in

¹⁵⁴ Migrant's Rights in the European Social Charter, Information Document Prepared by the Secretariat of the ESC, 22nd June 2006.

¹⁵⁵ The Right to Education under the European Social Charter, Information Document Prepared by the ESC, 17th November 2006.

general until the minimum age of employment.¹⁵⁶ Additionally, the right to vocational training is guaranteed under Article 9, both at school and in the workplace.

Children's Rights

Certain rights set out in the Charter can be seen as pertaining in particular to children. The right of maternity leave, of the family, of housing and of childcare all concern the well-being of children. Furthermore the Charter sets out that children should be equal regardless of the conditions of their birth, and have a right to know their biological origins and identity. Punitive measures following criminal behaviour by a child are not to be treated too severely, and health education programmes must be followed in schools. Rights further include protection from abuse, exploitation and trafficking, and, as noted above, a right to an education that is both accessible and effective. While child labour is specifically prohibited, conditions are laid down regarding the working conditions of 15-18 year olds, including the limitation by the national government of the number of hours per week that a young worker may undertake employment, and the level of remuneration to which they are entitled.

The European Convention on Human Rights

The European Convention on Human Rights (ECHR) and its interpretation and enforcement mechanism, the European Court of Human Rights (ECtHR) are, like the Charter, under the auspices of the Council of Europe, and are therefore institutionally and constitutionally separate from the European Union. However as has already been seen, ECtHR jurisprudence has run parallel to that of the European Court of Justice, and has increasingly been seen as a point of reference by the latter. It is therefore important to take note of the rights and values set out in the ECHR by means of assessing the basis upon which citizenship rights were necessarily grounded. By order of the fact that the ECHR required transposition into national law in order to become fully justiciable within that State, the resulting legislation incorporated into national laws the rights set out in the original Convention. As such, citizenship of the Union is premised on the willingness of Member States to uphold the rights set out in the Convention with regard to all persons.

The ECHR sets out a list of rights, including the right to life (Article 2), the right to liberty and security (Article 5), the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), and the prohibition of discrimination (Article 14).

¹⁵⁶ The Right to Education under the European Social Charter, Information Document Prepared by the ESC, 17th November 2006.

The EU Reform Treaty and the EU Charter of Fundamental Rights

The version of the Treaty Establishing a Constitution for Europe signed in Rome 2004 also sets out provisions for citizenship of the Union in Article I-10 under Title II, which also encompasses the Charter on Fundamental Rights. Both the wording and content greatly resemble that found in the EC Treaty. Article 2 of the Treaty sets out the philosophical foundations of the Union:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3 sets out the goals of the Union, including the promotion of peace and the well-being of its peoples (Art 3(1)), the establishment of an internal market (Art 3(3)), and the establishment of an economic and monetary union (Art 3(4)). Article 3(2) states:

The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

In a similar vein, Article 3 continues:

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

More crucially, however, is the inclusion within the Reform Treaty of a Charter of Fundamental Rights of the Union. This Charter was drawn up by a study group set up at the Cologne summit in 1999, with the intention of cataloguing the various fundamental rights spread around the EU Treaties, European Convention on Human Rights and the Declaration on Fundamental Rights of the European Parliament 1989. As such, the aim of the Charter was not to codify new rights. Article 6 of the Reform Treaty states: 'The Union recognises the rights, freedoms and principles

set out in the Charter of Fundamental Rights of 7 December 2000, as adapted [at..., on... 2007], which shall have the same legal value as the Treaties.'

It sets out a list of rights to be upheld within the Union, neatly categorising such under the subheadings of Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, Justice, and General Provisions of Interpretation and Application. It is under the fifth subheading, Citizens' Rights, that additional rights can be found to those set out in the EC Treaty. Article II-101 provides for the 'Right to Good Administration'. This appears to mirror other provisions of the Charter falling mainly under the subheading of Justice, but entails the right to have one's affairs handled 'impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union'.¹⁵⁷ Article II-102 provides for the right of access to documents of institutions of the Union. Finally, Article II-105 sets out the rights of freedom of movement and residence. While paragraph (1) sounds familiar, paragraph (2) of this Article is of interest. It states: 'Freedom of movement and residence may be granted, in accordance with the Constitution, to nationals of third countries legally resident in the territory of a Member State'.

Of course, until the Treaty – of which the Charter is an integral part – is ratified and becomes binding, this provision has little meaning. Indeed, given Protocol no7 on the Application of the Charter of Fundamental Rights to Poland and to the United Kingdom, the rights guaranteed in the Charter will likely remain ineffective in the two countries. The Protocol sets out:

The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.¹⁵⁸

The Article goes on to clarify that nothing in Title IV of the Charter creates justiciable rights that are not available to citizens of Poland or the United Kingdom under the national laws of those countries respectively.

However, the impact of the Charter can be seen in the Opinions of Advocates General and judgments of the ECJ. It remains to be seen however whether the Charter is a precursor to a European immigration policy and border control.

Of further interest are the second and third paragraphs of Article 6 of the Reform Treaty, which state:

¹⁵⁷ Treaty Establishing a Constitution for Europe, Part II, The Charter of Fundamental Rights of the Union, Art II-101(1).

¹⁵⁸ Art 1(1), Protocol no7 on the Application of the Charter of Fundamental Rights to Poland and to the United Kingdom.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Accession to the ECHR, long in the pipeline, would finally allow ECJ judges to legitimately draw on these freedoms, and arguably the jurisprudence of the ECtHR, bringing the two institutions more into line with one another. Finally, the explicit mention of 'general principles' of Union law also offers more scope to the ECJ in not only harmonising EU and Council of Europe jurisprudence, but upholding the rights of *all* persons within the Union.

Section 5 – Problems

Problems with EU Citizenship

Several problems with the current citizenship provisions can be identified, and as such, deserve individual attention. This section aims to outline those problems and consider the likely impact on the development of citizenship.

Reverse Discrimination and Self-Discrimination

Described by some as 'a necessary evil',¹⁵⁹ the idea of the wholly internal situation, or 'reverse discrimination' concerns the applicability of a national measure to nationals of that Member State, while nationals of another Member State are exempt. While the Court may be re-examining the wholly internal situation through recourse to Article 234 EC, the issue remains contentious.

In the notable case of *Rutili*¹⁶⁰ the Court considered whether residence restrictions introduced in certain *départements* across France could prohibit the exercise of the right of free movement by a Union citizen, and whether such restrictions could be justified on grounds of public policy. The Court stated that,

measures restricting the right of residence which are limited to part only of the national territory may not be imposed by a Member State on nationals of other Member States

¹⁵⁹ C Ritter, *Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234*, June 2006, available at <http://ssrn.com/abstract=954242>.

¹⁶⁰ *Roland Rutili v Ministre de l'intérieur*, Case C-36/75 [1975].

who are subject to the provisions of the Treaty except in the cases and circumstances in which such measures may be applied to nationals of the State concerned.¹⁶¹

Thus as long as the Union citizen had exercised his right to freedom of movement, he could not be subject to any measures that did not apply to nationals of the host Member State. Building on this, the (joined) cases of *Aubertin, Collignon, Creusot et al*¹⁶² saw the Court rule that Community measures do not preclude national provisions requiring nationals of that Member State to possess a qualification not required of nationals of another Member State, even though such a ruling clearly resulted in discrimination. In other words, measures contrary to Community law, contested in a factual situation that does not include a cross-border element or invoke other Community freedoms, will remain lawful under the competence of the Member State. This approach has been explained by reference to the original aim of the Community – that of access to markets, not the right of unfettered commerce within those markets. This argument appears an unconvincing justification of the wholly internal rule. Firstly, access to a market necessarily includes the ability to carry on a business within that market. If this latter is lost, the former becomes a friendly gesture, but ultimately meaningless. Furthermore, it is difficult to see how the unwillingness of the Court to ensure that commerce within markets is guaranteed is at all responsible for the construction of the wholly internal situation. Far more likely a reason is the sanctity of Member State competence regarding internal markets. This is the issue that needs to be approached if reverse discrimination is not to remain a necessary evil.

The ECJ appears to have heeded this proposal in its recent case law. *Martinez-Sala* and *Baumbast*, saw the Court find a cross-border element in facts where the applicant was no longer exercising one of the four freedoms. Instead, the Court was satisfied that the applicant could rely on Union citizenship or a link to a person who did exercise one of the four freedoms, even if that link was no longer in existence. Moreover, the case of *Carpenter* saw the Court develop what appears to be a very tenuous link to one of the four freedoms. While Mrs. Carpenter, a third country national in possession of no residence permit, was unemployed, it was sufficient for the Court that her husband, an entrepreneur, sold a 'significant proportion' of his services to buyers in other Member States. Invoking the provisions on free movement of services, the Court concluded that the deportation of Mrs. Carpenter would affect the ability of Mr. Carpenter to conduct his business. As Ritter points out, the application of such tenuous links to one of the four freedoms could seriously reduce the problem of the wholly internal situation. For example, if the *Carpenter* case was applied to those who receive services from another Member State, such as television

¹⁶¹ *ibid* at operative part.

¹⁶² *Criminal proceedings against Jean-Louis Aubertin, Bernard Collignon, Guy Creusot, Isabelle Diblanc, Gilles Josse, Jacqueline Martin and Claudie Normand*, C-29/94, C-30/94, C-31/94, C-32/94, C-33/94, C-34/94 and C-35/94 [1995].

programmes, the scope of persons who then fall within Community law increases exponentially.¹⁶³

Although prohibited by Article 12, and antithetical to the spirit of the European Union, discrimination can still be seen in various other functions of the Union. Treaty provisions on citizenship of the Union have been used to enhance non-discriminatory provisions, as discussed above, yet this can only be accomplished by judicial interpretation *in areas and rights explicitly granted by the Treaty*. Other areas not mentioned as explicit citizenship rights, remain – to all intents and purposes – within the sole competence of the European executive and legislature. Such areas can lead to situations which have been termed 'self-discrimination'. In a recent article, Francis Chevenal has outlined one of the principal areas of self-discrimination: namely, voting practices on Treaty reform and ratification.¹⁶⁴ In discussing the variety of processes employed across the Member States to ratify a Treaty, he shows that States which provide for referenda – direct democratic participation – not only allow their citizens a greater say in the formation and development of the Union, but ultimately place the State in a different bargaining position at the IGCs.

While the realisation of Union citizenship is expressed through the exercise of national rights, Union citizens relying on representative democracy are unable to exert any influence on the development of the Union, or the basic legal and political structure of the institution of which they are citizens. As such, the ideal of Union citizenship is likely to remain secondary to national citizenship. Furthermore, where referenda do take place, different processes and times for such ultimately mean that those who vote first have an earlier chance to 'decide for all'. Thus while in Austria and Ireland, institutional provisions for required referenda ensure direct democratic participation for nationals of those countries, nationals of other Member States may not have the same opportunity to vote. While this is not contrary to Article 12 EC – the rights devolving from Union citizenship do not explicitly include a right in participation in EU Treaty ratification by direct voting – this status quo is clearly contrary to the spirit of the Union. This situation has been termed 'self-discrimination', and while Chevenal does not discuss whether such matters could be classed as wholly internal, they are certainly distinguishable from the so-called 'reverse discrimination'.

Additionally, with reference to the introduction of Europe-wide, simultaneous referenda on simple, specified questions, it is conceded that it will never be possible to escape the 'one people decides

¹⁶³ Reverse discrimination has proved to be a problem in case law on the other freedoms. For a comprehensive discussion of reverse discrimination in free movement of goods, see C Ritter '*Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234*' [2006].

¹⁶⁴ F Chevenal '*Caminante, no hay camino, se hace camino al andar: EU Citizenship, Direct Democracy and Treaty Ratification*' European Law Journal, Vol 13, no 5, September 2007, 647-663.

for all' dilemma. Furthermore, the problem remains that required referenda can only be implemented by Treaty reform. Even were the above situation to be implemented, it remains feasible that Malta, for example, could effectively veto a Treaty reform agreed by all other Member States. This problem highlights two further questions: firstly the future of the unanimity voting requirement, and secondly the future of Member State-oriented voting in Treaty reform referenda.

The unanimity rule for Treaty ratification must remain in place until changed by the national *demos* unanimously. This is unlikely to be achieved. Any replacement such as double- (super-) majority, could allow the alleviation of the above problem, only if such referenda were carried out among the European *demos* as a whole, and not among nationals of Member States. The current Member State-centric approach to referenda on issues of Treaty reform retains the dilemma of Union citizenship being subordinated to Member State citizenship and nationality, ultimately reinforcing the latter. The one problem with the above proposal is the inherent trampling of Member State sovereignty involved in the implementation of referenda where such is not provided for in the national constitution of the Member State. This requires a national referendum in each Member State allowing for constitutional change, which Chevenal has called a 'prime act of sovereignty'¹⁶⁵ on behalf of the people. It is only with unanimous change, however, that a European-wide referendum could be considered, and in so doing, could enhance the meaning of Union citizenship.

Legitimacy and the Democratic Deficit

The Declaration of the Læken European Council expressed concern about the potential role of the EU as a political system, this latter seeming to defy the characteristics of good governance required of applicant countries (Article 48 TEU) and of its members (Article 6 TEU).¹⁶⁶ This reflected many arguments that the EU was lacking in transparency and democratic accountability and as such could not legitimate its increasing competence over Member States. Yet if this is the case, and there really is such a large democratic deficit in the Union, how has it continued to maintain steady and stable growth?

The European Union, as a continental organisation, is likely to appear distant from the individual, and as a multinational body, lacks the common history, social discourse and symbolism from which most individual polities draw legitimacy. However, this should not act as the final full stop to an explanation of why the Union lacks legitimacy. On the contrary, scholarly critiques of the lack

¹⁶⁵ *ibid*, 663.

¹⁶⁶ W Wessels, 'Readdressing the Legitimacy Debate', in Weiler, Begg and Peterson, *Integration in an Expanding European Union; Reassessing the Fundamentals*, Oxford, 2003 at 104.

of legitimacy within the Union focus for the most part on the lack of democratic legitimacy within the Union, and the way in which policy is proposed and promulgated. While stronger than it once was, the European Parliament, the only elected branch of the European Union, still lacks the wherewithal to inspire cross-polity debate across Europe, and for the most part, half-hearted election to the Parliament takes place on regional and national issues. Of the other institutions that comprise the Union, the Commission is still seen as a 'technocracy'¹⁶⁷, the Council, although indirectly accountable, conducts meetings in secret, and the Court is unelected and seemingly unaccountable. It is not surprising therefore that most Europeans feel distanced from the source of Union competence. With regard to the policies of the Union, the widening and deepening of economic integration and co-operation has arguably not been matched by social welfare benefits. However, Moravcsik has argued that an assessment of empirical evidence of the democratic deficit in the Union simply does not support this claim. Pointing to constitutional checks and balances and the indirect democratic control of the institutions at national level, he argues that accountability within the Union is sufficient to ensure transparency and effective rule. Using criteria drawn from modern democratic States which explicitly avoids the utopian ideals of democratic accountability in government, he concludes that the EU is 'specialising in those functions of modern democratic government that tend to involve less direct political participation'.¹⁶⁸ Indeed, it must be noted that the EU does not hold a legal monopoly of public authority. Areas such as social welfare provision, defence, education, culture and infrastructure, which all require high levels of government expenditure, remain within the competence of Member States, although the Union occasionally encourages harmonisation. The Union's ability to tax is capped at 2-3 percent of national and local government spending, and the disbursement of these funds is limited to certain areas that are regularly unanimously agreed upon by Member States.

Moreover, the EU's ability to act in policy fields is limited by institutional checks such as the separation of powers, the multi-level basis of decision-making, and a plural executive.¹⁶⁹ This empowers veto groups to block unilateral action, allowing for the effective protection of minority interests within the Union.

Seminally, the most fundamental constraint comes in the form of the requirement of unanimous voting plus electoral, parliamentary or administrative ratification, to amend the Treaty of Rome. Once again this focuses development on areas of broad consensus and allows for the protection of minority rights.

¹⁶⁷ A Moravcsik, 'Reassessing Legitimacy in the European Union', in Weiler, Begg and Peerson, *Integration in an Expanding European Union; Reassessing the Fundamentals* Oxford, Blackwell, 2003, at 78.

¹⁶⁸ *ibid* 79.

¹⁶⁹ *ibid* 83.

Yet however much one emphasises the limits on the exercise of Union competence, there exist certain areas in which EU regulation dominates that carried out by Member States. Notable areas include monetary policy and market regulation, while European Court of Justice jurisprudence, European Central Bank monetary policy and Commission competition policy result from semi-autonomous supranational authorities. Regardless of super-majoritarian consent requirements, the EU policy process has been noted to favour national bureaucrats and ministers at the expense of national legislatures and publics.

The most fundamental source of EU legitimacy lies in the democratic accountability of national governments. However, it is the very erosion of national sovereignty and identity that is inherent in the legitimisation of EU governance by reference to nation-state criteria that draws this legitimacy claim into question.¹⁷⁰ Lehning¹⁷¹ has put forward a solution to the problem, which he defines as the mismatch between the increasing power of the Union and the lack of legitimisation through the consent of the citizens of the Member States. He proposes that a system of transnational federalism could provide a solution by closing the gap between devices of democratic legitimisation and the advancing exodus of national powers to organs of a supranational Community. This could in time lead to a situation in which the citizens of the federation are subject to legal provisions from Community organs which articulate the will of a European *demos*.

The EU Reform Treaty has the potential to alleviate some of the legitimacy claims levelled at the EU. While creating a permanent President of the European Council, the Treaty will allow national Parliaments a voice in law-making at the European level for the first time. National Parliaments will receive proposals for new EU legislation directly, and can then debate the merits of such, determining the efficient application of subsidiarity. While this ultimately brings the deliberation process closer to the people, it remains to be seen whether in fact this will highlight local policy within a European context and further frustrate the development of a European political debate. The Treaty also increases the number of policy areas in which Members of the European Parliament must approve legislation, along with national ministers in the Council. Were it not for the general apathy in European level elections by the people, this process of co-decision would have the potential to improve the democratic deficit of the Union. On the other hand, by giving MEPs more say in the legislative output of the Union may simply improve the perception of the Parliamentarians, encouraging interest in the process.

¹⁷⁰ A Scott 'Analysing the Democratic Deficit – Methodological Priors: A Comment on Moravcsik', in *ibid* 100.

¹⁷¹ PB Lehning 'European Citizenship; Towards a European Identity', *Law and Philosophy*, 20, 3, 2001, at 258.

Rights-Based Citizenship or Nationality?

As Dora Kosakopoulou has stated, '[m]aking European citizenship a derivative of national citizenship does not only give prominence to the nationality principle, but, perhaps more worryingly, subjects membership to the European public to the definitions, terms and conditions of membership prevailing in national publics'.¹⁷²

Indeed, when the United Kingdom signed the Treaty on the European Union at Maastricht, a Danish Declaration on Nationality was specifically annexed to the final act, stating: 'the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned'.¹⁷³

Furthermore, the European Council adopted similar proposals at Edinburgh and Birmingham, the latter of these stating the complementary form of Union citizenship and the continuing primacy of national citizenship, this later finding codification under Article 17 at Amsterdam. The ECJ has further upheld this principle in cases such as *Micheletti*¹⁷⁴ and *Kaur*,¹⁷⁵ in the latter of which it stated 'it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality'.¹⁷⁶

This clearly leaves the acquisition and loss of Union citizenship in the hands of Member States, therefore arguably leaving Member State nationality as the primary force in forging a new era of European integration. In other words, we seem to be defining European citizenship by reference to something it isn't, has never been, and will never be. This is neither helpful to the development of citizenship of the Union, European harmonisation or integration, as the stress constantly falls on nationality as a 'go-between' for citizenship status. Arguably, for citizenship to advance within the Union, this is an issue that must be addressed.

Third Country Nationals

It must first of all be noted that third country nationals, i.e., those not holding the nationality of a Member State of the European Union, have no European Community law rights as such.¹⁷⁷ Indeed, Member States have unanimously opposed intervention at the Community level

¹⁷² Kostakopoulou, 'European Citizenship: Writing the Future', in *European Law Journal*, Volume 13, no5, September 2007 at 630.

¹⁷³ Declaration on Nationality of a Member State.

¹⁷⁴ *Micheletti and Others v Delegacion del Gobierno en Cantabria* [1992] ECR-4329.

¹⁷⁵ *R v Secretary of State for the Home Department, ex p. Kaur* [2001] ECR 1-1237.

¹⁷⁶ *ibid*, at para.19.

¹⁷⁷ J Bhabha, 'Enforcing the Human Rights of Citizens and Non-Citizens in the Era of Maastricht: Some Reflections on the Importance of States', *Development and Change*, vol29, no4, October 1998 at 713.

regarding rights of third country nationals and immigration in general. Differences abound not simply between Union citizens and third country nationals with regard to rights of movement, family reunion, and social security, to name but a few, but also between the treatment afforded to third country nationals in different Member States. Third country nationals may acquire rights in the EU based on co-operation agreements between their country of origin and the EU, such as those concluded with Turkey, and with the Maghreb countries. Furthermore, third country nationals working for an EU-based company and undertaking employment in another Member State may also acquire rights, although these can be few and far between. This can be seen as an example of the results of the foundation of citizenship on the nationality requirements of Member States, and the ethnocentric approach that this has propounded.

Access to justice by third country nationals can also be contrasted with that by Union citizens, who have the opportunity of recourse to supranational mechanisms of adjudication once domestic legal resources have been exhausted. Third country nationals, by contrast, have no such recourse, and as such are entirely reliant on national courts for the enforcement of their rights, leaving matters of immigration or social welfare in the sole competence of national courts. Moreover, the transparency drive seen in Europe has been confined to the first 'pillar' of the Union – the European Community. The second and third pillars, Common Foreign and Security Policy, and Justice and Home Affairs respectively, are thus exempt from review by the Commission or Parliament, judicial review before the ECJ, and public scrutiny. The third pillar, being the domain in which common immigration and asylum policy are determined, is therefore beyond the challenge of a Union citizen, let alone a third country national.

One particular aspect of Union citizenship – the consolidating, homogenising factor – while being a positive force for European-wide harmonisation and integration, has been criticised as contributing to the construction of an exclusionist culture based overwhelmingly on ethnicity. That which binds the peoples of Europe together necessarily excludes those who are not a national of a Member State, regardless of their length of residence, political beliefs, cultural ties, or nationalistic allegiances. Other fundamental rights of third country nationals, such as that to respect for family life, are also excluded from ECJ supervision, unless the third country national happens to be a family member of an EU citizen and can enjoy the privileged family reunion rights of citizens. Indeed, such rights of family reunion vary from Member State to Member State, as while some respect the right of dependent children to join a guardian up to the age of 21, other States only recognise this right up to the age of 16.¹⁷⁸

¹⁷⁸ *ibid.*

The one remedy available to all persons within the territory of Member States, regardless of legal status or nationality, is recourse to the European Court of Human Rights. All Member States are signatories to the European Convention on Human Rights and as such, the rights laid down therein are available to all. Thus the European Court of Human Rights has become a European Court of Last Instance for third country nationals, refugees and asylum seekers, for whom no remedy exists in Community law. However, while upholding fundamental rights, even the European Court at Strasbourg is mindful of sensitive areas of national policy such as immigration and social welfare regarding aliens. Furthermore, the Court only has competence to rule on those areas that come within the Convention on Human Rights. As such, the role of the Court as a bastion of third country national rights should not be overstated. However the inclusion in the EU Reform Treaty of the proposed accession of the EU to the ECHR can only be beneficial for third country nationals. Furthermore, the statement that general principles of Union law are based on fundamental rights may also indicate a broadening of the scope of application of the laws to all persons within the Union. This remains to be seen.

However, it should be noted at this stage that certain of the rights proclaimed as citizenship rights of Union citizens are in fact available to third country nationals. The right to petition the European Parliament, and the right of application to the European Ombudsman are available to all persons, regardless of nationality, residence, or indeed citizenship. Moreover, the possibility of the acquisition of permanent residence after, in some cases as little as five years' residence in a Member State, opens up the possibility of access to social welfare benefits such as unemployment benefit and housing, health care and education. While requirements vary from country to country, and unlike citizenship rights are non-transferable from one Member State to another, such rights should not be totally underestimated, as once available, permanent residence can amount to citizenship minus voting rights. This can either be used as an argument for the dispensation of citizenship as a vessel of rights altogether in favour of a residence-based attribution, or can be used as a starting point for the argument that those with permanent residence status should be allowed equal enfranchisement as citizens of that State. Both of these arguments will be returned to later in discussions of the future of citizenship, suffice to say that for the present, while not able to equal the status afforded to citizens of a State, third country nationals can access a significant proportion of the rights attributed to citizenship.

By expecting a third country national to acquire nationality of a State in which he wishes to exercise a full panoply of rights is in fact contrary to the principle of equal treatment that pervades European development. Voting rights and rights to freedom of movement are just two areas in which anomalies in rights' attribution abound. For third country nationals resident in a Member State, such residence is seen as inconsequential with regard to voting rights at a European level

and at a local level for periods of up to five years. Yet for a Member State national residing in a host Member State, residence is taken into account, and voting rights are duly granted. Moreover, unless they are family members of Union citizens, third country nationals lawfully resident in a Member State have no right to free circulation within the Community. Thus, a second or third generation migrant living in the Community may need a visa to move within the Union if his family originates from a country that Member States require visas. Thus, some third country nationals need visas, and some do not.

Furthermore, the attribution of rights to third country nationals in a manner that will likely see the rights bundle equate to those pertaining to citizenship is likely to cause grave problems in countries where nationality and citizenship are co-determinus. In sum, the extension of rights to third country nationals ultimately threatens the existence of the nation-state. This being the case, a necessary dichotomy between rights based on residence, citizenship and nationality would need to be constructed by States in order to allow the development of the foremost of these without endangering the latter.

Section 6 – The Future

The Future of European Citizenship

'Is it citizenship which constitutes communities, or the reverse? There seems no conclusive position on this question.'¹⁷⁹

While existing problems with Union citizenship have been discussed above, any debate concerning the future of such must be located within the realm of the current problems. As speculated above, it is unlikely that certain dilemmas will be resolved soon, and hence the future of Union citizenship will depend heavily on the progression of debate surrounding such obstacles. Suggestions on the future of the Union and the nature of belonging within such are many and varied. Roel de Lange calls for reform of Union citizenship based on democracy rather than the rule of law in a formalist sense. He claims that 'the suggestion that citizenship is a homogeneous, non-contested concept is in fact part of an EC rule-of-law ideology: as long as we talk about citizenship, we won't have to talk about democracy'.¹⁸⁰ Bellamy also argues for a preliminary focus on democracy, rather than a preoccupation with rights, which will always 'prove too indeterminate and subject to conflicting interpretations to provide a constitutional basis for a

¹⁷⁹ J Shaw 'The Interpretation of European Union Citizenship' at 316.

¹⁸⁰ R de Lange, 'Paradoxes of European Citizenship', in P. Fitzpatrick (ed), 'Nationalism, Racism and the Rule of Law' (Aldershot, Dartmouth, 1995), as quoted in J. Shaw 'The Interpretation of Union Citizenship', MLR 1998, at 307.

European polity'.¹⁸¹ Furthermore, as Shaw points out, it can be argued that it is *national* level democratic institutions that legitimise the political power of the Union. Accordingly, and as the German court stated in the *Brunner* case on the ratification of the Maastricht Treaty, there can be no such thing as 'European citizens'.¹⁸² Shaw later remarks that 'while the exclusivity of the *State-citizen* relation may gradually be disintegrating (as the nation-state – whatever its long-term prospects – loses its more or less exclusive grip on political formations), there remains much vitality in the equally important link between the practice of citizenship and the process of State-building (or, in the EU context, of *polity-formation*'.¹⁸³ This vision appears as a reoccurring theme throughout the literature on the future of citizenship, Europe, and the nation-state in general. The following discussions aim to set out some of the main arguments in this field.

There is, however, one aspect of rights-based citizenship in particular that is deserving of further exploration here. This is the apparent contradiction between the rise of global rights theories, and the exclusive attribution of similar rights to 'citizens'. As we hope to demonstrate in this section, should current trends of fundamental rights attribution continue, and the rights contained within such categories continue to grow, it will become difficult, if not impossible, to distinguish individual rights from citizenship rights. Furthermore, the way in which such rights are premised on residence calls into question the intrinsic usefulness as a theory not just of citizenship but also of its legal counterpart, nationality.

Identity and Rights

In examining the development of citizenship rights in a post war global context, Soysal has identified four main factors that have undermined the identity-rights congruence. Firstly, the post-war internationalization of labour markets has contributed enormously to global migration, primarily *into* Europe. Secondly, massive decolonisation after 1945 left territories and fledgling States asserting for the first time the existence of their rights, contributing to the global rights discourse. This in turn saw the emergence of a new set of social movements, and the increasing incorporation of these sub-cultures into the social domain and institutions of citizenship. Women, homosexuals, environmentalists, regional identities, youth cultures, as well as immigrants, now come to form separate sub-groups within the context of citizenship. Thirdly, the advent and growth of multi-level polities, of which the EU is a prime example, has seen great changes brought about by the sharing of sovereignty in the field of acquiring rights and defining identities. Demands for rights and recognition extend beyond borders, breaking the previously intrinsic link

¹⁸¹ R Bellamy, '*The Constitution of Europe: Rights or Democracy?*' in R. Bellamy, v Buffacchi and D. Castiglione (eds) '*Democracy and Constitutional Culture in the Union of Europe*' (London, Lothian Foundation Press, 1995) at 153, quote in J Shaw, '*The Interpretation of Union Citizenship*', MLR 1998 at 307.

¹⁸² *ibid* 307.

¹⁸³ *ibid* 312.

between citizenship and nationhood. Finally, the increasing discourse on global rights' advancement and protection, which focuses on the codification of human rights as a global organising principle, increasingly leads to the recognition of rights devolving from the person, not from the State. As such, the idea of 'belonging', or relying on one's citizenship rights, is bypassed and a hegemonic language for the legitimation of State, and supra-State action is constructed. The combination of the second and fourth developments, as outlined above, have ultimately led to a continuing process of expansion of categories of rights pertaining to various cultures, and as such it may even be possible to argue that sub-groups within society play an increasingly important role in defining 'belonging', now this no longer guarantees fundamental rights, inversely proportionate to the declining role of the nation-state.

The expansion of 'foreigners' rights' by national courts, faced with increased numbers of migrant workers, further contributed to the diminution of attention afforded to the national order in the distribution of rights. Transnational organisations such as the International Labour Organization and the Council of Europe have increasingly supported the relocation of the rights of migrant workers into the discourse on fundamental rights. Indeed, the vast majority of third country nationals lawfully resident within the territory of the Member States, and enjoying permanent residence status, benefit from virtually the same rights as a national of that State or a citizen of the Union. While national voting rights may not be extended to resident foreigners, local voting rights are extended to non-citizen populations in a number of European countries.¹⁸⁴ Thus the presupposed differential between citizens and aliens is turned upside down and the definitive dichotomy between 'insiders who belong' and 'outsiders who don't' ceases to exist in any meaningful way.

The End of the Nation-State?

'All efforts at developing a European identity must remain free of analogies with the national State'.¹⁸⁵

The shift of the institutional and normative basis of citizenship to a supranational level has brought about the extension of associated rights and privileges beyond national boundaries. As such, the State ceases to be the principle granter of rights, and the exercise of such no longer entails association with the State. In fact, national citizenship ceases to exercise any function of the attribution of rights, and the vocabulary of participation and representation within the national polity increasingly move beyond the bounds of national discourse. Thus the result is what Soysal

¹⁸⁴ YN Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe*, University of Chicago Press, 1994, at 21.

¹⁸⁵ M Rainer Lepsius, 'The Ability of a European Constitution to Forge a European Identity', in Blanke and Mangiameli, *Governing Europe Under a Constitution*, Springer 2006.

has termed a new model of membership anchored in 'deterritorialized notions of personal rights', giving rise to a 'postnational' model. As such, territorial boundaries of such postnational citizenship are fluid, and it is no longer necessary to demonstrate attachment to the State in which one desires to exercise one's fundamental rights. Hence a dichotomy appears between the current trend of States to reinforce national boundaries, while coming under pressure on an international front to accede to a more expansive form of membership and attribution of rights. Notions of rights are not the only sphere in which national territorial boundaries are becoming less relevant. The drive for globalization in economic, political, environmental, and ultimately legal practice has arguably not resulted in homogenization, but in fact the opposite. According to Greenhouse, the indelible march of globalization has resulted in the *intensification* of differences conceived in racial, ethnic and class terms.¹⁸⁶ Santos has remarked that '[f]ar from being linear or unambiguous, the process of globalization is highly contradictory and uneven. It takes place through an apparently dialectical process, whereby new forms of globalization occur together with new or renewed forms of localization'.¹⁸⁷ The resulting process is a coming-together and falling-apart consecutively, effecting a gradual erosion of the sovereignty and autonomy of the nation-state. These two distinct concepts can be said to encompass the traditional notion of the nation-state; sovereign in that the State holds absolute authority within its territory, and autonomy in that there is no higher power than the State. The notion of the direct effect of human rights severely curtails the sovereignty of a State, while supranational authorities such as the European Union prove that there is an authority to which the nation-state must answer. As Albrow has pointed out, 'large spheres of human interaction have become detached from purely national regulation'.¹⁸⁸

Furthermore the need for multilateral action in the Gulf War and Bosnia, only two examples, show the extent to which the individual autonomy of the nation-state is now no longer sufficient to achieve the ends it sets for itself. International co-operation is also required in the field of finance, while loans from the World Bank and the International Monetary Fund are often premised on the implementation of 'structural adjustment' and 'good governance' programmes. Martin Albrow has argued that a key event that marks the end of the modern era and the transition to a new, Global Age is the loss of the State's ability to control new forms of social organisation.¹⁸⁹ The discussion so far will have indicated that this applies equally to the economic, political, cultural and legal realms. The nation-state is effectively at the mercy of forces beyond its control.

¹⁸⁶ Greenhouse, quoted in Tamanaha *A General Jurisprudence of Law and Society*, Oxford University Press 2006, at 123.

¹⁸⁷ Santos, quoted in *ibid* 123.

¹⁸⁸ Albrow, 1996, quoted in *ibid* 123.

¹⁸⁹ *ibid* 124.

The Individual Transcends the Citizen?

While the notion of equality factored high in the list of guarantees brought about by national citizenship, the postnational variety offers a different premise. Indeed, Soysal has described a 'plurality of membership forms' such as one sees in the current European Union where certain groups of migrants are more equal than others. For example, legal permanent residents, political refugees, dual citizens and the nationals of common market countries enjoy a broader spectrum of rights than temporary residents, or those who do not hold legal status. However, while this may be the case, it must be noted that the most striking change in the rights granted to persons is the legitimation of such a grant. National citizenship granted rights on the basis of 'belonging' to a certain defined polity. Membership and rights are now legitimated by reference to universal ideologies of human rights. Thus, 'universal personhood replaces nationhood; and universal human rights replace national rights'.¹⁹⁰ Ideologies grounded in transnational community legitimate the rights and claims of persons, regardless of their citizenship. As Soysal states, 'the individual transcends the citizen'.¹⁹¹ It is with this reasoning that the ultimate duality between the national sovereignty on the one hand, and universal human rights on the other, can be discerned. Within the discourse on immigration even, as the one facet sees the closure of the national polity, the other is the expansion of the same polity beyond national closure.¹⁹²

The Citizenship Ideal Supplanted in the Politics of Identity?

The increasing espousal of nationhood can be readily attributed to decolonisation and the collapse of empire in all its guises. However, dissolution of States into ethnic territories which aspire to statehood gives rise to calls for self-determination – a basic fundamental right which, as such, must be respected. This further reinforces nationalistic tendencies, encouraging the people to accentuate their uniqueness compared to the 'other' - be this in the field of language, culture, ethnicity, etc. - in order to unify and homogenise the population. The claim to and exercise of such postnational rights are legitimated by reference to the essential inalienable nature of fundamental rights, and the translation of such rights onto the global spectrum has been defined by Ronald Robertson as 'the universalization of particularism and the particularization of universalism'.¹⁹³ Thus the characteristics called upon to define uniqueness become intrinsic aspects of the core of humanness, giving rise to a never-ending circle of such claims and their necessary acceptance. A politics of identity therefore develops, the participation of which necessitates a definition of the 'other' as difference, in turn allowing definition of oneself within a global polity. Attribution of rights of the person can then take place.

¹⁹⁰ Soysal, at 23.

¹⁹¹ *ibid.*

¹⁹² *ibid.*

¹⁹³ Robertson 1992:100, quoted in Soysal at 26.

Thus, while one aspect of this process is the re-legitimation and reification of 'nationness',¹⁹⁴ its antithesis, the fragmentation and de-legitimation forms the necessary duality. Such fragmentation, part of the process of regionalization and the construction of cultural sub-units, ultimately destabilises the nation-state, undermining its territorial integrity. The advent of series upon series of particularistic identities eventually discredits the exclusionary vision espoused by national citizenship, consigning any notions founded upon *jus sanguinis* firmly to the past. The resulting status is one of global citizenship, membership of a universal polity that has no notion of citizens and aliens but which is premised on a plurality of rights and membership structures. Hence we are left with a system in which, while upheld by nation-states, rights are universally intrinsic to the person and are thus available to all, regardless of nationality, citizenship status, or even residence. Given that identity forms one aspect of citizenship, and is both territorially rooted in the nation-state and in the cultural sub-group of which one is a member, and given that rights of the person transcend territorial boundaries, it is difficult to see what benefits the definition of citizenship could bring. Hence while identity continues to underpin and undermine the nation-state simultaneously, the rights of all identities continue to be upheld by the State, which no longer premises citizenship as a basis of exclusion.

At the same time, however, another series of processes is taking place which, while appearing to contradict those described above, ultimately leads to the same end. The rise of supranational institutions and processes such as that in Europe and its gradual expansion necessitates a gradual erosion of national sovereignty to a central, postnational power. Even within the context of the economic sphere that still characterises the European polity, it has become necessary to harmonise rights' attribution and enforcement within the common territory. Once again, grants of rights are freed from any link with identity as this remains for the most part with the individual's particular State. The universal recognition of rights of all persons across Member State territory not only once again questions the true benefits brought about by Union citizenship, but allocates rights to all dependent on the personhood of the individual. This once again neutralises any advantages claimed by Member States of 'belonging', and we end up with the same situation as outlined in the previous paragraph. The difference this time is that while in the first process, individuals were using global rights' theories as a way of claiming fundamental rights regardless of citizenship, in this process States are voluntarily relinquishing an aspect of their sovereignty to a postnational construct which then ensures the universal attribution of fundamental rights to all persons who come within the territory.

It appears, then, that there are two possible means by which the usefulness of national citizenship can be negated, both of which appear eminently possible as future predictions.

¹⁹⁴ This term is borrowed from Soysal, as it best seems to describe the compunction at issue on the part of the person towards the national territory they identify with.

It has been noted that 'Western Europe is the most promising site for a remarkable experiment in creating political systems which no longer weld sovereignty, territoriality, citizenship and shared nationality together. [...] If a neo-medieval society is to develop at all, it will most probably be between the like-minded societies of Western Europe'.¹⁹⁵

Although to what extent the societies concerned can be categorised as 'like-minded' has been questioned. Magnette has stated that without regard for the maintenance of mutual trust between the Member States, co-operation, harmonisation and development cannot feasibly progress.¹⁹⁶ Yet whatever the long term outcome of European development, shorter term analyses remain to be posed, in particular, the inherent question of the future of European integration; to further integrate, or simply to more coherently manage diversity? If citizenship is based on a theory of recognition, the State becomes a 'framework in which conflicts of recognition are organised'¹⁹⁷, the existence of which ultimately defines the State itself. As Markell states, '[t]o the limited extent that the State 'resolves' struggles for recognition, it does so not as a *deus ex machina*, that appears from outside the social, miraculously transcending its conflicts once and for all, but by acquiring and maintaining a hegemonic position in the midst of the social'.¹⁹⁸ Such a position of a State must therefore be applied to the horizontal integration seen to be continuing through European citizenship as a transnational concept, ultimately aspiring to a European Community in the true political sense. Any advent of true cosmopolitanism would inherently necessitate a disregard for further integration. With regard to just some of the problems involved in the conceptualization of a Union citizenship, it is clear that without further harmonisation and integration, national citizenship of one's State will remain the trump card during the progression of global theories of rights and the potential development of a pan-national polity. Of course, without continuing the current development within Europe, it is possible that the nation-state may indeed remain the principle protector of fundamental rights.

¹⁹⁵ Linklater, 'Citizenship and Sovereignty in the post-Westphalian State' *European Journal of International Relations*, vol2, no1 1996 p66.

¹⁹⁶ P Magnette 'How can one be European? Reflections on the Pillars of European Civic Identity' *European Law Journal*, vol13, no5, September 2007, 664-679.

¹⁹⁷ *ibid.*

¹⁹⁸ P Markell, *Bound by Recognition* (Princeton University Press, 2003), 26-27, in *ibid* 669.

National Reports

Australian Citizenship

Introduction

Citizenship in legislation and case law

The Australian Constitution¹ entered into force in 1901, but was largely devoid of any description of the rights and responsibilities of Australian citizenship.² Rather, the Constitution focused mainly on the relationship between governmental institutions and did not address the relationship between the government and its people. Aside from a limited right of freedom of political communication which was read into the Constitution by the High Court³ in 1992, civic rights are determined through legislation and case law.

There is no Australian federal bill of rights; however, the Australian Capital Territory⁴ (hereinafter 'ACT') and the State of Victoria⁵ have both enacted their own bills of rights. Citizenship as a legal concept was first addressed in the Australian Nationality and Citizenship Act of 1948 ("the Act"). The Act has gone through several amended forms, the latest of which, The Australian Citizenship Act 2007 entered into force on 1 July 2007. It delineates specifically how one may become a citizen and how one may lose or resume such status, but it does not provide a definition of citizenship *per se* or provide any insight into the privileges and duties connected to Australian citizenship. In its preamble, however, the Act refers to citizenship as representing the 'full and formal membership of the community of the Commonwealth of Australia' and acting as 'a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity.' Consequently, the Act does little more than the Constitution to shed light on the legal status of citizens in the country.

¹ Commonwealth of Australia Constitution Act, 9 July 1900 (entered into force 1 January 1901). The only reference to 'citizen' occurs in Section 44(i) in relation to disqualification for membership in either the House of the Parliament or the Senate.

² K Rubenstein, 'Citizenship and the Centenary – Inclusion and Exclusion in 20th Century Australia', 24 *Melb. U. L. Rev.* 576, 579 (2000).

³ *Australian Capital Television v Commonwealth* (High Court 1992); see also *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104.

⁴ The Australian Capital Territory Human Rights Act 2004 (entered into force 2 January 2007).

⁵ The Victoria Charter of Human Rights and Responsibilities Act (2006) entered into force 1 January 2007. Although it was argued by many that civil and political freedoms should be included in the Charter, it was thought best not to include such rights at the stage of the Charter and to only include those fundamental rights that had strong support from the community (George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope', 30 *Melbourne University Law Review* (December 2006) 880). This indicates that the Charter is intended as a flexible document able to adapt to changing communal thinking. Consequently, the rights included in the Charter are fundamental human rights, most of which fall outside the scope of this study.

To complicate things, the Australian High Court uses the term “citizen” interchangeably with the word “person” which might include citizens, permanent residents, or sometimes even temporary residents. Consequently, there is much confusion within not only the Court itself, but among people living in Australia, as to the meaning of citizenship. Citizenship seems to attach to ideas of personhood rather than legal status.⁶ It is believed by some that this understanding serves as one of the explanations for the lack of a bill of rights in Australia.⁷

Acquisition of citizenship

Under the current version of the Act one may acquire Australian citizenship either automatically⁸ or by application⁹. Automatic acquisition occurs by birth if one is born to at least one parent who either is an Australian citizen or a permanent resident at the time of birth. If neither parent has such status, a person born in Australia may become a citizen if he or she is ‘ordinarily resident’ in the country for a period of 10 years from the person’s date of birth.¹⁰ The concept of ‘ordinary resident’¹¹ is linked to domicile in Australia. Other forms of automatic acquisition of citizenship include citizenship through adoption by an Australian citizen or permanent resident¹², citizenship bestowed on abandoned children found within the Australia¹³, and citizenship through incorporation of a territory¹⁴.

One may also acquire Australian citizenship through application for such status. This occurs in two situations: citizenship by descent¹⁵ or by conferral¹⁶. Citizenship by descent allows persons born outside Australia on or after 26 January 1949, and persons born outside of Australia or New Guinea before 26 January 1949, to a parent who was an Australian citizen at the time¹⁷, to apply for citizenship under the procedure set forth in the Act under Section 46. Such application is subject to ministerial approval.¹⁸

Citizenship may be conferred on a person if he or she is deemed ‘eligible’ under the general criteria of the Act.¹⁹ A person is eligible if he or she: (1) is 18 years or over; (2) is a permanent

⁶ K Rubenstein, *Australian Citizenship Law in Context* (Law book Co, New South Wales 2002) 273.

⁷ *ibid.*

⁸ Australian Citizenship Act 2007, s 11A, Division 1.

⁹ *ibid* s 15A, Division 2, Subdivisions A and B.

¹⁰ *ibid* s 12(1).

¹¹ *ibid* s 3.

¹² *ibid* s 13.

¹³ *ibid* s 14.

¹⁴ *ibid* s 15.

¹⁵ *ibid* s 15A, Division 2, Subdivision A.

¹⁶ *ibid*, Subdivision B.

¹⁷ *ibid* s 16(2) and 16(3).

¹⁸ *ibid* s 17.

¹⁹ *ibid* s 21.

resident²⁰; (3) understands the meaning of his or her application; (4) satisfies a residence requirement²¹ or has completed certain defence service); (5) has basic knowledge of the English language; (6) possesses 'adequate' knowledge of the responsibilities and privileges of Australian citizenship; (7) is likely to reside or continue to reside in Australia upon approval of the application; and (8) is deemed by the Minister to be of good character. The applicant must also satisfy administrative application requirements²², such as completion of a standard form and payment of a fee, and make a pledge of commitment to become an Australian citizen²³. In addition to the general eligibility requirements and some specific provisions regarding physical or mental incapacity, age of majority, and minors, a person may be eligible to become an Australian citizen in the following circumstances: (a) he or she was born to a parent who had ceased to be an Australian citizen at the time of the applicant's birth²⁴; (b) he or she was born in Papua prior to 16 September 1975 to a parent with Australian citizenship at the time of the applicant's birth²⁵; and (c) he or she was born in Australia and has never been nor is not likely to ever be a national or citizen of any country (i.e. stateless)²⁶.

In addition to the requirements under the Act, on 12 September 2007, the Australian Parliament passed a bill amending the Act to require most people to pass a citizenship test before they apply for citizenship by conferral.²⁷ The test formally became part of the application process from 1 October 2007. The stated purpose of the test is 'to assist people who want to become Australian citizens gain an understanding of Australia's values, traditions, history and national symbols'²⁸. The Australian Department of Immigration and Citizenship has also stated that '[t]he test is an important part of ensuring that migrants have the capacity to fully participate in the Australian community as citizens and maximise the opportunities available to them in Australia' and that '[i]t promotes social cohesion and successful integration into the community'.²⁹ Although most people will have to pass the test before becoming eligible to make an application for citizenship, those who lodged their applications prior to the test's entry into force will not have to pass the test. Neither will the following categories of people: (1) those under 18; (2) those over 60; (3) those

²⁰ Defined under s 5 in relation to whether the person holds a permanent visa as defined in the Migration Act of 1958 or has been determined to have special status by the Minister.

²¹ Section 21 generally requires lawful presence in Australia during the four years immediately before application, including permanent residency during the 12 months immediately before such application is made, provided that any absences from Australia did not exceed 12 months in total (for purposes of determining 'presence') or three months (for purposes of determining 'permanent residence').

²² *ibid* s 46.

²³ *ibid* s 26. Schedule 3 of the Act offers two forms of the pledge which must be made by applicants for citizenship: 'From this time forward, under God, I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey.' Applicants are given the option to use a version of the pledge which omits the words 'under God'.

²⁴ *ibid* s 21(6).

²⁵ *ibid* s 21(7).

²⁶ *ibid* s 21(8).

²⁷ Australian Citizenship Amendment (Citizenship Testing) Bill 2007 amends s 21 of the Australian Citizenship Act 2007 by inserting a new subsection 2A which provides for the sitting and successful passing of a citizenship test (which is separately governed by new s23A).

²⁸ <http://www.citizenship.gov.au/test/index.htm> last accessed 14 Oct. 07.

²⁹ *ibid*.

suffering from substantial hearing, sight or speech impairment; (4) those suffering from incapacity and are incapable of understanding their actions with regard to the application; and (5) those who fall under one of the three categories of people mentioned above [(a) through (c)] in relation to eligibility.³⁰

To prepare for the citizenship test, the Australian Government has prepared a resource book entitled *Becoming an Australian Citizen*³¹ which is intended to demonstrate what it means to become an Australian citizen. The book provides an overview of Australian values, culture, history, geography, national symbols and emblems, the system of government, and the rights and responsibilities associated with being an Australian citizen (which will be further discussed below).

Dual citizenship

Dual citizenship was not permissible under the Citizenship Act until 4 April 2002.³² Prior to that date, loss of Australian citizenship upon acquiring the citizenship of another country was a mandate. Where an adult Australian citizen committed an act solely intended to acquire another nationality or citizenship, his or her Australian citizenship was terminated. The motive behind acquiring citizenship of another country was held to be irrelevant; what was important was whether the 'person had the relevant intention (that is, a sole or dominant purpose) at the time he or she did the act or thing' which resulted in the acquisition of the other nationality.³³ This restriction was repealed with the Australian Citizenship Legislation Amendment Act of 2002, which allows dual citizenship provided that the other citizenship was acquired prior to 4 April of that year. The rule against dual citizenship for those who acquired it before that date did not apply to those who obtained dual citizenship automatically at birth, or to those who simply gained another passport. There is provision under the 2007 Act allowing for resumption of citizenship for those who lost it under the 1948 Act.³⁴

³⁰ <http://www.citizenship.gov.au/test/eligibility/index.htm> last accessed 14 Oct. 07.

³¹ Available at: <http://www.citizenship.gov.au/test/resource-booklet/citz-booklet-full-ver.pdf>.

³² Australian Citizenship Act 1948 [superseded] s 17 stated: 'An Australian citizen of full capacity, who whilst outside Australia and New Guinea, by some voluntary and formal act, other than marriage, acquires the nationality or citizenship of a country other than Australia, shall thereupon cease to be an Australian citizen.' This language was amended by Act No 129 of 1984 s 13 to read: '(1) A person, being an Australian citizen who has attained the age of 18 years, who does any act or thing: (a) the sole or dominant purpose of which; and (b) the effect of which, is to acquire the nationality or citizenship of a foreign country, shall, upon that acquisition, cease to be an Australian citizen. (2) Subsection (1) does not apply in relation to an act of marriage.'

³³ K Rubenstein (n6) 139, quoting *Minister for Immigration, Local Government and Ethnic Affairs v Gugerli (Gugerli)* (1992) 15 AAR 483.

³⁴ Citizenship Act (n8) s 29(3)(a)(i).

Loss of citizenship

The Australian Citizenship Act provides for loss of citizenship for behaviour mostly with regard to fraudulent acquisition of citizenship or criminal activity. Such penalties are mentioned in connection with those citizens who obtained their citizenship by application rather than automatically. The Act provides that Australian citizens may be deprived of Australian citizenship if: (1) they renounce their citizenship³⁵; (2) they did not automatically become an Australian citizen and they are convicted for certain offences mainly involving fraud (false statements and representations) in the person's citizenship or migration application³⁶; (3) they did not automatically become an Australian citizen and the person has received a prison sentence of 12 months or more (in any country) for an offence committed before the person's application for Australian citizenship was approved. Deprivation of citizenship cannot occur for this reason if the person has no other citizenship³⁷; (4) if they did not automatically become an Australian citizen and the Minister is satisfied that it would be contrary to the public interest for them to remain an Australian citizen³⁸; and (5) if they are also considered to be a national or citizen of a foreign country at war with Australia and serve in the armed forces of that country³⁹.

Categories of citizenship

From 1900 until 1948, a person's legal status was determined according to whether the person was a British subject (temporary or permanent) or whether the person was an alien. British subject status continued to exist until 1987 at which time the relevant distinction in terms of nationality (that continues today) was between Australian nationals and aliens. However, current Australian legislation and case law often does not apply in such a strict way, as often it is the case that rights are not granted solely by reason of citizenship, but rather due to a person's residence in Australia. For instance, many acts that confer benefits, such as veterans' entitlement rights and social security are linked to residency, rather than a person's status as a citizen.⁴⁰ Likewise, many responsibilities that one may think of as linked to the status of citizen are also applicable to non-citizens. For example, the Defence Act of 1903 allows the government to enlist the services of non-citizens temporarily residing in Australia in time of war.⁴¹ Concerning national protection, the Australian High Court has held that a non-citizen who relies on governmental advice could later claim liability against it for any negligent actions.⁴² Similarly, a non-citizen is

³⁵ *ibid* s 33.

³⁶ *ibid* s 34(1)(b); for the definition of fraud see s 50 or s 137.1 or 137.2 of the Criminal Code.

³⁷ *ibid* s 34(2)(b).

³⁸ *ibid* s 34(1)(c) and 34(2)(c).

³⁹ *ibid* s 35.

⁴⁰ K Rubenstein (n2) 597-98.

⁴¹ Defence Act 1903, s 59; see also, K Rubenstein, *ibid*, 599.

⁴² *Shaddock & Associates v Parramatta City Council* [No 1] (1981) 150 CLR 225; see also K Rubenstein, *ibid*, 604.

also arguably entitled to the procedural protections afforded by criminal law.⁴³ Consequently, it is difficult to draw any clear conclusions regarding what rights are bestowed by virtue of 'citizenship' in Australia. As far as possible, such distinctions will be made clear below in connection with the discussion on Hallmark rights.

It is also important to note the unique case of citizenship within a federalist country. In many cases, for example with regard to jury service or service in State public services, the Commonwealth allows the States to determine the legal consequences of citizenship based on federal minimum standards. Therefore, equality between citizens of Australia differs based on the rights granted by each individual State.

Treatment of Aboriginal Australians

Aboriginal Australians, despite their status as British subjects and formal legal citizens, were not placed on equal footing with other Australian citizens. In 1938, Aboriginals formally requested full citizenship status. It was not until a 1962 amendment of the Commonwealth Franchise Act 1902 that the Aborigines were given the right to vote in the 1963 commonwealth elections; however, States reserved the right to determine whether Aboriginal Australians could vote and such entitlement varied between the States and was often arbitrarily given. Even now, although they are technically equal to other Australian citizens, the substance of their civic rights socially, culturally, and economically is not at the same level.⁴⁴

The Hallmarks of Citizenship

It should be noted at the outset that there is a difference between those laws which grant Australian citizens rights and government policies which, while they may in practice support and protect citizens' rights, do not in themselves speak to the existence of a right.

Hallmark 1 – Freedom of Movement

The centrality of status as 'citizen' to the right to freedom of movement in and out of Australia can be derived from the Migration Act of 1958. The purpose of the Act is to regulate the entrance and presence of non-citizens in Australia.⁴⁵ By specifically referring to non-citizens and the requirement that they obtain a visa to enter or remain in the country, the Act impliedly provides

⁴³ *Ousley v The Queen* (1977) 192 CLR 69, 105, 120, and 142; *R v Marks; Ex parte Australian Building Construction Employees Builders Labourers' Federation* (1981) 147 CLR 471, 484; see also K Rubenstein, *ibid*, 605.

⁴⁴ K Rubenstein and D Adler, 'International Citizenship: The Future of Nationality in a Globalized World', 7 *Indiana Journal of Global Legal Studies* (Spring 2000), 519.

⁴⁵ Migration Act 1958 s 4.

citizens of Australia with the right to move freely in and out of the country.⁴⁶ The Migration Act further specifies that a non-citizen must have a visa in order to enter Australia.⁴⁷ The visa requirement does not apply to citizens of New Zealand⁴⁸ with valid New Zealand passports and non-citizens with passports giving them the authority to reside on Norfolk Island indefinitely⁴⁹. The emphasis on citizenship status with regard to rights of freedom of movement was affirmed by the High Court in the case of *Air Caledonie International v The Commonwealth*⁵⁰. The High Court held that '[t]he right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or 'clearance' from the Executive.'⁵¹ Such a right persists 'for so long as [the person] retain[s] his citizenship.'⁵² However, the decision in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Ame*⁵³ brings into question whether this legislative right is constitutionally protected.

The Victoria Charter also provides the right to freedom of movement: '[e]very person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live'.⁵⁴ The ACT Human Rights Act provides that, '[e]veryone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT.'⁵⁵

Hallmark 2 – Right to a Passport

The right of a citizen to a passport was originally delineated in the Passports Act of 1938 which has been superseded by the current Act of 2005. The stated purpose of the act is to 'provide for the issue and administration of Australian passports, to be used as evidence of identity and citizenship by Australian citizens who are travelling internationally.'⁵⁶ The Act is applicable to the external Territories of the Commonwealth.⁵⁷ Subject to the authorities being satisfied that the applicant for a passport is indeed an Australian citizen and a verification of the applicant's identity⁵⁸, the Act provides that an Australian citizen is entitled to a passport (upon payment of any applicable fee).⁵⁹

⁴⁶ There was historically a second class citizenship, in that Australian citizens resident in Papua were not entitled to freedom of entry into mainland Australia. See the High Court decision of *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Ame* [2005] HCA 36; (2005) 222 CLR 439; 79 ALJR 1309; 218 ALR 483 (4 August 2005) at <http://www.austlii.edu.au/au/cases/cth/HCA/2005/36.html>

⁴⁷ Migration Act (n43) s 42.

⁴⁸ *ibid* s 42(2A)(a).

⁴⁹ *ibid* s 42(2A)(b).

⁵⁰ *Air Caledonie International v The Commonwealth* 165 CLR 462 (1988).

⁵¹ *ibid* 469.

⁵² *ibid* 470.

⁵³ [2005] HCA 36; (2005) 222 CLR 439; 79 ALJR 1309; 218 ALR 483 (4 August 2005)

⁵⁴ Victoria Charter (n5) s 12.

⁵⁵ ACT Human Rights Act (n4) s 18.

⁵⁶ Australian Passports Act 2005, s 3.

⁵⁷ *ibid* s 4.

⁵⁸ *ibid* s 8.

⁵⁹ *ibid* s 7.

Hallmark 3 – Right to vote

Enrolment and voting in Australia is compulsory.⁶⁰ For that reason, it may be considered that voting is a duty rather than a right, although applicants for citizenship are taught that it is a privilege.⁶¹ The Commonwealth Electoral Act of 1918 provides that Australian citizens, age 18 and over, shall be entitled to enrolment and to vote⁶² and that it is the duty of every elector to vote. Every person who is entitled to enrolment must do so within 21 days of his or her becoming entitled. Failure to do so may result in a penalty fee unless the person can show that he or she attempted to enrol.⁶³ Likewise, it is the duty of all enrolled electors to vote at each election.⁶⁴ Those electors who fail to vote must provide a 'valid and sufficient reason' for the failure to do so.⁶⁵ The determination of citizenship is based on that found within the applicable version of the Australian Citizenship Act.

The Electoral Act also extends to certain permanent residents, i.e. British subjects who were enrolled to vote prior to 26 January 1984.⁶⁶ The Electoral Act specifically excludes holders of temporary visas (as defined under the Migration Act and 'unlawful non-citizens').⁶⁷ It permits those Australian electors who are enrolled but intend to live outside of Australia for no longer than six years to apply for status as an overseas elector.⁶⁸ A person who is living outside Australia but who has not yet enrolled, may make an application to become an overseas elector, provided again that they intend to live outside Australia for no longer than six years after he or she ceased to reside in the country.⁶⁹ The Electoral Act also provides that the eligible spouse and child of an overseas elector who have not yet enrolled to vote may do so, provided that they do not intend to remain overseas for more than six years after the date on which they left Australia.⁷⁰

Residents are excluded from the right to vote. However, even non-citizens or residents may be permitted to vote in local elections in certain circumstances. For example, Victoria's *Local Government Act 1989* entitles property owners of any land in the ward over the age of 18 to vote

⁶⁰ The Commonwealth Electoral Act 1918 s 245(1).

⁶¹ Australia's citizenship pamphlet entitled 'Becoming an Australian citizen' refers to voting as 'one of the most important privileges held by Australian citizens' on p 3. The pamphlet is available at: <http://www.citizenship.gov.au/test/resource-booklet/citz-booklet-full-ver.pdf>.

⁶² The Commonwealth Electoral Act (n58) s 93(1)(i).

⁶³ *ibid* s 101(4).

⁶⁴ *ibid* s 245(1).

⁶⁵ *ibid* s 245(5)(c)(ii).

⁶⁶ *ibid* s 93(1)(ii); see also K Rubenstein (n2), p 596.

⁶⁷ Electoral Act s 93(7).

⁶⁸ *ibid* s 94(1).

⁶⁹ *ibid* s 94A(1).

⁷⁰ *ibid* s 95(1).

even if they are not resident in the ward itself.⁷¹ The same applies to non-resident occupiers of land in the relevant ward.⁷²

The Victoria Charter provides every person in Victoria with the right to direct or indirect participation without discrimination in public affairs, including the right to vote.⁷³ The ACT Human Rights Act provides every citizen with the right to 'vote and be elected at periodic elections, that guarantee the free expression of the will of the electors'.⁷⁴

Australian legislation and case law provide for voter disenfranchisement in certain circumstances where a citizen has been convicted of a felony offence. In *Roach v Electoral Commissioner*⁷⁵ the High Court quashed provisions inserted in the Commonwealth Electoral Act during 2006 that resulted in the disenfranchisement of all those in prison. This was done with the support of Sections 7 and 24 of the Australian Constitution which were interpreted as providing a 'constitutional protection of the right to vote'. Those sections provide that the members of the House of Representatives and Senate be 'directly chosen by the people'. While not automatically invalidating all restrictions on the right to vote, the Court held that Parliament's power to define these restrictions is restricted by the wording of the constitution, i.e. it is unable to issue a blanket disenfranchisement of all prisoners. Such a pervasive restriction was found to lack the necessary nexus between the disqualification criteria and conduct evincing culpability considered incompatible with participation in the electoral process. In the same case, the High Court upheld pre-2006 laws disenfranchising those serving prison sentences longer than 3 years.⁷⁶ Voting rights will be reinstated once the person is no longer under detention or serving a sentence of imprisonment longer than 3 years.

The Commonwealth Electoral Act also restricts the right to vote where a person 'by reason of unsound mind is incapable of understanding the nature and significance of enrolment and voting'.⁷⁷ Nor does it permit a person convicted of treason or treachery who has not been pardoned to vote at any federal elections.⁷⁸

⁷¹ Local Government Act 1959 (Victoria) s 11(2); see also K Rubenstein (n6) 213.

⁷² *ibid* s 11(4).

⁷³ Victoria Charter (n5) s 18.

⁷⁴ ACT Human Rights Act (n4) s 17(b).

⁷⁵ [2007] HCA 43.

⁷⁶ Electoral Commissions Act s 93(8)(b).

⁷⁷ Commonwealth Electoral Act (n58) s 93(8)(a).

⁷⁸ *ibid* s 93(8)(c).

Hallmark 4 – Right of Petition and to a Referendum

There is no fundamental right to a referendum in Australia; however, the Constitution provides that amendments to the Constitution must be approved by referendum.⁷⁹

Hallmark 5 – Right to Stand as a Candidate in National and Local Elections

The Commonwealth Electoral Act provides for the qualifications of members of Parliament. In both the House of Representatives and the Senate, a person is eligible for nomination if he or she is 18 years of age, entitled or qualified to vote in such an election him- or herself, and is an Australian citizen.⁸⁰

The Constitution of Australia provides that membership in either the House or Senate can only be attained by someone who is (1) 21 years of age; (2) entitled or qualified to vote in such an election him- or herself; (3) resident in the Commonwealth for at least three years; (4) a citizen, either natural born or naturalised after five years.⁸¹

The Victoria Charter provides every person in Victoria with the right to direct or indirect participation without discrimination in public affairs, including the right to be elected.⁸² The ACT Human Rights Act provision on the right to stand as a candidate in elections was discussed in the previous section.

The Australian Constitution states that a person may be rendered incapable of being chosen or of sitting as a senator or a member of the House of Representatives in several circumstances if the person is: (1) 'under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power'⁸³, and (2) 'attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer'⁸⁴. The Constitution includes provision regarding other types of behaviour that may lead to candidate disenfranchisement; however, they are not directly related to non-civic behaviour.⁸⁵

⁷⁹ Australian Constitution Act (n1) s 128.

⁸⁰ Commonwealth Electoral Act (n58) s 163(1).

⁸¹ Constitution of Australia (n1) s 34.

⁸² Victoria Charter (n5) s 18.

⁸³ Australian Constitution Act (n1) s 44(i).

⁸⁴ *ibid* s 44(ii).

⁸⁵ The Constitution also restricts the right to candidacy where the citizen: (a) is 'an undischarged bankrupt or insolvent' (s 44(iii)); (b) 'Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth' (s 44 (iv)); and (c) 'Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons' (s 44(v)).

Hallmark 6 – Right of Access to Public Office and Public Services

Employment in the public sector is mainly governed by the Australia Public Service Act of 1999, although several other acts, including legislation establishing governmental bodies, also govern conditions or restrictions on public employment.⁸⁶ The Public Service Act of 1922 contained a strict condition of British citizenship in relation to public employment.⁸⁷ More than 60 years later, a piece of ‘streamlining’ legislation was developed that extended the right to public employment to permanent residents on a probationary basis for up to two years. Permanent employment would follow only upon their obtaining Australian citizenship.⁸⁸ The 1999 Act (which is current) maintains the citizenship requirement: ‘The engagement of an APS [Australian Public Service] employee...may be made subject to conditions notified to the employee, including conditions dealing with any of the following matters:... citizenship’.⁸⁹ However, it goes on to provide Agency heads with the ability to consider whether it is ‘appropriate’ to employ a non-citizen.⁹⁰ The Act represents a more lax approach to public service employment which is best represented in its statement of values which include freedom from discrimination and the recognition and utilisation of diversity⁹¹. The implementation of this value is more specifically addressed in the Public Service Commissioner’s Directions which state that ‘[i]n upholding and promoting the APS Value mentioned in paragraph 10(1)(c) of the Act, an Agency Head must put in place measures in the Agency directed at ensuring that: (a) all Commonwealth anti-discrimination laws are complied with; and (b) engagement decisions in the Agency are made taking into account the diversity of the Australian community, the organisational and business goals of the Agency and the skills required to perform the relevant duties; and (c) the diverse backgrounds of APS employees are effectively utilised, taking into account the organisational and business goals of the Agency and the skills required to perform the relevant duties.’⁹²

The Victoria Charter provides every person in Victoria with the right to direct or indirect participation without discrimination in public affairs, including the right to access to public service and office.⁹³ The ACT Human Rights Act provides every citizen with ‘access, on general terms of equality, for appointment to the public service and public office.’⁹⁴

⁸⁶ For example, the legislation establishing the Australian Institute of Marine Science includes a provision restricting the position of an officer to an Australian Citizen (s 33); see also K Rubenstein (n6) 225.

⁸⁷ Public Service Act 1922 s 34(a) [repealed].

⁸⁸ Public Service Legislation (Streamlining) Act 1986 s 33 which amended s 47 of the 1922 Act.

⁸⁹ Public Service Act 1999 s 22(6)(b).

⁹⁰ *ibid* s 22(8).

⁹¹ *ibid* s 10(1)(c).

⁹² K Rubenstein (n6) 227.

⁹³ Victoria Charter (n5) s 18.

⁹⁴ ACT Human Rights Act (n4) s 17(c).

Hallmark 7 – Right to Protection

The right to protection by the government extends beyond citizens to all lawful residents. This proposition was expounded by the High Court in *Re Bolton; Ex parte Beane*⁹⁵ where the Court held that, ‘the laws of this country secure the freedom of every lawful resident, whether citizen or alien, from arrest and surrender into the custody of foreign authorities on a mere executive warrant.’

Hallmark 8 – Right to Welfare Benefits

Benefits under the Social Security Act⁹⁶ are bestowed based on residence rather than citizenship. An Australian resident is defined as one who resides in Australia and is either a citizen, holder of a permanent visa, or holder of certain specified visas.⁹⁷ An amendment to the Social Security Act of 1991 imposes a waiting period of 104 weeks for migrants with regard to certain benefits.⁹⁸ The waiting period is applicable to migrants who arrived on or after 1 December 1997 or who were granted permanent residence on or after 1 December 1996. The date for arrival is to be determined based on the date of grant of a permanent visa.⁹⁹ The waiting period does not apply with respect to family assistance.¹⁰⁰

Furthermore, family assistance provisions under the recent Family Assistance Act are also extended to residents of Australia.¹⁰¹ The Act specifically cites the definition of ‘Australian resident’ as under the Social Security Act.¹⁰² An individual is eligible for family tax benefits if he or she has at least one child and is an Australian resident.¹⁰³

The Veterans’ Entitlements Act¹⁰⁴ provides benefits based on residency. Under that Act, an Australian resident is defined as one who resides in Australia and is either a citizen, holder of a permanent visa, or holder of certain specified visas.¹⁰⁵ The Act entitles such residents to an age

⁹⁵ 162 CLR 514, 521 (1987).

⁹⁶ Social Security Act 1991.

⁹⁷ *ibid* s 7(2).

⁹⁸ Social Security Legislation Amendment (Newly Arrived Resident’s Waiting Periods and Other Measures) Act 1997. This amendment has been incorporated into the current version of the Social Security Act. Benefits subject to such a waiting period include (1) carer payment; (2) widow allowance; (3) pensioner education supplement; (4) sickness allowance; and (5) seniors health card. See s 23 of the Act and definition of ‘newly arrived residents waiting period’.

⁹⁹ Social Security Act (n94) s 4(4B).

¹⁰⁰ K Rubenstein (n6) 194.

¹⁰¹ A New Tax System (Family Assistance) Act 1999.

¹⁰² *ibid* s 3.

¹⁰³ *ibid* s 21(1).

¹⁰⁴ Veterans’ Entitlements Act 1986.

¹⁰⁵ *ibid* s 5G(1AA).

service pension¹⁰⁶, invalidity service pension¹⁰⁷, partner service pension¹⁰⁸, and income support supplement¹⁰⁹.

Australia has a compulsory pension scheme in place called the Superannuation Fund whereby employers make a superannuation guarantee contribution for their employees to a complying superannuation fund or retirement savings account if the employee is eligible.¹¹⁰ The scheme applies based on earnings, not legal status. A temporary resident who earned income during his or her stay in Australia can claim back any benefit accrued while legally working in Australia.¹¹¹

Hallmark 9 – Right to Health Care

The Constitution¹¹² gives the Federal Parliament the power to make laws aimed to facilitate the enjoyment of the right to health, relating to: 'The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize and form of civil conscription), benefits to students and family allowances'. This power supports the Commonwealth Medicare program, and actions taken by the Federal Government under the 1973 Health Insurance Act. It should be noted that under the 1973 Health Insurance Act, one does not have to be a citizen (or on permanent visa) in order to be entitled to a Medicare card and coverage by the health care system.¹¹³

Furthermore, Australia has ratified all the international human rights instruments that enshrine and codify the right to health or health related rights and the obligations it must undertake with respect to the right to health¹¹⁴. In keeping with its obligations under the International Convention on Economic, Social and Cultural Rights it has submitted reports on its compliance with the provisions of the Covenant and has been subject to reviews of its performance by the Committee. Australia has generally been very supportive of the international human rights system (although there has recently been a trend away from this – for example, the refusal to sign up to the

¹⁰⁶ *ibid* s 36H.

¹⁰⁷ *ibid* s 37H.

¹⁰⁸ *ibid* s 38H.

¹⁰⁹ *ibid* s 45M.

¹¹⁰ Superannuation Guarantee (Administration) Act 1992; Further information on superannuation can be found at: <http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/63830.htm> (last accessed 3 December 2007). Note that there is a public sector counterpart act of 2005: Superannuation Act 2005 regarding the Public Sector Superannuation Accumulation Plan (PSSAP).

¹¹¹ *ibid*.

¹¹² Australia Constitution Act (n1) s 51.xxiiiA.

¹¹³ Health Insurance Act 1973, s 3; see also K Rubenstein (n6) 198.

¹¹⁴ Including: Universal Declaration of Human Rights Art. 25; International Covenant on Economic, Social and Cultural Rights Art. 12; Covenant on the Elimination of All Forms of Discrimination Against Women Art. 12; International Covenant on Civil and Political Rights Art. 26; for a summary of the international right to health see A Hendriks, 'The right to health in National and International Jurisprudence', 5 *European Journal of Health Law* (1998) 389-408; for Australia's attitude to the international right to health see E A Reid, 'Health, Human Rights and Australia's foreign policies', 180 *Medical Journal of Australia* (August 2004), 164.

Optional Protocol of the Covenant on the Elimination of All Forms of Discrimination Against Women (2000) and the vote against the Draft Optional Protocol to the Convention Against Torture (2002)).¹¹⁵

Hallmark 10 – Right to Education

Australian citizens enjoy access to public education. However, at the Federal level there is scant recognition of this right. The Commonwealth Constitution grants a limited power to parliament to enact legislation that will yield ‘benefits to students’¹¹⁶, but there is no explicit recognition a corresponding right. A right to education may, however, be inferred from the Indigenous Education (Targeted Assistance) Act 2000 which aims to provide Indigenous peoples with equitable and appropriate outcomes¹¹⁷, access to¹¹⁸, equal participation¹¹⁹ and involvement in¹²⁰, and culturally appropriate development of education services¹²¹.

Responsibility for education lies primarily with the States and Territories. There is more explicit recognition of the citizens’ right to education at this level. For example, one of the objectives of West Australia’s School Education Act 1999 is ‘to recognize the right of every child in [West Australia] to receive a school education’.¹²² Similarly, New South Wales’ Education Act 1990 recognizes, *inter alia*, that ‘every child has a right to receive an education’¹²³. Although not every State is as explicit in their recognition of a right to education, all States have legislation that makes obligatory the provision of free and compulsory education for those in primary and secondary school¹²⁴.

The right of Australian citizens to education can also be seen by the commitment of Australia to international conventions recognising the right to education¹²⁵, as well as the acceptance of international provisions accepting the obligation to ensure equitable availability and access to this right.¹²⁶ In the absence of a Federal bill of rights, Australia’s ratification of international human

¹¹⁵ Reid, *ibid*.

¹¹⁶ Australian Constitution Act (n1) s 51 xxiiiA: ‘the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . the provision of . . . benefits to students’.

¹¹⁷ s 5.

¹¹⁸ s 6.

¹¹⁹ s 7.

¹²⁰ s 8.

¹²¹ s 9.

¹²² s 3.1.a.

¹²³ s 4 (a).

¹²⁴ See A Durbach and S Moran, ‘Rights, Roles and Responsibilities: the right to education and the nature of obligations on Australian Governments’, Public Interest Advocacy Centre (April 2004).

¹²⁵ UDHR Art 26; ICESCR Art 13 & 14; CRC Art 5.

¹²⁶ ICESCR Art 2 (1); CESCR General Comment No. 13, para 6; CRC Art 28 & 29.

rights instruments has been interpreted as being legally persuasive, although not enforceable.¹²⁷ For instance, Brennan J in *Mabo v Queensland (No.2)* observed that '[t]he common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.'¹²⁸ Furthermore, the Australian Human Rights and Equal Opportunities Commission exists to ensure that legislation at both the State and Federal level comply with Australia's obligations under international human rights law, including those provisions relating to equal availability and accessibility of the right to education.¹²⁹

This is not to say that there is full compliance with these obligations. For example, temporary visa holders may be required to pay school fees.¹³⁰ There is also a question regarding whether asylum seekers enjoy the right to education under the Migration Act.¹³¹

Hallmark 11 – Right to Employment

Australian citizens do not have any specific right to employment under domestic law. In the absence of a bill of rights, this is not surprising. In the absence of a domestic rights regime, international human rights norms have been given greater salience¹³². To this end, the Human Rights and Equal Opportunity Commission Act (1986) established a Commission to ensure that public practices are consistent with Australian laws related to non-discrimination and human rights¹³³ as well as those laws established in certain international conventions ratified by Australia¹³⁴. Similarly, the Workplace Relations Act (1996) establishes a commission to prevent and eliminate discrimination on the basis of, amongst other things, sex and family responsibilities, and to assist in giving effect to Australia's international obligations in relation to labour standards¹³⁵.

¹²⁷ A. Durbach and S. Moran, 'Rights, Roles and Responsibilities: the right to education and the nature of obligations on Australian Governments', Public Interest Advocacy Centre (April 2004).

¹²⁸ 175 CLR 1 at 42 (1992), Mason CJ and McHugh J agreeing.

¹²⁹ http://www.humanrights.gov.au/human_rights/rural_education/briefing/right_ed.html (last accessed 27 November 2007); CESCR General Comment 13, para. 6 (1999).

¹³⁰ Australian Department of Immigration and Citizenship: <http://www.dimia.gov.au/living-in-australia/settle-in-australia/everyday-life/education/index.htm>

¹³¹ *Jaffari v Minister for Immigration and Multicultural Affairs* [2001] FCA 1516, paras 43 & 44.

¹³² See Galligan and Morton, 'Australian Exceptionalism: Rights protection without a Bill of Rights', ch 1 of T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia*, Ashgate: 2006.

¹³³ Specifically, those laws set out in the Age Discrimination Act 2004, Disability Discrimination Act 1992, the Human Rights and Equal Opportunities Commission Act 1986, the Race Discrimination Act 1975 and the Sex Discrimination Act 1984.

¹³⁴ ILO Discrimination (Employment) Convention (ILO 111), International Covenant on Civil and Political Rights, Convention on the Rights of the Child, Declaration on the Rights of the Child, Declaration on the Rights of Disabled Persons, Declaration on the Rights of Mentally Retarded Persons, and Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief.

¹³⁵ s 3 (j) and (k).

Permanent residents have these same general rights to employment. They are, however, exempted from public sector employment. Citizens may therefore be said to have specific rights to public sector employment under the Public Service Act (1999).¹³⁶

Restrictions on the right to employment for non-permanent residents are in force under sections 2 and 8 of the Migration Act (1958). The extent to which a non-permanent resident may enjoy the right to employment is determined by the specific type of visa held and the conditions attached to the visa, the most extreme of which is that the 'holder must not engage in work in Australia'¹³⁷.

Hallmark 12 – Right to Housing

As mentioned above with regard to the right to health care, Australia is a signatory to major international law instruments which include provisions relating to the right to adequate housing (e.g. the ICESCR) and so must satisfy the provisions relating to housing as pronounced therein. There is no real national housing strategy in Australia; however two main acts govern assistance and social housing projects. The first is the Supported Accommodation Assistance Programme¹³⁸ which is aimed at providing aid to homeless people in Australia and recognises the protection of universal human rights, including the ICESCR, in its preamble. It functions also to nationally co-ordinate state-run homelessness assistance programs. The programme does not refer specifically to citizens, but rather is applicable to homeless men, women, and young people.

The other programme is called the Commonwealth State Housing Agreement which actually consists of a series of agreements between the Commonwealth and each of the States. It was formed against the backdrop of the Housing Assistance Act of 1989¹³⁹ which manages financing for housing assistance. The main thrust of the Act is to set up social housing which is managed and financed by the government, as well as community housing which is owned and managed by non-governmental organisations. In both situations, housing is offered below market value rent. As of late, the focus has moved away from public housing and toward rent assistance. The preamble of the Act states that, 'Australia has acted to protect the rights of all its *citizens*, including people who have inadequate housing, by recognising international standards for the protection of universal human rights and fundamental freedoms' through the ratification of several international treaties. It then goes on to note, however, that assistance will be provided to '*people* requiring access to affordable and appropriate housing' [emphasis added]. It is therefore unclear

¹³⁶ s 22 (8): 'An Agency Head must not engage, as an APS [Australian Public Sector] employee, a person who is not an Australian citizen, unless the Agency Head considers it appropriate to do so.'

¹³⁷ Migration Act (n43) Condition 8101.

¹³⁸ For more information, see http://www.facsia.gov.au/internet/facsinternet.nsf/aboutfacs/programs/house-saap_nav.htm.

The latest version of the enacting legislation can be found here: <http://scaletext.law.gov.au/html/comact/8/4450/top.htm>.

¹³⁹ The 1996 version is currently in force.

whether housing assistance is only afforded to Australian citizens, or whether it will be provided on a needs-basis.

Hallmark 13 – Linguistic Rights

Australian citizens have no general linguistic rights at the Federal level. There are policies enacted by the Australian federal government which aim to support the use and maintenance of linguistic right for indigenous peoples, but these policies are not legally enforceable and cannot be considered to constitute linguistic rights.¹⁴⁰

There are two things to note, however. First, some States and Territories do have specific legal provisions for cultural rights, including the right for Aboriginal peoples to maintain and use their language¹⁴¹. Citizens living in these States do therefore have linguistic rights.

Second, Australia is signatory to numerous international conventions protecting linguistic rights¹⁴². While international human rights law does seem to have a special status in aiding the progressive development of Australian common law, international laws are not in themselves enforceable within the domestic courts. Government policy is that international human rights should be respected, but there is no law obligating that this be so. The lack of a federal Bill of Rights enshrining these international commitments as a matter of constitutional law leads to a 'patchwork method' of human rights protection.¹⁴³ There is no effective remedy to violations of linguistic rights.

It is also worth noting that, while federal legislation does not grant Australian citizens linguistic rights, it does grant non-citizens the right to be informed, through an interpreter if necessary, in a language in which they are able to communicate.¹⁴⁴

Hallmark 14 – Non-discrimination

The Australian Constitution provides that 'A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State'.¹⁴⁵ The High

¹⁴⁰ National Aboriginal and Torres Strait Islander Education Policy s 17 & 20; Indigenous Education (Targeted Assistance) Act 2000, s 5 (e).

¹⁴¹ Victoria Charter (n5) s 19.2.b; ACT Human Rights Act (n4) s 22 (a) & (h) & s 27.

¹⁴² UDHR 2.1; ICCPR Art. 2, 14, 24, 26 & 27; CRC Art. 17, 29, 30 & 40.

¹⁴³ http://www.humanrights.gov.au/human_rights/un_committee/index.html#covenant_rights (last accessed 5 December 2007).

¹⁴⁴ The Migration Act (n43) s 258 (b).

¹⁴⁵ Australian Constitution (n1) s 117.

Court expanded on this provision of the Constitution most notably in the case of *Street v Queensland Bar Association*¹⁴⁶ where Deane J held that its purpose is to protect the citizen resident in one State from being subjected in another State to 'disability or discrimination' and that its scope is to be determined on a case-by-case basis. The Court held that, '[w]hether a person living in Australia, but not a natural born or naturalized Australian citizen, is entitled to the protection accorded by Section 117 is a matter to be considered when the occasion arises.'¹⁴⁷

The Australian Capital Territory's Human Rights Act provides that, '[e]veryone has the right to enjoy his or her human rights without distinction or discrimination of any kind.'¹⁴⁸ The Victoria Charter has a similar provision.¹⁴⁹

Hallmark 15 – Duty of Allegiance

Allegiance

As discussed above with regarding to acquiring Australian citizenship, the Citizenship Act requires that the applicant make a commitment to the country: 'From this time forward, [under God,] I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey.' The Act does not include any reference to allegiance or loyalty with regard to natural-born Australian citizens, nor does the Constitution Act of Australia provide for such a concept.

Jury Service

Although it is left to each State to determine who may serve on a jury, all States require those who are on the electoral roll to be available for jury service.¹⁵⁰ As discussed above, citizenship is a necessary qualification in order to be placed on the electoral roll and hence it may be seen as a requirement to serve jury duty. However, each State may determine its own provisions for disqualification. For example, the Juries Act (2000) of Victoria provides that persons 18 years or older who are entitled to vote are eligible for jury service.¹⁵¹ Those who are ineligible include (1) the governor, a judge, magistrate or holder of a judicial office; (2) a bail justice; (3) legal practitioners; (4) police officers; and (5) ombudsman or an employee of the Ombudsman.¹⁵²

¹⁴⁶ 168 CLR 461 (1989).

¹⁴⁷ *ibid*, at 554.

¹⁴⁸ ACT Human Rights Act (n4) s 8(2).

¹⁴⁹ Victoria Charter (n5) s 8(2).

¹⁵⁰ K Rubenstein (n6) 40.

¹⁵¹ Juries Act 2000 (Victoria) s 5.

¹⁵² *ibid* Schedule 2.

Hallmark 16 – Duty to Undertake Military or Alternative Service

Australia's Defence Act¹⁵³ does not reserve service in the country's military forces to citizens. It provides that, 'the Army shall be kept up by the appointment to the Army, or the enlistment in the Army, of persons who volunteer and are accepted for service in the Army.'¹⁵⁴ Its provisions regarding compulsory military service are also not restricted to Australian citizens. During time of war, the Act makes all who have resided in Australia for at least six months and who have reached the age of 18 liable to serve in the defence force.¹⁵⁵

The validity of requiring non-citizens to serve in the military during time of war was called into question and reaffirmed before the High Court in *Polites v Commonwealth*¹⁵⁶. The Court based its affirmation of the legislative provisions on principles of national sovereignty which constitutionally allowed Parliament to enact such a provision. The Chief Justice noted that 'It is for the Government of the Commonwealth to consider its political significance, taking into account the obvious risk of the Commonwealth having no ground of objection if Australians who happen to be in foreign countries are conscripted for military service there.'¹⁵⁷

Hallmark 17 – Duty to Pay Taxes

Although the High Court is most often cited as referring to citizens in relation to the responsibility to pay taxes¹⁵⁸, it is clear from the relevant legislation that this duty is not restricted to citizens. The Income Tax Assessment Act of 1997 places an obligation on individuals to pay taxes based on the level of income earned in a fiscal year, not based on whether they are considered Australian citizens. In delineating who must pay income taxes, the Act reads, 'Income tax is payable by each individual and company, and by some other entities.'¹⁵⁹ The term 'entities' includes individuals, companies, partnerships, trustees, and mutual insurance associations.¹⁶⁰

¹⁵³ Defence Act (n39).

¹⁵⁴ *ibid* s 34.

¹⁵⁵ *ibid* s 59.

¹⁵⁶ (1945) 70 CLR 60.

¹⁵⁷ *Polites v Commonwealth* (1945) 70 CLR 60 at 73; see also K Rubenstein (n2) 599.

¹⁵⁸ In *Brambles Holdings v Federal Commissioner of Taxation* (1977) 138 CLR 467, the High Court expounded its notions on the tax system when it held, 'In the administration of taxation laws it is, in my opinion, fundamental that the citizen is entitled to take advantage of the provisions of the statute, even if the result is not something contemplated by the draftsman.' (Barwick CJ); similarly, in *Federal Commissioner of Taxation v Westrad Pty Ltd* (1980) 1544 CLR 55, the same Chief Justice stated that it was the duty of citizens to 'mould' their behaviour around the Act in order to keep up what is 'basic to the maintenance of a free society'; see also, K Rubenstein (n6) 272.

¹⁵⁹ Income Tax Assessment Act 1997 s 4-1.

¹⁶⁰ *ibid* s 9-1.

Hallmark 18 – Duty to Pay National Insurance Contributions

Australia's universal healthcare system, Medicare, is publicly-funded through tax contributions. A Medicare levy surcharge is imposed based on residence rather than citizenship under national tax legislation.¹⁶¹ The surcharge only applies to those people who earn income over the designated threshold and do not have private health insurance.¹⁶² The standard charge is 1.5 per cent of the individual's taxable income. The Medicare scheme was supplemented with a private system for rebates in 1999 whereby the government funds at least 30 per cent of any private health insurance program considered eligible.¹⁶³

¹⁶¹ A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Act 1980 s 10.

¹⁶² Information regarding the Medicare Levy can be found at:
<http://www.ato.gov.au/individuals/pathway.asp?pc=001/002/030> (last accessed 3 December 2007).

¹⁶³ Information on the Private Health Insurance Rebate scheme can be found at:
<http://www.medicareaustralia.gov.au/public/claims/private-health.shtml>.

French Citizenship

Introduction

French nationality is defined as the legal link that binds an individual to the French State. It is historically and traditionally based on the principle of *jus soli*, according to Ernest Renan's definition. However, elements of *jus sanguinis* have progressively been included in the French Civil Code which now lays down a compromise between the two traditions.¹

As a preliminary remark, it has to be noted that some of the hallmarks studied below derive from different sources, the Constitution or Statutory law (codified in various codes). In this respect, it must also be noted that since the famous decision of 16 July 1971 of the Constitutional Council, the Preamble of the Constitution of 1958 (currently in force) which refers to the Preamble of the Constitution of 1946 and to the Declaration of Rights of the Man and of the Citizen of 1789, has a 'constitutional value' and is part of the 'block of constitutionality' (*bloc de constitutionnalité*). Therefore, rights and responsibilities deriving from either the Preamble of the Constitution of 1946 or the Declaration of Rights of the Man and of the Citizen of 1789 have a constitutional value and have to be considered as constitutional rights.

French nationality is regulated by the Civil Code² and can be either automatically granted or required. It is automatically granted to children, legitimate or illegitimate, of whom at least one parent is French.³ If however only one of the parents is French, the child who was not born in France has the power to repudiate French nationality within six months preceding and twelve months following his majority⁴. A child born in France is also considered to be French where at least one of his parents was born there.⁵

¹ As a parallel remark, it can be noted that the French word for citizen, *citoyen*, also became an adjective and not only a name in 1995, and is now used as synonym of 'civic', emphasising the moral aspect of the notion.

² All translations of Articles of the Civil Code derive from www.legifrance.gouv.fr. Any other translations are made by the author and should not be regarded as official. Statutory provisions and judicial decisions are generally cited in the French original version, since, for virtually all of them, this is the only language in which they may be researched and accessed on www.legifrance.gouv.fr.

³ Civil Code, Article 18.

⁴ *ibid*, Article 18-1.

⁵ *ibid*, Article 19-3.

Acquisition of French nationality

By reason of marriage

In this respect, the recent change in the Law has to be examined. Previously, by virtue of Act no 2003-1119 of 26 November 2003⁶, ex Article 21-2 of the Civil Code provided that:

An alien or stateless person who marries and whose spouse is of French nationality may, after a period of two years from the date of marriage, acquire French nationality by way of declaration provided that, at the time of the declaration, the community of living⁷ both affective and physical has not come to an end and the French spouse has kept his or her nationality. The foreign spouse must also prove a sufficient knowledge of the French language, according to his or her condition.

The duration of the community of living shall be raised to three years where the alien, at the time of the declaration, does not prove that he has resided in France uninterruptedly for at least one year from the marriage.

The declaration shall be made as provided for in Articles 26 and following.

Notwithstanding the provisions of Article 26-1, it shall be registered by the Minister in charge of naturalisations.

This has been modified by Act no 2006-911 of 24 July 2006⁸. The new provisions state that a community of living both affective and physical for at least four years that has not come to an end is now required (five years if the alien does not prove that he has resided in France uninterruptedly for at least three years from the marriage or is unable to prove that his French spouse has been registered, during the period of their community of living spent abroad, in the register of the French national established abroad).

The Government may, on grounds of indignity or lack of assimilation other than for linguistic reasons, oppose the acquisition of French nationality by the foreign spouse within a period of two years. It should be noted that polygamy of the alien spouse and condemnation of the alien spouse for mutilation of a minor person constitute a lack of assimilation (Article 21-4).

⁶ *Loi n° 2003-1119 du 26 novembre 2003.*

⁷ 'Community of living' can be understood as the fact of living together.

⁸ *Loi n° 2006-911 du 24 juillet 2006, Article 79, Journal Officiel du 25 Juillet 2006.*

By reason of birth and residence in France

Children born in France of foreign parents acquire automatically French nationality on their coming of age, unless they disclaim it within six months preceding and twelve months following their majority, or are born of diplomatic agents if they have their residence in France and have had their usual residence in France for a continuous or discontinuous period of at least five years, from the age of eleven.⁹

From the age of 16 years, children born in France of foreign parents may claim French nationality if they have their residence in France, or if they have had their usual residence in France for a continuous or discontinuous period of at least five years from the age of eleven.¹⁰

By reason of a declaration of nationality

Children adopted by a French national may claim French nationality up to their majority if they have their residence in France at the time of declaration (unless the French national does not have his or her residence in France).¹¹ In the same way, French nationality may also be claimed by children sheltered and brought up by a French national for at least five years, children entrusted to the Children's Aid Service for at least three years and children sheltered in France that received, during five years at least, a French education by a public or private body offering certain features.¹²

By a decision of the Government

The person should normally prove a residence of five years before the submission of the request.¹³

As a general rule, the applicant should be of 'good character' and not have incurred one of the sentences referred to in Article 21-27 of the Civil Code.¹⁴

He should also prove his assimilation into the French community, and especially a sufficient knowledge of the French language, according to his condition and of the rights and duties conferred by French nationality.¹⁵

⁹ Civil Code, Articles 21-7 and 21-8.

¹⁰ *ibid*, Article 21-11.

¹¹ *ibid*, Article 21-12.

¹² *ibid*.

¹³ *ibid*, Article 21-17.

¹⁴ *ibid*, Article 21-23.

¹⁵ *ibid*, Article 21-24.

Declarations of nationality shall be received by the *Juge d'instance* or by consuls in the form prescribed by Decree in *Conseil d'Etat*.

There are some exceptions to the general rule of residence: the probationary period of five years is reduced to two years for aliens having successfully completed two years of university education in view of obtaining a diploma from a French establishment of higher education, as well as for aliens who gave or can give significant services to France due to their competences and talents.¹⁶

There is no probationary period at all:

- For aliens who performed military services in a unit of the French army or who, in time of war, enlisted voluntarily in French or allied armies;¹⁷
- For aliens who gave exceptional services to France or whose naturalisation is of exceptional interest for France¹⁸;
- For aliens who obtained the status of refugee;¹⁹
- For any person who belongs to the French cultural and linguistic unit, where he is a national of territories or States whose official language or one of the official languages is French, whether French is his mother tongue or he proves school attendance of at least five years at an institution teaching in French.²⁰

The requirement of knowledge of the French language shall not apply to political refugees and stateless persons who have resided in France regularly and habitually for at least 15 years and who are over 70.²¹

One can also note the specific provisions pertaining to foreign members of French army injured within military operations: French nationality may be conferred by Decree, on a proposal from the Minister of Defence, to an alien recruited in French armies who was wounded on duty during or on the occasion of an operational action and who makes a request herefor²².

Since Act no 2006-911 of 24 July 2006²³, the representative of the State or the Department (or, in Paris the *Préfet de Police*) organises, within six months from the day of the acquisition of French nationality, a welcoming ceremony in French citizenship. MPs and Senators are invited to join the ceremony.

¹⁶ *ibid*, Article 21-18.

¹⁷ *ibid*, Article 21-19

¹⁸ *ibid*.

¹⁹ *ibid*.

²⁰ *ibid*, Article 21-20.

²¹ *ibid*, Article 21-24-1.

²² *ibid*, Article 21-14-1.

²³ *Loi n° 2006-911 du 24 Juillet 2006, Article 85 du Journal Officiel du 25 juillet 2006.*

Residence and nationality

This aspect will be examined within the different hallmarks below.

Dual citizenship

Dual citizenship is allowed and the fact of possessing one or several nationalities has in principle no incidence on French nationality.

However, the Council of Europe and the Strasbourg Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 6 May 1963 have instituted a mechanism of automatic loss of the nationality of origin in the case of voluntary acquisition of the nationality of another contracting State. The second Protocol, signed in 1963 and modifying the Convention reduces its scope. It is in force in France, Italy, and the Netherlands; and enables the nationals of these three countries to keep their original nationality when acquiring the nationality of one of the signing parties.

Furthermore, France does not distinguish between dual nationals and other French nationals in terms of rights and duties of citizenship. However, it can be noted that a French dual national can normally not invoke his French nationality when he resides in the country of his other nationality.

Loss of citizenship

Loss of citizenship mainly takes the form of renunciation which can be done either by declaration or by virtue of a Decree. In the case of a declaration, it can happen when only one parent of a child is French, or when a person acquires another nationality. In case of a marriage with a foreign person, the French spouse can renounce his French nationality under the condition of having acquired the nationality of the country he resides in.

It can also in rare cases be involuntary, as in the case when the renunciation results from the Strasbourg Convention of 6 May 1963 on Reduction of Cases of Multiple Nationality.

French nationality can also be forfeited in several hypothesis: where an individual is sentenced for an act characterised as ordinary or serious offence which constitutes an injury to fundamental interests of the Nation, for an ordinary or serious offence which constitutes an act of terrorism, for an act characterised as ordinary or serious offence to public administration and for evading duties under the Code of National Service. Forfeiture also applies when an individual committed acts

incompatible with the Status of French and detrimental to interests of France for the benefit of a foreign State.²⁴

The Hallmarks of Citizenship

Hallmark 1 - Freedom of Movement

There is no express constitutional guarantee of freedom of movement.

However, the freedom of movement has been elevated to the rank of a constitutional principle by the Constitutional Council, according to which the freedom of movement within French territory is given to French nationals and EC nationals.²⁵

On the contrary, foreigners cannot claim a general right to residence as this is dependent on nationality. They require an authorisation (*titre de séjour*) which is valid for a certain time, can be revoked and is most of the time closely linked to a job. There are different types of *carte de séjour*, e.g. visitor, student, scientific, artistic and cultural profession, private life and family, retired, competence and talent, etc.

The conditions to obtain these different residence permits are outside of the scope of this report and will therefore not be analysed. All the relevant provisions can be found in the Code of Entry and Stay of Foreigners and of Asylum Right (Code of Entry and Stay hereafter)²⁶ into force since 1st March 2005.

All foreigners can freely leave French territory.²⁷

An alien allowed for the first time to stay in France or who regularly enters France between the age of 16 and 18, and who would like to stay durably shall prepare his republican integration into French society. To this end, he concludes an 'integration contract' with the State within which he agrees to undertake civic training, and, if needed, linguistic training.²⁸ This training is free and the organisation of this contract is supervised by the National Agency of Welcoming Strangers and of Migrations (*Agence nationale de l'accueil des étrangers et des migrations* or ANAEM). When the *carte de séjour* has to be renewed for the first time, the violation of some provisions of the contract can be taken into account.

²⁴ Civil Code, Article 25.

²⁵ *Décision n° 79-107 DC du 12 Juillet 1979.*

²⁶ *Code de l'Entrée et du séjour des étrangers et du droit d'asile.*

²⁷ Code of Entry and Stay, Article L 321-1.

²⁸ *ibid*, Article L 311-9; *Loi n° 2006-911 du 24 juillet 2006 Article 5 I, Journal Officiel du 25 juillet 2006; Loi n° 2007-290 du 5 Mars 2007 Article. 64, Journal Officiel du 6 Mars 2007.* It can be noted that the person gets a diploma at the end of the formation that is recognised by the State.

Every *département* shall constitute a '*commission du titre de séjour*'.²⁹ This commission is seized by the administrative authority when planning to refuse or to renew certain types of *cartes de séjour*. The applicant can benefit from legal aid and from an interpreter if necessary.³⁰

In this respect, it can be noted that there are currently some discussions about the possibility to create a similar contract for the family in case of family reunion. In the hypothesis of the creation of such a contract, it is noteworthy to mention that its breach could lead to a claim before the Judge for children (*Juge pour enfants*) and to the suspension of some welfare benefits.³¹

Every alien who can prove an uninterrupted residence of at least five years in France, and who possesses one of the following *carte de séjour* - visitor, artistic and cultural profession, scientific, temporary *carte de séjour* authorizing the exercise of a professional activity, private life and family, competence and talents - can obtain a resident card with the notation 'long-term resident - EC' if he has national insurance. The decision to grant or refuse this card is based on facts corroborating the applicant's intention to be established in France, such as the conditions of his professional activity if any, and his means of existence that have to be stable and sufficient to ensure his living³².

The resident card can also be granted to:

- The spouse or children in the year following their majority of a foreigner having a resident card, and who have been authorized to stay in France by virtue of family reunion, and who can prove that they have resided in France without interruption for three years.
- The foreigner who fathers or mothers a French child and who possesses for three years a temporary *carte de séjour*, and who is not polygamist.
- The foreigner married for at least three years to a French national, under the condition that they lived together uninterruptedly for this period.³³

The election of President Nicolas Sarkozy was followed by the creation of a new Ministry, namely the Ministry of Immigration, Integration, National Identity and Co-development headed by Brice Hortefeux.³⁴

²⁹ Code of Entry and Stay, Article L312-1. This commission is composed of the president of the administrative tribunal (or a delegate counselor), a judge designated by the general assembly of the *Tribunal de Grande Instance*, a qualified person competent with regard to public security, a qualified person in social matters, both designated by the *Préfet*, and a mayor.

³⁰ *ibid*, Article L312-2.

³¹ See <http://www.vie-publique.fr/actualite/dossier/integration/contrat-accueil-integration-parcours-obligatoire-condition-installation-durable.html>

³² Code of Entry and Stay, Article L314-8; *Loi n°2006-911 du 24 juillet 2006, Article 29, Journal Officiel du 25 juillet 2006.*

³³ *ibid*, Article L314-9; *ordonnance n° 2005-759 du 4 juillet 2005 Article 19 V, Journal Officiel du 6 juillet 2005 entrée en vigueur le 1^{er} juillet 2006; Loi n° 2006-911 du 24 juillet 2006 Article 37, Journal Officiel du 25 juillet 2006.*

³⁴ *Décret n° 2007-999 du 31 mai 2007 relatif aux attributions du ministre de l'immigration, de l'intégration, de l'identité nationale et du codéveloppement.*

It has been created to 'assemble in one structure the different aspects of immigration policy, which were until now divided between the Ministries of Interior, Foreign Affairs, Social Affairs and Justice'. Its main objectives are³⁵:

- Regulation of migratory fluxes: fight against illegal immigration, 'selective chosen' legal migration, maintenance of the right of political asylum.
- Encouragement of integration: requirements for immigrants (proficiency in French language, respect of the 'principles of the Republic') and also responsibilities of the State (notably in facilitating access to housing or education).
- Promote French identity as an answer to communautarism³⁶.

Minister Hortefeux recently submitted a new proposal of law on immigration which became highly controversial. Indeed, shortly after the proposal, an MP submitted an amendment, now famously known as the 'Mariani Amendment' authorising DNA tests in the event of a request for a visa for a period of more than three months for a family reunion. Another controversial provision of the Law was the possibility to undertake, with the aim of conducting studies on the diversity of origins, discrimination and integration, the treatment of personal data highlighting, directly or indirectly, ethnic and racial origins.

The Constitutional Council was seized on 25 and 26 October 2007 to assess whether the abovementioned provisions complied with the French Constitution. Opponents of the law argued that the abovementioned condition constituted an infringement of the right of family reunion and of the principle of equality before the law between families.

The Council gave its decision on 15 November 2007.³⁷

Article 13 of the Law, as submitted to the Constitutional Council provided that in case of the non-existence of a civil act, or in case of 'serious doubt on its authenticity', a DNA test could be conducted to ensure that there is a link of filiation between the mother and the applicant. In any case, express consent is required. Consular and diplomatic agents have to seize the *Tribunal de Grande Instance* of Nantes for it to assess the necessity of identifying the applicant. The subsequent analyses are paid for by the State.

This article has not been censored by the judges, but has been restricted with precise reserves.

The Constitutional Council indeed held that the litigious article provided sufficient guarantees: the applicant has to volunteer for a DNA test, the test is only reserved to the mother and more importantly the whole procedure is under the control of a judge.

³⁵ Statement of Minister Brice Hortefeux on the Ministry website, http://premier-ministre.gouv.fr/iminidco/ministere_830/missions_role_56625.html

³⁶ 'Communautarism' can be likened to the term 'nationalism' but at the community, rather than national level.

³⁷ *Décision 2007-557 DC du 15 novembre 2007.*

More specifically, it held that with regard to the child applicant, the law shall not institute particular rules of filiation that would lead to non-recognition of other forms of filiation available under the applicable law. In other words, and according to international conventions applicable to filiation, all the evidence of filiation applicable under the personal law of the mother can be used. It is outside the scope of the law to impose the French rules of filiation. In this interpretation, which guarantees the equality of all national modes of establishing filiation, the principle of equality is preserved. Furthermore, consular and diplomatic authorities still have to examine, case by case, and under the control of the judge, the validity and authenticity of the produced civil documents. It must also be noted that the abovementioned article is not applicable to adoptive filiation which will be still proved by means of a judgment.³⁸

Moreover, the Council invoked Article 37-1 of the Constitution which provides that the Law can include, for a circumscribed object and period, experimental provisions that do not comply with the principle of equality before the law. As DNA tests will be conducted as an experiment for 18 months, and as the legislator limited their scope of application to applicants from selected States of whom civil certificates are doubtful, the article complies with the Constitution.³⁹

This article is now codified under Article L 111-6 of the Code of Entry and Stay.⁴⁰

The new law also provides in what is now Article L 411-8 that the applicant to family reunion aged between 16 and 65 benefits in his country of residence from an evaluation of his knowledge of French language. According to the results of this evaluation and if necessary, the applicant has to undertake a training of no longer than two months at the end of which a new evaluation is made. The delivery of the visa depends on the production of a certificate stating the compliance with this condition.

The other controversial provision of the law was Article 63 that allowed, with the aim of conducting studies on the diversity of origins, discrimination and integration; and providing the authorisation of the National Commission on Information Technology and Liberties (*Commission Nationale de l'Informatique et des Libertés* or CNIL), the treatment of personal data; highlighting, directly or indirectly, ethnic and racial origins.

In its decision, the Constitutional Council stated that the necessary data used in studies on diversity of origins of persons, discrimination and integration has to be objective, and cannot be based on criteria such as race and ethnic origin. That is an infringement of Article 1 of the French Constitution that provides that 'France shall be indivisible, secular, democratic and social Republic. It shall ensure the equality of citizens before the law, without distinction of origin, race

³⁸ On this point, one can note that Jean-Louis Debré, the President of the Constitutional Council has reiterated in an interview given the newspaper *Le Monde* on 16 November, that the Council made clear that the law under scrutiny did not limit family reunion to blood-filiation and that family can be reunited under adoptive filiation. See paragraph 9 of the Decision.

³⁹ paragraph 13 of the Decision.

⁴⁰ *Loi n° 2007-1631 du 20 novembre 2007, Article 13 I Journal Officiel du 21 novembre 2007.*

and religion.’ It also stated that this provision did not have any link whatsoever with the other provisions of the law or with its objective.⁴¹

Hallmark 2 - Right to a Passport

The right to a passport is dependent on nationality.

Hallmark 3 - Right to Vote

According to Article 3 of the French Constitution, the right to vote is subject to three main conditions: generally, one will only be entitled to take part in elections if one has French nationality, has reached one’s majority and is moreover in possession of one’s civil and political rights. Articles L2 to L11 of the Electoral Code (*Code Electoral*) provide for specifications of those general Constitutional provisions. Thus, the age of majority is fixed at 18 years⁴². Interestingly, the right to take part in elections is, as far as national elections are concerned, not subordinated to residence in France. However, some restrictions and administrative formalities apply. The right to vote is denied to individuals under legal guardianship⁴³, for instance due to a mental disability, and those convicted, by a final judgment, of certain offences defined in the Penal Code⁴⁴. Moreover, individuals wishing to take part in elections are generally required to register one time to vote on the electoral roll.⁴⁵ It should be noted that some of the abovementioned conditions vary according to the type of election. Hence, it is necessary to examine successively the specific conditions and provisions pertaining to the presidential, parliamentary, municipal and European elections.

As regards the presidential elections, the right to vote does not depend on residence or the registration on an electoral roll of a French commune, since French nationals residing abroad who are registered as such enjoy this right as well. Unambiguously, nationality constitutes the essential criterion. The same applies basically for the elections of the French Assembly, for French nationals residing abroad who are registered as such may be authorised to register on the electoral board of a French commune.⁴⁶

Deriving from the 1993 Maastricht Treaty, nationals from an EU Member State other than France who are residing in France enjoy the right to vote at municipal⁴⁷ and European⁴⁸ elections. To be

⁴¹ paragraph 29 of the Decision.

⁴² Electoral code, Article L2.

⁴³ *ibid*, Articles L2 and L5.

⁴⁴ *ibid*, Articles L2 and L7. In this event, the deprivation of the right to vote is effective for 5 years.

⁴⁵ *ibid*, Articles L9 and L11.

⁴⁶ *ibid*, Article L12. The sole condition is the existence of a link to that commune, which is fulfilled where, for instance, one of the ancestors of the elector was born or registered in that commune.

⁴⁷ *ibid*, Article L0227-1; *Loi organique n° 98-404 du 25 mai 1998 déterminant les conditions d'application de l'article 88-3 de la Constitution relatif à l'exercice par les citoyens de l'Union européenne résidant en France, autres que les*

considered as resident, it is necessary to have a 'real domicile' in France or a residence of 'continuous character'⁴⁹. EU citizens wishing to vote in France must moreover 'enjoy the electoral capacity in their state of origin and fulfil the legal conditions other than the French nationality to be elector and to be registered on an electoral roll in France.'⁵⁰ Also, registration on a specially created electoral roll is required.⁵¹ Finally, EU citizens must comply with a certain number of additional formalities, the purpose of which consists essentially in the prevention of potential abuses, for instance the participation at European elections in France and the country of origin at the same time.⁵²

It seems noteworthy to mention that on 3 May 2000, the National Assembly adopted a law giving foreigners who reside in France the right to vote at municipal elections. However, this law has never been at the *ordre du jour* of the Senate, and has therefore never been the subject of a vote. Following this, several initiatives have been taken, the most recent being launched by the French political association *Ligue des Droits de l'Homme* and known as 'Citizen Vote' or '*Votation Citoyenne*'.

On December 2002, 60 organisations organised a symbolic vote asking the following question: 'Are you in favour of the right to vote in local elections and to stand as a candidate for foreigners residing in France?'. More than 40 000 persons participated in this first *Votation Citoyenne*, and the latest one was organised between the 5th and 11th December 2007.⁵³

Hallmark 4 - Right of Petition and to a Referendum

Article 3 of the French Constitution stipulates that 'National sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum.' The subject matter of such a referendum may be either a bill, pertaining to the organisation of the public authorities, to economic and social reforms, to the ratification of a treaty⁵⁴, or an amendment of the Constitution.⁵⁵ By virtue of Article 3 of the Constitution, the right to vote is subordinated to French nationality, the age of majority (18 years) and the possession of the individual's civil and political rights. Those three main conditions apply to the right to participate in national referenda.

ressortissants français, du droit de vote et d'éligibilité aux élections municipales, et portant transposition de la directive 94/80/CE du 19 décembre 1994 (1). NB: This concerns only the election of town councillors, since mayors are not directly elected in France.

⁴⁸ *Loi n° 94-104 du 5 février 1994 relative à l'exercice par les citoyens de l'Union européenne résidant en France du droit de vote et d'éligibilité aux élections au Parlement européen, Journal officiel du 08 février 1994, pages 2154/2156.* This concerns the election of the representatives of France inside the European Parliament.

⁴⁹ Electoral Code, Article 2-1 and *LOI n° 94-104 du 5 février 1994* (n.46), Article 2-1.

⁵⁰ *ibid*, Article L-0227-2 ; *Loi n° 94-104 du 5 février 1994*, Article 2-2.

⁵¹ *ibid*.

⁵² *ibid*, Article L-0227-4 ; *Loi n° 94-104 du 5 février 1994*, Article 2-4.

⁵³ For more information on this, please see http://www.ldh-france.org/actu_nationale.cfm?idactu=1110

⁵⁴ Constitution, Articles 11 and 88-5.

⁵⁵ Constitution, Article 89.

Neither the Constitution nor the Electoral Code provide for more specific requirements relating to national referenda. However, regulations fix the specific conditions under which national referendums take place and usually make references to provisions of the Electoral Code. In respect of the most recent referendum, on the 'Constitutional Treaty', which took place the 29 May 2005, only those French nationals who were registered, until 28 February 2005, on an electoral roll were entitled to take part in that vote.⁵⁶ The registration on an electoral roll is subject to the restrictions mentioned in the Hallmark *The right to vote*, applying notably where an individual is under legal guardianship or was convicted of a certain criminal offence. It should be noted that the right to take part in national referenda does not depend on residence in France, since French nationals residing abroad who are registered as such enjoy this right as well, provided they register on a specific list.⁵⁷

In addition to national referenda, the French Constitution authorises, following an amendment voted in March 2003, that local referenda may be held, pertaining to projects falling within the competence of a 'territorial unit'.⁵⁸ Where a local referendum takes place in one commune, nationals from EU Member States other than France who are residing in France, can participate at this vote.⁵⁹ Those EU citizens must satisfy the same conditions as required for the right to vote at municipal elections (*cf.* Hallmark *The right to vote*) and notably be registered on a specific electoral roll.⁶⁰

Hallmark 5 - Right to Stand as a Candidate

Basically, any French national who enjoys the right to vote also has the right to stand as a candidate, subject to the restrictions and specifications provided for by statute.⁶¹ One of these restrictions requests that one has, in order to be candidate for an election, to provide proof for having satisfied the obligations of national service.⁶² Further, there are incompatibilities with military functions and certain political mandates (restriction of accumulation of mandates)⁶³. Moreover, it should be noted that there are specific conditions depending on the type of election.

⁵⁶ *Décret n° 2005-237 du 17 mars 2005 portant organisation du référendum*, *Journal officiel n° 65 du 18 mars 2005*, page 4571, Article 5.

⁵⁷ See *Décret n° 2005-237 du 17 mars 2005* (n. 54), Article 1.

⁵⁸ Constitution, Article 72-1; *Loi organique n° 2003-705 du 1er août 2003 relative au référendum local*. The notion 'territorial unit' encompasses essentially communes, *départements* and regions.

⁵⁹ General code of the territorial Units (*Code général des collectivités territoriales*), Article L 01112-11.

⁶⁰ *ibid.* See also Articles LO 227-1 to LO 227-5 of the Electoral Code.

⁶¹ Electoral Code, Article L 44.

⁶² *ibid.* That provision will become less relevant in the future, for the obligation of military service is, since 1997, confined to the participation at a one-day event (*cf.* Hallmark *Duty to undertake national service*).

⁶³ Electoral Code, Articles L 46, L 46-1 and L 46-2.

For the presidential elections, two further criteria and three formalities apply, beyond the abovementioned conditions. The two conditions require the candidate to be 23 years old at least and to prove 'moral dignity', a notion which is not precisely defined.⁶⁴ The formalities include a declaration making transparent the holdings of the candidate, the opening of a specific account used for the costs of the political campaign and, most importantly, the collection of 500 signed presentations from certain elected representatives, mainly mayors.⁶⁵

As regards election to the French Assembly, candidates must have reached 23 years of age.⁶⁶ Moreover, individuals may be ineligible, for having violated, as a Member of Parliament, the rules of transparency⁶⁷, or on the ground of a conviction precluding them, definitively or temporarily, from registering on the electoral roll⁶⁸, or because they are deprived by judicial decision of their right to eligibility or are under legal guardianship.⁶⁹ Besides, certain senior civil servants, e.g. judges, engineers and prefects (*préfets*), may not be candidates in constituencies where they exercise or exercised recently their function.⁷⁰ Furthermore, the mandate of an MP is incompatible with certain political mandates⁷¹, due to the restriction of accumulation of mandates, as well as several other functions⁷², including, inter alia, civil service in general, senior positions in national companies and certain private companies.

To be a candidate in the election of town councillors, it is sufficient to have reached 18 years of age⁷³. Also there is to be a certain link with the commune: this condition can be fulfilled where one is an elector in the town in question or pays local taxes.⁷⁴ The ineligibilities⁷⁵ and incompatibilities⁷⁶ applying here are virtually identical with those governing the election of the Assembly. To name just one example, it is not possible to be elected Town Councillor in two different communes at the same time. Nationals from an EU Member State other than France who are residing in France may stand as a candidate for the election of town councillors⁷⁷. In order to exercise this right, they must be registered on the specifically created electoral roll of the

⁶⁴ *Loi organique, Loi n°62-1292 du 6 novembre 1962 relative à l'élection du Président de la République au suffrage universel, version consolidée au 22 février 2007.*

⁶⁵ *ibid.*

⁶⁶ Electoral Code, Article L 0127.

⁶⁷ *ibid.*, Article L 0128. This provision may apply where an MP failed to disclose properly his/her personal possessions or election campaign funds.

⁶⁸ *ibid.*, Articles L 0129 and L 0130.

⁶⁹ *ibid.*, Article L 0130.

⁷⁰ *ibid.*, Articles L 0131 and L 0133.

⁷¹ *ibid.*, Articles L 0137 to L 0141.

⁷² *ibid.*, Articles L 0142 to L 0153.

⁷³ *ibid.*, Article 228.

⁷⁴ *ibid.*

⁷⁵ *ibid.*, Articles L 230, L 231 and L 234.

⁷⁶ *ibid.*, Articles L 237, L 237-1 and L 238.

⁷⁷ Electoral Code, Article LO228-1 and *Loi organique no 98-404 du 25 mai 1998 déterminant les conditions d'application de l'article 88-3 de la Constitution relatif à l'exercice par les citoyens de l'Union européenne résidant en France, autres que les ressortissants français, du droit de vote et d'éligibilité aux élections municipales, et portant transposition de la directive 94/80/CE du 19 décembre 1994.*

commune in question (*cf.* Right to vote)⁷⁸. Alternatively, they have to fulfil all the legal conditions but the French nationality to be a voter and to be registered on the roll in question and must pay local taxes in the commune⁷⁹. In both cases, the right to eligibility for EU citizens is entirely based on their right to vote, which they only enjoy if they have in France their 'real domicile' or a residence of 'continuous character' (*cf.* Right to vote). A further restriction is that they need to be eligible in the state of origin in order to be eligible in France⁸⁰. Also it is not possible to be town councillor both in France and in the state of origin at the same time.⁸¹ It should be noted that EU citizens are precluded from exercising the functions of mayor or deputy mayor, who participate in the designation of the Senate, the second chamber of Parliament.⁸²

With regard to the elections for the European Parliament, EU citizens wishing to stand as a candidate in France must have in that country 'their real domicile' or a 'continuous residence', be 23 years old, enjoy the right to stand as a candidate in their state of origin and must not be candidate at the same time in another EU Member State.⁸³ There are several further formalities to comply with: potential candidates need to produce an official certificate issued by their state of origin proving that their right to stand as a candidate has not been withdrawn, as well as a written declaration specifying their nationality, their address in France, and indicating that they are not simultaneously candidate in another EU Member State, as well as, if there is need, the name of the town or constituency where they were last registered as candidate for the elections of EU Parliament.⁸⁴

Hallmark 6 - Right of Access to Public Office and Public Service

Three different types of civil service exist in France: civil service of the state, civil service of public hospitals and civil service of local governments. As a general rule, passing a competitive exam (so-called *concours*) is a precondition to becoming a civil servant. Regardless of the type of competitive exam and of civil service, several general conditions apply.⁸⁵ First, in order to be a civil servant, one must be either a French national, a national of an EU member state, or of another Member State of the European Economic Area, or of Switzerland⁸⁶. Also, one must enjoy

⁷⁸ *ibid.*, L 0228-1.

⁷⁹ *ibid.*

⁸⁰ *ibid.*, L 0230-2.

⁸¹ *ibid.*, L 0238-1.

⁸² Constitution, Article 88.

⁸³ *Loi no 94-104 du 5 février 1994 relative à l'exercice par les citoyens de l'Union européenne résidant en France du droit de vote et d'éligibilité aux élections au Parlement européen*, Articles 3 and 5-1.

⁸⁴ *Ibid.*, Article 5.

⁸⁵ *Loi n°83-634 du 13 juillet 1983. Loi portant droits et obligations des fonctionnaires. Loi dite loi Le Pors. Version consolidée au 22 février 2007.* Article 5.

⁸⁶ Pursuant to 'transitional agreements', nationals of the member states that have accessed to the EU in 2004 and 2007, are, with the exception of Cyprus and Malta, excluded from the right to public office.

one's civil rights⁸⁷ and not be convicted of a crime incompatible with the exercise of the civil service. Further requirements include the fulfilment of obligations arising out of the duty to undertake national service⁸⁸ and of the conditions of physical ability.

Moreover, there may be conditions specific to one of the three civil services. These can, for instance, consist in conditions of age, although most of them have progressively been repealed. More relevant are conditions relating to the possession of a diploma which do exist for most of the posts inside the civil service. If a candidate is unable to produce the required diploma, an equivalent diploma, education or professional experience delivered in France or another state of the European Economic Area, may also be accepted.⁸⁹

It should be noted that not all posts are open to nationals of the EEA and Switzerland.⁹⁰ Those nationals are excluded from access to posts 'the attributions of which are either not separable from the exercise of sovereignty, or involve a direct or indirect participation at the exercise of prerogatives of public power of the State or of the local governments'.⁹¹

These exceptions include most notably posts inside the diplomacy, the police and the Judiciary.⁹² The relevant regulations specify for each sector of the civil service which professions are open to foreign nationals.⁹³

⁸⁷ Those rights include most notably the right to vote and the right to stand as a candidate. Cf. <http://ugict.cgt.fr/nvsite/opt-juridique/doc0600.pdf>

⁸⁸ Given the suspension of the national service in France, those obligations simply consist, for male candidates born after the 31 December 1978 and female candidates born after the 31 December 1982, in providing for certificates of registration (*recensement*) and of participation at the *Journée d'appel à la préparation à la défense* (cf. hallmark on the duty to undertake national service).

⁸⁹ Specifications are provided for by instruments of secondary legislation, *inter alia*: *Décret n°2007-196 du 13 février 2007 relatif aux équivalences de diplômes requises pour se présenter aux concours d'accès aux corps et cadres d'emplois de la fonction publique*; *Arrêté du 26 juillet 2007 relatif aux commissions, instituées pour la fonction publique d'Etat, chargées de se prononcer sur les demandes d'équivalence de diplômes*.

⁹⁰ *Loi n° 2003-1119 du 26 novembre 2003*, (n. 1), Article 5bis.

⁹¹ *Loi n°83-634 du 13 juillet 1983* (n.1), Article 5 bis and quarter: 'Toutefois, ils n'ont pas accès aux emplois dont les attributions soit ne sont pas séparables de l'exercice de la souveraineté, soit comportent une participation directe ou indirecte à l'exercice de prérogatives de puissance publique de l'Etat ou des autres collectivités publiques.'

This is repeated in a regulation taken by the *Conseil d'Etat* (*J.O n° 152 du 2 juillet 2002 page 11345 texte n° 11: Décret n° 2002-946 du 25 juin 2002 portant publication de l'accord entre la Communauté européenne et ses Etats membres, d'une part, et la Confédération suisse, d'autre part, sur la libre circulation des personnes*): 'Le ressortissant d'une partie contractante exerçant une activité salariée peut se voir refuser le droit d'occuper un emploi dans l'administration publique lié à l'exercice de la puissance publique et destiné à sauvegarder les intérêts généraux de l'Etat ou d'autres collectivités publiques'.

⁹² Cf. <http://vosdroits.service>

public.fr/particuliers/F433.xhtml?&n=Emploi,%20travail&l=N5&n=Fonction%20publique&l=N499&n=Acc%C3%A8s%20C3%A0%20la%20fonction%20publique&l=N500.

⁹³ *E.g.* for the sector of education, see *Décret n°92-1246 du 30 novembre 1992, Décret ouvrant aux ressortissants des Etats membres de la Communauté européenne ou d'un autre Etat partie à l'accord sur l'Espace économique européen autres que la France l'accès à certains corps de fonctionnaires de l'éducation nationale, modifié par Décret n°2000-1221 du 12 décembre 2000 art. 1 (JORF 15 décembre 2000)*.

Hallmark 7- Right to Protection

In France, consuls are entrusted with the responsibility to guarantee diplomatic protection for nationals. They exercise this competence pursuant to a regulation (*décret*) taken in 1976 by the prime minister.⁹⁴ Article 11 of that regulation stipulates that consul generals, consuls, honorary vice-consuls and consulate agents 'shall ensure the protection of French nationals and of their interests'.⁹⁵ As regards the scope of diplomatic protection, regulations (*Arrêtés*) taken by the minister of foreign affairs for each foreign country individually⁹⁶ stipulate that the consuls provide all the types of diplomatic protection that are covered by the Vienna Convention on Consular relations of 24 April 1963. This encompasses, *inter alia*, 'protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law'⁹⁷, 'helping and assisting nationals, both individuals and bodies corporate, of the sending State'⁹⁸ and, 'subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests'.⁹⁹

Hallmark 8 - Right to Welfare Benefits

According to the French Constitution, the 'Nation shall provide the individual and the family with the conditions necessary to their development.'¹⁰⁰ It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have to the right to receive suitable means of existence from society.'¹⁰¹

We will in the following discussion examine how these principles apply to the granting of family allowances and income support.

⁹⁴ *Décret n° 76-548 du 16 juin 1976 relatif aux consuls généraux, consuls et vice-consuls honoraires et aux agents consulaires.*

⁹⁵ *ibid.*, Art. 11.

⁹⁶ As a matter of example, the relevant regulation for Germany is the following: *Arrêté du 19 juin 2006 relatif aux compétences des chefs de poste consulaire en Allemagne*, Article 2, para 1.

⁹⁷ Vienna Convention on Consular relations of 24 April 1963, Article 5, para a.

⁹⁸ *ibid.*, paragraph e.

⁹⁹ *ibid.*, paragraph i.

¹⁰⁰ Preamble of the Constitution of 1946, indent 10.

¹⁰¹ *ibid.*, indent 11.

Entitlement to family allowances is generally not based on nationality, but on residence.¹⁰² Both the child to whose benefit the allowances are paid as well as the parent bringing up the child must have their residence in France.¹⁰³ Also, the child must not already be a beneficiary of family or other social allowances on his or her own.¹⁰⁴ Assigned workers working only temporarily in France are generally not entitled to family allowances.¹⁰⁵ Foreigners must, moreover, meet several further criteria beyond the abovementioned conditions. First, they have to provide evidence that they and the child in question reside legally in France.¹⁰⁶ Second, they qualify for family allowances only where the child was born in France, where they enjoy the status as recognised refugee or where they possess a residence permit out of a list specified by regulation.¹⁰⁷ Not all types of residence permits qualify for family allowances. It should be noted that nationals from the EEA are exempted from the obligation to produce specific pieces of evidence for themselves and their children, beyond the documents that French nationals have to provide, such as a national identity card. However, they do not qualify for the single parent allowance in the event that they entered France to seek a job and are staying in the country on that basis.¹⁰⁸

With regard to the allowance of income support, the Code of Social Action and of Families¹⁰⁹ requires individuals to fulfil four conditions. One has to be a resident in France¹¹⁰, one's resources must not exceed the amount of the income support, one has to be older than 25 years or be in charge of a child, and the beneficiary must be committed to participate at several actions aiming at his or her social or professional rehabilitation.¹¹¹ Foreigners who are not nationals from an EEA state may benefit from income support only under quite restrictive circumstances. They only qualify for it if they are in possession of one specific residence permit among the ones listed, and those residence permits prove certain duration of residence in France, mostly of five years.¹¹² Likewise, foreign children younger than 16 years can only be taken into account for the calculation of the amount of income support if, either the children were born in France, or their date of entry is prior to the 3rd December 1988, or they reside legally in France subsequent to this date.¹¹³

¹⁰² Social Security Code, Article L 512-1

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*, Article L 512-2.

¹⁰⁷ *ibid.* See also Article D512-2.

¹⁰⁸ *ibid.*, Article L 524-1.

¹⁰⁹ *Code de l'Action Sociale et des Familles*

¹¹⁰ Code of social action and of families, article r262-2-1: i.e. People who reside permanently in France and such whose stay(s) abroad do not last longer than 3 months in a calendar year.

¹¹¹ *ibid.*, Article L 262-1.

¹¹² *ibid.*, Article L 262-9.

¹¹³ *ibid.*

Foreigners from the EU or one of the other EEA states may more easily have to fulfill the 'conditions necessary to be entitled to reside in France' and must have resided in France during three months prior to their request of social income.¹¹⁴ This condition of residence seems to be much less restrictive than the one for non-EEA foreigners. Also three categories of individuals are exempted from the condition of residence, notably individuals who are exercising or have exercised in France a lawful professional activity and their close family and spouses. However, as for the case of health care and family allowances, EEA-foreigners who have entered France to seek a job and who are staying in the country on that basis are not entitled to income support.

Hallmark 9 - Right to Health Care

The French Constitution lays down that 'The Nation shall provide the individual and the family with the conditions necessary to their development'.¹¹⁵ It also stipulates that the Nation 'shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure'.¹¹⁶

These general principles are specified by Statute, in the Social Security Code.¹¹⁷ The eligibility of an individual for health insurance coverage is generally based on a socio-professional criterion, that is either the payment of a certain amount of insurance contributions on the basis of the remuneration received by the individual or a minimum number of working hours.¹¹⁸ Individuals and their beneficiaries qualify for that regime of health insurance coverage regardless of their nationality, provided they are able to prove that their place of residence is in France.¹¹⁹ The right to health insurance coverage may even include foreigners whose residence is in a foreign country but whose permanent place of work is in France, provided a specific convention exists between France and their country of origin.¹²⁰

Even where individuals do not exercise a professional activity corresponding to the abovementioned criteria, they nevertheless are entitled to the same provisions of health care where they reside in France in a 'stable and regular manner'.¹²¹ Therefore, the following conditions need to be fulfilled: one has to be a resident for more than three months without interruption¹²², one has to reside legally in France¹²³ and one must have in this country one's

¹¹⁴ *ibid*, Article L262-9-1.

¹¹⁵ Preamble of the Constitution of 1946, indent 10.

¹¹⁶ *ibid*, indent 11.

¹¹⁷ *Code de la Sécurité Sociale*.

¹¹⁸ Social Security Code, Article L 313-1. Details are laid down in Article R313-2 *et seq.*.

¹¹⁹ *ibid*, Article L 311-7.

¹²⁰ *ibid*.

¹²¹ *ibid*, Article L 380-1.

¹²² *ibid*, Article R 380-I. There are, however, exceptions, such as for students and certain interns.

main place of residence.¹²⁴ It should also be noted that certain groups are excluded from this right, e.g. people who entered France for the purpose of a medical treatment or a cure or, more importantly, nationals from the EU or the EEA who entered France to seek a job and who are staying in the country on that basis.¹²⁵ Furthermore, the individuals that benefit from health insurance coverage due to their residence in France are required to pay insurance contributions where their resources exceed a certain ceiling.¹²⁶

With regard to the reimbursement of foreign tourists falling ill in France, the French Social Security bears, for nationals from the EEA and Switzerland, the medical costs on the basis of the French rates provided the tourists secure themselves the European Health Insurance Card¹²⁷. For nationals of other states, the reimbursement is guaranteed only in rare exceptional cases, for instance for Algerian nationals thanks to a Franco-Algerian protocol.

Hallmark 10 - Right to Education

Since the “Jules Ferry” Law of 28 March 1882, education has been compulsory. This obligation applies from the age of 6, for all French and foreign children having their residence in France. Since *Ordonnance* n°59-45 of 6 January 1959, education has been compulsory until the age of 16.

Paragraph 13 of the Preamble of the Constitution of 27 October 1946 which is referred to in the Preamble of the Constitution of 1958, provides that ‘The Nation guarantees equal access of the child and the adult to instruction, formation and culture; the organisation of public, free and laic education at all degrees is a duty of the State’ (Article L 141-1 Code of Education). All the relevant provisions are to be found in the Code of Education.

France requires a separation of Church and State. The Constitution of the Republic of France of 1958 is strongly secular and describes France as a “Republic indivisible, secular, democratic and social.” Correspondingly the principle of *laïcité* is said to be fundamental to the State. Prior to the Constitution, a law enacted in 1905 instituted the separation of Church and State and prohibited the government from recognising, providing salaries for adherents of, or subsidizing any religion.

¹²³ *ibid*, Article R 380-1 II.

¹²⁴ *ibid*, Article R 380-1 III. This entails staying in France for more than six months a year.

¹²⁵ *ibid*, Article L 380-3.

¹²⁶ *ibid*, Article L 380-2. This ceiling is fixed by regulation.

¹²⁷ <http://vosdroits.service-public.fr/particuliers/F395.xhtml?&n=Etrangers%20en%20France&l=N8>

Prior to 1980's, despite the jealous protection of the concept of *laïcité*, children were allowed to wear or carry crosses and rosaries at school, Jewish people were allowed to wear the yarmulke, and Sikh children turbans.¹²⁸

Over the past decade, however, the wearing of the *hijab* has caused huge tensions in French society (known in France as *l'affaire du foulard*). Several claims were brought before the administrative Supreme Court, the *Conseil d'Etat*, which culminated in the introduction of legislation by the French government in 2004 banning signs and clothes that ostensibly manifest the religion of pupils in state primary and secondary schools.¹²⁹

Hallmark 11 - Right to Employment

Article 5 of the Preamble of the Constitution of 1946 provides that 'Each person has the duty to work and the right to employment. No person may suffer prejudice in his work or employment because of his origin, opinion or beliefs.'

The relevant provisions are can be found in the Labour Code (*Code du Travail*).

A foreigner who wants to enter the French territory in order to be employed there must present a contract of employment or authorization of employment. In the event that he plans to settle durably in France, he should prove a sufficient knowledge of the French language, or engage himself to acquire this knowledge following his settlement.¹³⁰

Some foreigners can legally work in France without the requirement of any form of authorization. Foreigners in possession of a resident card (valid for ten years), of a temporary "*carte de séjour*" card with the mention "private life and family" (valid for one year) or of an Algerian certificate of residence can freely work in France.¹³¹

Hallmark 12 – Right of housing

The right of housing derives in France from paragraphs 10 and 11 of the Preamble of the Constitution of 27 October 1946:

¹²⁸ Samantha Knights, 'Religious Symbols in the school: freedom of religion, minorities and education', *European Law Review*, 2005

¹²⁹ Article L141-5-1 (Law n° 2004-228 of 15 March 2004).

Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit.

¹³⁰ Article L 341-2 Code of Labour

¹³¹ See, http://www.social.gouv.fr/article.php3?id_article=1133#residencefrance4

10. The Nation shall provide the individual and the family with the conditions necessary to their development.

11. It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working shall have the right to receive suitable means of existence from society.

In its decision of 19 January 1995, the Constitutional Council held that ‘the possibility to dispose of a decent accommodation was an “objective entailed with constitutional value”’ (*objectif à valeur constitutionnelle*).

Former President Jacques Chirac supported, during his New Year Speech of 31 December 2006, a vote on a text instituting the Right to Opposable Housing (*Droit au Logement Opposable* or DALO) before the expiry of his mandate.

The DALO creates the possibility for every person without domicile and residing on a regular basis in France to bring a claim against public authorities when the procedure aiming at obtaining a social accommodation knows an ‘abnormal stagnation’.

The State would therefore have the obligation to compensate the plaintiff.

This is now a reality with law n° 2007-290 of 5 March 2007 creating the DALO and diverse measures in favour of social cohesion.¹³² This law has been followed by a Decree¹³³.

It should be seized of any project of Decrees of application, notably with regard to the administrative remedy prior to any action before the courts.

Article 300-1 of the Code of Construction and Habitation (as created by the abovementioned law) provides that the right to decent and independent accommodation applies to every person residing in France “in a regular manner” and in the conditions of permanency as defined by Decree in *Conseil d’Etat*.

¹³² Published in the Official Journal of 6 March 2007

¹³³ *Décret n° 2007-1354 of 13 septembre 2007 relatif à la composition du comité de suivi de la mise en œuvre du droit au logement opposable.*

It has to be noted that there is a very precise calendar concerning the different steps of the law:

- By 1st January 2008, a Commission of mediation should be created in each *département*.¹³⁴
- By 1st December 2008, the applicant who, according to the commission of mediation, was supposed to be housed as a priority, and did not benefit from it can bring a claim before the administrative court.¹³⁵
- By 1st January 2012, this remedy is open to all applicants living in insalubrious, undignified or dangerous accommodation.

It should be noted that there was a proposition of amendment in February 2007, aiming at reserving the application of the law only to foreigners in possession of a 10-year resident card. This amendment was retired on the request of then Minister Jean-Louis Borloo.¹³⁶

Hallmark 13 - Linguistic Rights

According to Article 2 of the Constitution of 1958, the official language of the French Republic is French. It can be noted that the use of an interpreter is permitted before the courts.

The right to an interpreter also applies in other situations, for example in Labour law. The Code of Labour states that when the employee is a foreigner, he can request a translation into his mother tongue. This version has the same legal effect as the French version. In case of a disagreement, only the contract written in the language of the employee can be invoked against him¹³⁷.

Furthermore, the Code of Entry and Stay of Foreigners provides that every communication made to the foreigner should be done in a language he understands, should it imply an interpreter¹³⁸.

Hallmark 14 - Right to Non-discrimination

The principle of non discrimination is enshrined in Article 1 of the Declaration of the Rights of Man and the Citizen provides that “Men are born free and equal in rights. Social distinctions may be based only on considerations of the common good”.

On this basis, the first step regarding ‘positive or reverse discrimination’ (*discrimination positive*), was taken with Law N°87-157 of 10 July 1987 in favour of the employment of handicapped worker which imposes every employer to hire at least six per cent of handicapped workers.

¹³⁴ Article L 441-2-3 of the Code of Construction and Habitation.

¹³⁵ *ibid* Article L 441-1-2-3-1.

¹³⁶ <http://www.liberation.fr/actualite/societe/279203.FR.php>

¹³⁷ Article L 121-1.

¹³⁸ Article L 11-8.

More recently, in 2001, the Institute for Political Sciences (IEP or *Sciences-po*) launched the “Conventions of Priority Education” (*Conventions d’Education Prioritaire*) enabling pupils from areas where education is a priority (*Zones d’Education Prioritaire* or ZEP) to have access to the prestigious institution. A specific procedure has been created, exonerating these pupils to undertake the exam which is normally required for admission to the Institute. Each year, selected schools pre-select pupils who will then have a detailed interview with a jury from the Institute based on their dossier. It has to be noted that there is no quota.

During the Presidential elections that took place earlier this year, President Sarkozy stated in his programme: ‘If I am elected, I will launch a reverse discrimination policy *à la française*, not based on ethnic criteria as it would nurture communitarism, but on social and economic criteria; because the Republican equality does not mean the equal treatment of unequal situations, but has to be interpreted in the sense of giving more to those who have less, in order to compensate handicaps.’¹³⁹

Hallmark 15 - Duty of Allegiance

Paragraph 12 of the Preamble of the Constitution of 1946 stated that “The Nation proclaims the solidarity and equality of all French people in bearing the burden resulting from national calamities.”

As regards jury service, only citizens aged over 23, who know how to read and write in French, and who enjoy their political and civil rights can perform jury service.¹⁴⁰ Although compulsory, there are some exceptions to the obligation of jury service. It seems interesting to mention that a moral objection, religious or secular, cannot be regarded as a serious reason justifying exclusion from the list of the members.¹⁴¹

Hallmark 16 - Duty to Undertake Military Service

In 1997, the duty to undertake military service was suspended for all French nationals born after the 31 December 1978. Legally speaking, pursuant to the Code of National Service¹⁴², it can be reintroduced by statute at any moment.¹⁴³ There remains, however, one compulsory part of the national service, which is the attendance of an event lasting one day, the so-called *Appel de*

¹³⁹ ‘*Si je suis élu je mettrai en œuvre une politique de discrimination positive à la française, fondée non pas sur des critères ethniques qui nourriront le communautarisme, mais sur des critères économiques et sociaux, parce que l’égalité républicaine ce n’est pas traiter également des situations inégales mais de donner plus à ceux qui ont moins, de compenser les handicaps.*’

¹⁴⁰ Article 255 of the Code of Penal Procedure.

¹⁴¹ Article 258-1

¹⁴² Code of National Service.

¹⁴³ Code of National Service, Article L 112-2.

préparation a la défense'. It aims, according to the relevant provision, at 'strengthening the spirit of defence and at contributing to the affirmation of the feeling to belong to a national community, as well as to the maintenance of a link between army and the young people'.¹⁴⁴

In view of the *Appel de préparation a la défense*, every French citizen who is 16 years old has to participate in a census, during which certain data on his person will be collected.¹⁴⁵ Since 1 January 1999, this obligation applies to young women as well¹⁴⁶. The compliance with this obligation before reaching the age of 25 is a condition for the entitlement to register for examinations and selection procedures that are publicly controlled.¹⁴⁷

Moreover, a compulsory lesson on the principals and the organisation of national defence and European defence as well as on the general organisation of military reserve takes place in every secondary school. This instruction seeks to strengthen the link between army and nation whilst sensitizing the young people as to their duty to defence.¹⁴⁸

The actual *Appel de préparation à la défense* itself lasts one day and takes place between the date of census and the 18th birthday.¹⁴⁹ The programme of this event consists notably in an instruction presenting the challenges and general objectives of national defence, the civil and military means of the national defence, the types of voluntary commitment, the opportunities of commitment in the armed forces and the reserve forces.¹⁵⁰ Rather than entailing a real duty demanding from the participants a considerable amount of time and energy, this event seems to aim primarily at the information about, and promotion of, career opportunities offered by the military. Nevertheless, the compliance with this obligation before reaching the age of 25 is a condition to be entitled to register for examinations and selection procedures that are publicly controlled.¹⁵¹

Hallmark 17 - Duty to Pay Taxes

Under French law, the obligation to pay taxes does not depend on nationality but on the notion of residence (*'residence or domicile fiscal(e)'*).¹⁵²

¹⁴⁴ *ibid*, Article L 111-2.

¹⁴⁵ *ibid*, Article L 113-1.

¹⁴⁶ *ibid*, Article L 112-1.

¹⁴⁷ *ibid*, Article L 113-4.

¹⁴⁸ *ibid*, Articles L 114-1 and Code of Education [*Code de l'Education*], Article L 312-12.

¹⁴⁹ *ibid*, Article L 114-2.

¹⁵⁰ *ibid*, Article L 114-3.

¹⁵¹ *ibid*, Articles L 114-6 and L 114-7. Exempted from this obligation are individuals definitively inapt to participate, as the disabled.

¹⁵² Article 4A of the General Tax Code

An individual will be considered to have his or her tax residence in France if he or she principally resides in France, exercises a professional activity in France, or has their economic interests in France.¹⁵³

One will also be required to pay taxes if the individual is a French national or alien, whether or not their tax residence is in France, or one who receives benefits or revenue the imposition of which is attributed in France by virtue of an international convention on double taxation.¹⁵⁴

Hallmark 18 - Duty to Pay National Insurance Contributions

In France, the organisation of social security is based on 'the principle of national solidarity'¹⁵⁵. It provides 'the workers and their family', but also 'any other person and the members of his or her family residing on the French territory' a guarantee covering, notably, costs due to sickness and maternity and family charges. This guarantee is the bedrock of the 'affiliation to one or several compulsory regimes' of national insurance.¹⁵⁶ It is therefore, in principle, impossible to leave the regime of social security and to opt for private insurance in France or another country.¹⁵⁷ However, the individual is free to choose, beyond the social security which covers the most fundamental costs, a complementary insurance. The same principle is reaffirmed for the specific case of health care: 'The Nation affirms its attachment to the universal, compulsory and joint character of the health insurance'.¹⁵⁸

The duty to pay national insurance concerns every person exercising, temporarily or permanently, on a full-time or part-time basis, independently or for one or more employers, a professional activity.¹⁵⁹ Age, sex, nationality and place of residence are irrelevant factors.¹⁶⁰ Exceptions to the general obligation are regulated by treaties and international agreements.¹⁶¹ They may pertain, for instance, to detached workers from foreign countries working in France only for a certain time and paying insurance contributions in their state of origin.

Every person that is not entitled to benefit from any other regime of health insurance and maternity care is automatically affiliated to the general regime of Social Security. However, this is subordinated to the person in question residing permanently in France¹⁶². Those individuals who

¹⁵³ Article 4B

¹⁵⁴ Article 4B bis

¹⁵⁵ Social Security Code [Code de la Sécurité Sociale], Article L 111-1.

¹⁵⁶ *ibid.*

¹⁵⁷ In a publication of 22 January 2007, the management of the Social Security has reaffirmed this principle of compulsory affiliation.

Cf. <http://www.securite-sociale.fr/comprendre/europe/monopolesecu/monopole.htm>, accessed the 15th of October 2007.

¹⁵⁸ Social Security Code, Article L 111-2-1.

¹⁵⁹ *ibid.*, Article L 111-2-2.

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

¹⁶² *ibid.*, Article L 380-1.

are beneficiaries of Social Security due to their residence in France and not their professional activity, also need to pay a contribution if their resources exceed a certain amount.¹⁶³

¹⁶³ *ibid*, Article L 380-2.

Spanish Citizenship

Introduction

No distinction is made between nationality and citizenship in Spanish law.

The first characteristic of Spanish legislation on nationality is the historical absence of laws to regulate it. The various Constitutions enacted during the nineteenth century dedicated some articles to the question of nationality but they all delegated the responsibility for expanding the regulatory framework into law to the legislator. It was not until the Civil Code of 1889 that articles devoted to defining the main features of Spanish legislation on nationality were introduced.¹ It is said that the main characteristics of the regulations that the Civil Code introduced were 'a strong component of *jus sanguinis*, a relatively generous application of *jus soli* and a rather naïve application of the principle of naturalisation by residence'.²

The Constitution of 1978, currently in force, states that Spanish nationality is acquired, retained and lost in accordance with the provisions of the law. No person of Spanish origin may be deprived of his nationality and the State may negotiate dual nationality treaties with Ibero-American countries or with those which have had or which have special links with Spain. The Constitution further stipulates that in these countries, Spaniards may become naturalised without losing their nationality of origin, even if these countries do not recognise a reciprocal right for their own citizens.³

The above mentioned are the only references to nationality included in the Constitution, leaving its regulatory framework to the Civil Code.⁴ The maintenance of *jus sanguinis* as the main mechanism for the attribution of Spanish nationality and the preferential one for nationals of the Ibero-American community of nations, in terms of dual nationality and reduced residence requirements for naturalisation, are the main features of Spanish nationality legislation.

¹ FJM Montes, 'Migration and Spanish Nationality Law' in R Hansen and P Weil (eds.), *Towards a European Nationality. Citizenship, Immigration and Nationality Law in the EU*, (Palgrave, Hampshire 2001) 123-4.

² *ibid*, 124.

³ Constitution, Article 11. All translations of Articles of the Constitution derive from a translation by the services of the Spanish Ministry of Foreign Affairs under the technical supervision of the Centre of Constitutional Studies of the Presidency of the Government, 1982. Any other translations are made by the author and should not be regarded as official.

⁴ Civil Code Articles 17 to 28. The Civil Code was modified in terms of nationality regulation by the Law 36/2002 of 8 October.

Attribution/acquisition of nationality

There are two forms of acquiring Spanish nationality, originally at, or derivatively after, birth. According to Articles 17.1 and 19.1 of the Civil Code Spaniards are those originally:

- Born of a Spanish parent.
- Born in Spain of foreign parents where at least one of them was also born in Spain (except for the children of Diplomatic or Consular officers in Spain, who are not entitled to Spanish nationality).
- Born in Spain of alien parents where both are stateless or the child would be otherwise stateless.
- Foundling first found in Spain.
- Aged under 18 adopted by a Spanish parent.

Those aged over 18 adopted by a Spaniard parent may opt for Spanish nationality of origin within two years following adoption.⁵

In case filiation or birth in Spain is established after majority (18 years) (s)he may opt for Spanish nationality of origin within two years following establishment.⁶

The possession and bona fide use of Spanish nationality for ten years, based on a title registered in the Civil Registry, even though this title is rendered void subsequently, is a way of consolidating nationality.⁷

The Civil Code recognises the possibility of acquiring nationality derivatively by option.⁸ Spanish nationality may be opted for by those:

- Currently or in the past subject to patria potestas (guardianship) of a Spaniard.
- Who have a parent who was a Spaniard (by origin) and who was born in Spain.⁹

⁵ Civil Code, Article 19.2.

⁶ *ibid*, Article 17.2.

⁷ *ibid*, Article 18.

⁸ *ibid*, Article 20.

- Adopted aged over 18 (within two years following adoption).
- Whose legitimacy or birth in Spain is determined as an adult (within two years following establishment).

It is also possible to acquire Spanish nationality via discretionary naturalisation conferred by Royal Decree upon fulfilment of requirements.¹⁰

According to Articles 21.2 and 22, nationality may also be acquired by residence in Spain for ten years. Five years will suffice for refugees and two years for those originally nationals of Ibero American countries, Andorra, Portugal, Philippines, Equatorial Guinea and for Sephardic Jews. Only one's year residence is necessary for those:

- Born in Spanish territory.
- Who could have opted for nationality but did not exercise it at the time.
- Currently or in the past were subject to guardianship by a Spaniard or Spanish institution for two consecutive years.
- Married to a Spaniard for at least one year, not being legally or in fact separated.
- Widow/widower of a Spaniard not being legally or in fact separated at the time of death.
- Born abroad to an originally Spanish parent or grandparent.

In any case, residence must be lawful, continuous and immediately before petition and the petitioner must also provide evidence of good behaviour and sufficient degree of integration in Spanish society.¹¹

There are two further requirements to acquire Spanish nationality derivatively (by means of option, naturalisation and residence). First, the petitioner over 14 years must take an oath of loyalty to the King and obedience to the Constitution and the Laws. Second, the petitioner must

⁹ The Law for the Recovery of Historical Memory which will be put to the vote on the 31st of October 2007, provides the extension of this right to those (regardless the nationality of their parents) whose grandparents were originally Spaniards and lost or had to withdraw their nationality during exile after the Civil War (1936-1939).

¹⁰ Civil Code, Article 21.1.

¹¹ *ibid*, Article 22.3 and 4.

renounce to his/her previous nationality (except those nationals of Ibero American countries, Andorra, Portugal, Philippines and Equatorial Guinea).¹²

Withdrawal/loss of nationality

The Constitution states that no person of Spanish origin may be deprived of his nationality.¹³

However, according to Article 24 of the Civil Code Spanish nationality shall be lost voluntarily by those:

- Who permanently reside abroad and voluntarily acquire or exclusively use other nationality attributed during minority. They will lose Spanish nationality if they do not make a declaration of wish to conserve nationality within three years following acquisition of foreign nationality or from majority. This provision does not apply to those who acquire nationality of Ibero American countries, Andorra, Portugal, Philippines and Equatorial Guinea, thus they will not lose Spanish nationality.
- Who expressly renounce it providing they are multiple nationals and reside permanently abroad.
- Born and permanently residing abroad who receive Spanish nationality through a parent who was also born abroad, who possess the nationality of their country of residence, lose Spanish nationality within three years from majority if they do not declare their desire to preserve it.

None of these provisions will apply if Spain is at war.¹⁴

Those who are not Spaniards by origin will lose their nationality, according to Article 25 of the Civil Code:

- If during a three year period they use exclusively the nationality renounced when acquiring Spanish nationality.
- If they voluntarily do military service or exercise political office abroad where such service is expressly forbidden by the Spanish Government.

¹² *ibid*, Article 23.

¹³ Constitution, Article 11.2.

¹⁴ Civil Code, Article 24.4.

- After revocation for fraud in acquisition.

Recovery of nationality

Spanish nationality may be recovered by residing in Spain¹⁵, making a formal declaration before the Civil Registry and registering the recovery in the Civil Registry.¹⁶ Those who were not Spanish by origin and have lost their nationality will need a special discretionary authorisation conferred by the Government.¹⁷

Multiple nationality

The Constitution recognises the possibility of negotiating dual nationality treaties only with Ibero-American countries or with those which have had or which have special links with Spain.¹⁸ Conventions already exist with Argentina, Bolivia, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Honduras, Nicaragua, Paraguay, Peru, and there has been an exchange of notes with Venezuela providing for reciprocal rights to nationality between the two countries.

Due to the historical and linguistic links between Spain and countries such as Andorra, Philippines, Equatorial Guinea, Portugal and Ibero American countries, the Civil Code provides that neither Spaniards by origin who acquire the nationality of one of these countries will lose their Spanish nationality nor nationals by origin of these countries will have to renounce to their nationality when acquiring Spanish nationality.¹⁹

Therefore, these dual nationals benefit from two fully operative nationalities, except where it is necessary to determine the relevant nationality as a connecting factor for the purpose of Conflict of Laws. In that case, the Civil Code states that, in the absence of international legislation or treaties regulating this situation, the nationality coincident with the last habitual residence (or the last acquired, in the absence of habitual residence), will be preferred.²⁰ Spanish nationality will prevail over foreign nationality of its nationals not regulated by international treaties or law.²¹

¹⁵ Except for emigrants and their children. (Civil Code, Article 26.1.a).

¹⁶ Civil Code, Article 26.

¹⁷ *ibid*, Article 26.2.

¹⁸ Constitution, Article 11.3.

¹⁹ Civil Code, Articles 23.b and 24.1.

²⁰ *ibid*, Article 9.9.

²¹ *ibid*.

Residence

The Civil Code establishes that, for the purpose of the exercise of rights and fulfilment of civil duties, domicile of individuals is that of their habitual residence.²² However, there is no definition of habitual residence in Spanish legislation, apart from that for taxation purposes.²³

Regarding aliens, lawful residence in the territory of Spain is the condition for the recognition and protection of the majority of rights that will be analysed in the present report.²⁴ However, regulation of residence is different depending on whether aliens come from any Member State of the European Union and other State party of the Agreement on the European Economic Area (EEA) (EC nationals), or from third countries.

EC Nationals

The Royal Decree 240/2007 of 16 February, integrates into Spanish law the content of the European Directive 2004/38/EC, regulating the entry, freedom of movement and residence in Spain of EC nationals. On this subject, see the Citizenship of the European Union section of this report.²⁵

Nationals from third countries

The Organic Law on Rights and Freedoms of Aliens in Spain and Their Social Integration (Organic Law 4/2000, of 11 January, modified by the Organic Laws 8/2000 of 22 December, 11/2003 of 29 September and 14/2003 of 20 November) (hereinafter Aliens Act), applies to those who do not possess Spanish nationality and also to EC nationals when the provisions of this law may benefit them.²⁶ Further details regarding residence of non EC citizens in Spain are included in the Freedom of Movement section below.

Nevertheless, all provisions relating to the fundamental rights of aliens will be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties to

²² *ibid*, Article 40.

²³ Law 35/2006 of 28 November on Income Tax, Article 9. Individuals are deemed to be resident in Spain where their stay in the country exceeds 183 days, their centre of vital interests is in Spain and their spouse and minor dependent children qualify as residents in Spain under the two previous requirements, unless the taxpayer proves that he/she is resident in another country.

²⁴ According to Article 13 of the Constitution, aliens shall enjoy the public freedoms guaranteed by Title I, concerning fundamental rights and duties, under the terms to be laid down by treaties and the law. Only the rights to participate in public affairs and access to public office seem to be reserved to Spanish nationals, except in cases which may be established by treaty or by law concerning the right to vote in municipal elections.

²⁵ p 71.

²⁶ Organic Law 4/2000 of 11 January on Rights and Freedoms of Aliens in Spain and Their Social Integration (modified by the Organic Laws 8/2000 of 22 December, 11/2003 of 29 September and 14/2003 of 20 November) (hereinafter Aliens Act), Article 1.1.

which Spain is a party. Cultural identity and religious and ideological beliefs will not justify acting against those international instruments.²⁷

The Hallmarks of Citizenship

Hallmark 1 - Freedom of Movement

The Constitution establishes the right of every national to freely choose their place of residence and freely move within the national territory.²⁸ They also have the right to enter and leave the country under the conditions determined by law, and it is expressly provided that this right of freedom of movement may not be restricted for political or ideological reasons.²⁹

Furthermore, article 139.2 of the Constitution states that ‘no authority may adopt measures which directly or indirectly hinder freedom of movement and settlement of persons’ throughout the territory of Spain.

In compliance with EC Law Spanish law recognises the right of freedom of movement and residence in Spain of European citizens and nationals of other states parties to the Agreement on the European Economic Area and also to the members of their family regardless of their nationality.³⁰ Therefore, they all have the right to enter, leave, circulate and reside freely in the Spanish territory.³¹ The condition for the enjoyment of this right is the possession of a valid passport or identity card, and a visa, where necessary, in the case of family members³², without prejudice to the limits concerning public order, security and health.³³

With regard to non EC nationals, the Aliens Act establishes their right to enter to the territory of Spain if they have the required documentation (such as passport and visa, where applicable)³⁴, have not been prohibited entry and provide evidence of economic self-sufficiency during the time in Spain.³⁵ These requirements will not apply to those seeking asylum or entering for

²⁷ *ibid*, Article 3.

²⁸ Constitution, Article 19, first paragraph.

²⁹ *ibid*, second paragraph.

³⁰ The members of family included are: spouse (where they are not legally separated or divorced and the marriage is not void); partners where the couple is registered in a Member State; their lineal descendants and those of the spouse or legal partner aged under 21, over 21 living at their expenses or disable (where they are not legally separated or divorced and neither the marriage is void nor the inscription cancelled); and their lineal ancestors and those of the spouse or legal partner (where they are not legally separated or divorced and neither the marriage is void nor the inscription cancelled) living at their expenses.

³¹ Royal Decree 240/2007 of 16 February, regulating the entry and stay in Spain of EC nationals, Article 3.

³² *ibid*, Article 4.

³³ *ibid*, Article 1.

³⁴ Spain has agreements for the reciprocal suppression of visas for members of the diplomat service with: Bulgaria, Serbia and Montenegro, Albania, Bosnia and Herzegovina, Ecuador, Macedonia and Peru.

³⁵ Aliens Act, Article 25.1 and 2.

humanitarian reasons.³⁶ Those who had been previously expelled may be prohibited from entering Spain for the time of the prohibition.³⁷ Aliens may leave the country freely subject to no other limitations than those laid down for reasons of national security or public health by the Minister of Interior.³⁸

According to the Aliens Act they may “stay” in Spanish territory only up to ninety days after the fulfilment of the visa requirements to enter the country, where applicable³⁹, or they may have the condition of temporary or permanent residents⁴⁰. Residents are those who are in Spain in possession of a valid residence permit.⁴¹

A temporary residence permit allows aliens to stay in Spain between ninety days and five years.⁴² According to the Aliens Act, they need to provide evidence of economic self-sufficiency for themselves and their families without exercising any gainful activity during the period of residence applied for.⁴³ They must also provide evidence of non-existence of criminal records.⁴⁴ Nevertheless, the Authorities may also permit temporary residence for humanitarian and any other exceptional reasons.⁴⁵

Permanent residence is the authorisation that allows aliens to reside in Spain permanently.⁴⁶ Permanent residence is an entitlement for those who have enjoyed temporary residence for five years, despite the fact that they may have left the country temporarily on holiday or for any other justified reasons.⁴⁷

Therefore, aliens who have lawfully entered the country and applied for a residence permit (in case they want to stay for more than ninety days), have the right to travel and choose their place of residence freely within Spanish territory, subject only to limitations generally established in the law, specifically adopted during a state of emergency or siege (martial law), resulting from judicial decisions or for security reasons.⁴⁸

³⁶ *ibid*, Article 25.3 and 4.

³⁷ *Ibid*, Article 26.

³⁸ *Ibid*, Article 28.

³⁹ *ibid*, Article 30.

⁴⁰ *Ibid*, Articles 30 bis to 32.

⁴¹ *ibid*, Article 30. bis.

⁴² *ibid*, Article 31.1.

⁴³ *Ibid*, Article 31.2.

⁴⁴ *Ibid*, Article 31.4.

⁴⁵ *Ibid*, Article 31.3.

⁴⁶ *Ibid*, Article 32.1.

⁴⁷ *Ibid*, Article 32.2.

⁴⁸ *Ibid*, Article 5.

It should be mentioned that since 1985⁴⁹, the Government has regularised more than 1.5 million immigrants in six extraordinary regularisation procedures.⁵⁰ The last, in 2006, called the 'normalisation process', tightened the requirements. Thus, immigrants had to provide proof of registration with a local municipality in Spain before August 7, 2004, they had to have a work contract and a clean criminal record and they must prove they were in Spain at the time of applying. Immigrants had to apply through their employers and the latter had to demonstrate that they were enrolled in and paying into Social Security, that they have no history of breaking immigration laws in the previous 12 months, and that they had not been sanctioned for violating the rights of workers or immigrants.⁵¹

Regarding asylum seekers, the Law 5/1984 of 26 March⁵² stipulates that the granting of asylum will imply authorisation to reside in the territory of Spain.⁵³ The freedom of movement of those granted asylum may be only temporarily restricted for national security reasons by the Minister of Interior.⁵⁴

Hallmark 2 - Right to a Passport

Spanish nationals have the right to a passport unless they are deprived from the right to freedom of movement and residence or from their right to a passport by judicial decision, or by reasoned decision of the Minister of Interior in accordance with the provisions of the law.⁵⁵

Regarding asylum seekers, the granting of asylum shall also imply the right to an identity card or travel document.⁵⁶

Hallmark 3 - Right to Vote

The Constitution recognises the right of citizens to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage.⁵⁷ The right to vote is, however, one of the few rights reserved to Spanish nationals in the Constitution, except in cases which may be established by treaty or by law regarding the right to vote in municipal elections, in accordance with the principle of reciprocity.⁵⁸

⁴⁹ Date when the first Aliens Act was passed.

⁵⁰ See <http://www.migrationinformation.org/Feature/print.cfm?ID=330>.

⁵¹ Ministry of Labour and Social Affairs' website: <http://www.mtas.es/migraciones/proceso2005/>.

⁵² Law 5/1984 of 26 March (modified by Law 9/1994 of 19 May), on the Right to Asylum and the situation of Refugees.

⁵³ *ibid*, Article 13.

⁵⁴ *ibid*, Article 18.

⁵⁵ Royal Decree 896/2003 of 11 July on the issue of Passports, Article 2.1.

⁵⁶ Law 5/1984 of 26 March, (modified by Law 9/1994 of 19 May), on the Right to Asylum and the situation of Refugees, Article 13.

⁵⁷ Constitution, Article 23.

⁵⁸ *ibid*, Articles 13 and 68.5.

The conditions to exercise the right to vote in national elections are: to be a Spaniard aged 18, be registered on the electoral roll and not being in any of the following situations: 1.- Deprived from the right to vote by final judgment during the time of the prohibition. 2.- Disqualified from voting by final judgment and 3.- Committed in a psychiatric hospital where a judicial statement expressly declares that the person is disqualified from exercising the right to vote.⁵⁹

Spanish nationals residing abroad have also the right to participate in every election subject to the same conditions as residents in Spain.⁶⁰

The right to vote in municipal and local elections is dependent on residence in municipality and subject to the same personal requirements to vote in general elections.⁶¹ EU citizens according to article 8.1.2 of the EC Treaty, shall have the right to vote providing they are lawfully resident in Spain, fulfil the same requirements as Spaniards and declare their intention to exercise their right to vote.⁶²

Non EU citizens may also vote in municipal and local elections if they reside in Spain and this right is reciprocally recognised to Spaniards by a treaty.⁶³ Currently, there is only one such treaty signed and ratified between Spain and Norway which allows Norwegians in possession of a valid resident permit and after having resided in Spain for three years to vote in municipal elections. There are also treaties with Colombia, Venezuela, Chile, Argentina and Uruguay but they have not yet been ratified.

Hallmark 4 - Right of Petition and to a Referendum

The Constitution stipulates the right of all Spaniards to individual and collective petition, in writing, in the manner and subject to the consequences to be laid down by law.⁶⁴ The only limitation is related to members of the Armed Forces or Institutes or bodies subject to military discipline who may only exercise this right individually and in accordance with statutory provisions.⁶⁵

However, in accordance with the interpretation of article 29 given by the Constitutional Tribunal, particularly in its judgment of 14 July 1993, the Parliament passed a law on the right of petition that extends this right to every individual regardless of nationality, with the only limitation referred

⁵⁹ Organic Law 5/1985, of 19 June, on the General Electoral Regime, Articles 2 and 3.

⁶⁰ Law 40/2006, of 14 December, regulating the situation of Spanish Nationals Living Abroad, Article 4.

⁶¹ Constitution, Article 140.

⁶² Organic Law 5/1985, of 19 June, on the General Electoral Regime, Article 176.1.a) and b).

⁶³ Aliens Act, Article 176.1 and Article 6.

⁶⁴ Constitution, Article 29.1.

⁶⁵ *ibid*, Article 29.2.

to above.⁶⁶ The right shall be exercised before any authority and with regard to any issue within their competence.⁶⁷

Spaniards residing abroad may also exercise this right in the same conditions as mentioned above.⁶⁸

As regards the right to a referendum, the Constitution establishes that political decisions of special importance may be submitted to all citizens in a consultative referendum.⁶⁹ The Prime Minister is the only person entitled to call for a referendum through a Royal Decree authorised by the Cabinet and countersigned by the King of Spain.⁷⁰ The Organic Law establishing regulations concerning the referenda stipulates that they are decided by universal, free, direct and secret suffrage.⁷¹ Nevertheless, according to the provision included in article 13 of the Constitution on the right of participation in public affairs, this right is only conferred on nationals.⁷²

Hallmark 5 - Right to Stand as a Candidate in National and Local Elections

It is dependent on nationality, except in cases which may be established by treaty or by law regarding the right to vote in municipal elections, and subject to the principle of reciprocity.⁷³

Those sentenced to prison by final judgment during the time of the confinement and those sentenced to prison for crimes against the State Institutions, terrorism and rebellion, where the judicial decision prohibits them to stand as a candidate, are ineligible.⁷⁴ The law also deprives those holding public office from being eligible, such as the members of the Royal Family, Judges, Prosecutors, Military Personnel, etc.⁷⁵

Spanish nationals residing abroad have the right to stand as candidates in every election subject to the same conditions as residents in Spain.⁷⁶

⁶⁶ Organic Law 4/2001, of 12 November, on the Right of Petition, Article 1.

⁶⁷ *ibid*, Article 2.

⁶⁸ Law 40/2006, of 14 December, regulating the situation of Spanish Nationals Living Abroad, Article 6.

⁶⁹ Constitution, Article 92. Only three referenda have been celebrated in Spain in democracy. The first one aimed at approving the Constitution of 1978; the second in 1986 was about the accession of Spain in the NATO and the last one, in 2005, related the European Constitution.

⁷⁰ Organic Law 2/1980, of 18 January 1980 establishing regulations concerning Referendum, Article 2. This provision is particularly relevant these days as the President of the Basque Country Autonomous Community has announced his intention to call for a referendum on the self-determination of the region to take place on the 25th October 2008.

⁷¹ *ibid*, Article 5.

⁷² See also Organic Law 5/1985, of 19 June, on the General Electoral Regime, Article 2.1, which states that the right of suffrage belongs to the Spaniards enjoying full political rights.

⁷³ Constitution, Articles 13, 23.1 and 68.5.

⁷⁴ Organic Law 5/1985, of 19 June, on the General Electoral Regime, Article 6.2.

⁷⁵ See *ibid*, Article 6.1.a) to p) and Article 6.3.

⁷⁶ Law 40/2006, of 14 December, regulating the situation of Spanish Nationals Living Abroad, Article 4.

The right to stand as a candidate in municipal and local elections is dependent on residency in the municipality and subject to the same personal requirements as for voting in general elections.⁷⁷ EU citizens according to article 8.1.2 of the EC Treaty, and non EU citizens whose countries of origin reciprocally grant this right to Spaniards residents by virtue of a treaty, shall also have the right to stand as candidates in municipal and local elections.⁷⁸ Further conditions are they reside in Spain, fulfil the same requirements as Spaniards and they have not been deprived from their right to stand as candidates by their countries of origin.⁷⁹ Currently there are only treaties signed but not ratified with Norway, Argentina and Chile.

Hallmark 6 - Right to Access to Public Service and Public Office

The Constitution stipulates the right of citizens to have access on equal terms to public functions and positions, in accordance with the requirements laid down by the law.⁸⁰ This section is also subject to the limitation established in article 13.2 of the Constitution, therefore only Spaniards have this right.

However and in compliance with EU law, the Law 7/2007 of 12 April on Civil Servants establishes the right of EU nationals to have access to public office on equal terms with Spaniards, except when public functions require the exercise of public authority or aim to protect the interest of the State or its Public Authorities.⁸¹ The same provision applies, regardless of their nationality, to the spouses of Spaniards or EU nationals where they are not legally separated, and to their descendants and those of their spouses where they are not legally separated, provided that they are aged under 21 or dependants over 21.⁸²

The right to have access to public office shall also be extended by virtue of international treaties established by the European Union and ratified by Spain concerning the right of freedom of movement of migrants.⁸³

Both the Aliens Act and the Law on Civil Servants stipulates the right of aliens as mentioned above⁸⁴ and of those lawfully residing in Spain to have access to positions working for public authorities but appointed by a private-law contract on equal terms with EU citizens and Spanish nationals.⁸⁵

⁷⁷ Organic Law 5/1985, of 19 June, on the General Electoral Regime, Article 177.1.b).

⁷⁸ *ibid*, Article 177 and Aliens Act, Article 6.

⁷⁹ Organic Law 5/1985, of 19 June, on the General Electoral Regime, Article 177.

⁸⁰ Constitution, Article 23.2.

⁸¹ Law 7/2007 of 13 April on Civil Servants, Article 57.1.

⁸² *ibid*, Article 57.2.

⁸³ *ibid*, Article 57.3.

⁸⁴ Relatives of Spaniards and EU nationals and those referred to by international treaties.

⁸⁵ Aliens Act, Article 10.2 and Law 7/2007 of 13 April on Civil Servants, Article 57.4.

Nevertheless, the requirement of nationality to have access to public office may be exempted for public interest reasons, in accordance with the requirements laid down by law.⁸⁶

Hallmark 7 - Right to Protection

The Constitution states that every person (regardless of nationality) has the right to freedom and security and that the Security Forces and Corps serving under the Government shall have the duty to protect the free exercise of rights and freedoms and to guarantee public safety.⁸⁷

Aliens shall enjoy this right on equal terms with Spanish nationals.⁸⁸

The right to freedom and security may be suspended when a state of emergency or siege is declared under the terms provided in the Constitution.⁸⁹

The protection of Spanish nationals abroad through the exercise of diplomatic protection is a competence of the Minister of Public Affairs.⁹⁰

Hallmark 8 - Right to Welfare Benefits

The Constitution establishes that the public authorities ensure social, economic and legal protection of the family.⁹¹ Article 41 also provides that the public authorities shall maintain a public Social Security system for all citizens guaranteeing adequate social assistance and benefits in situations of hardship, especially in case of unemployment. Supplementary assistance and benefits shall be optional.

Furthermore, article 50 states that the public authorities shall guarantee, through adequate and periodically updated pensions, a sufficient income for citizens in old age. Likewise, they shall promote their welfare through a system of social services that provides for specific problems of health, housing, culture and leisure.

⁸⁶ Law 7/2007 of 13 April on Civil Servants, Article 57.5.

⁸⁷ Constitution, Article 17.1 and 104.1.

⁸⁸ Aliens Act, Article 3.

⁸⁹ Constitution, Article 55.

⁹⁰ Royal Decree 1881/1996 of 2 August on the Basic Structure of the Minister of Foreign Affairs, Article 1. See also Law 40/2006, of 14 December regulating the situation of Spanish Nationals Living Abroad, Article 5, that establishes the duty of Public Authorities to provide the necessary means to protect them.

⁹¹ Constitution, Article 39.

According to the Constitution the law shall establish the forms of participation of the persons concerned in Social Security and in the activities of those public bodies whose operation directly affects quality of life or general welfare.⁹²

The Spanish Social Security System includes benefits for health care (sickness, high risk pregnancy, maternity and paternity), injuries at work, unemployment, pensions, invalidity, death benefits and family benefits.⁹³

Entitlement to the Social Security is given to all Spaniards and nationals of Ibero America, Portugal, Brazil and the Philippines, resident in Spain⁹⁴. Aliens lawfully residing in Spain have also the right to all welfare benefits in the same conditions as nationals, according to the Aliens Act.⁹⁵ They are also entitled to basic benefits regardless of the lawfulness of residence.⁹⁶

The Aliens Act also establishes the right of aliens to access the Social Security System in accordance with the requirements laid down by law.⁹⁷

The State shall also guarantee the right to welfare benefits of Spanish nationals living abroad and their relatives in accordance with the law.⁹⁸ The State shall guarantee financial aid to those Spanish nationals living abroad over 65 years or disabled who are in need.⁹⁹

Hallmark 9 - Right to Health Care

The Constitution recognises the right to health protection and stipulates that it is incumbent upon the public authorities to organise and watch over public health by means of preventive measures and the necessary benefits and services.¹⁰⁰ The public authorities shall also promote the welfare of citizens in old age through a system of social services that provides for their specific problems of health.¹⁰¹

The Law on Public Health recognises this right to all Spaniards and to aliens resident in Spain.¹⁰² The Aliens Act establishes the right to health care of aliens registered in the Municipal Register of

⁹² *ibid*, Article 129.

⁹³ Royal Legislative Decree 1/1994 of 20 June on the Social Security, Chapters IV to IX.

⁹⁴ *ibid*, Article 1 and 7.1, 3 and 5.

⁹⁵ Aliens Act, Article 14.1 and 2.

⁹⁶ *ibid*, Article 14.3.

⁹⁷ *ibid*, Article 10.1.

⁹⁸ Law 40/2006, of 14 December, regulating the situation of Spanish Nationals Living Abroad, Article 18.

⁹⁹ *ibid*, Article 19.

¹⁰⁰ Constitution, Article 43.

¹⁰¹ *ibid*, Article 50.

¹⁰² Law 14/1986 of 25 April on Public Health, Article 1.

Inhabitants, as well as of those aged under 18, in the same conditions as nationals.¹⁰³ All aliens in the territory of Spain have the right to medical assistance in an emergency.¹⁰⁴ Accordingly, pregnant aliens shall be assisted during pregnancy, delivery and post-natal care.¹⁰⁵

The State shall guarantee the protection of health of Spanish nationals living abroad on equal terms with those living in Spain through the adoption of agreements with foreign countries.¹⁰⁶

Hallmark 10 - Right to Education

The Constitution provides that everyone is entitled to education and the public authorities shall guarantee the right of everyone to education through general planning of education, with the effective participation of all parties concerned and the setting up of teaching establishments.¹⁰⁷

The Aliens Act establishes the right and the duty of all aliens aged under 18 to compulsory primary education free of charge on equal terms with Spaniards.¹⁰⁸ Aliens lawfully resident in Spain shall also the right to voluntary secondary education on equal terms with Spaniards, including access to grants.¹⁰⁹ The public authorities shall also guarantee access to voluntary child education to those applying for it.¹¹⁰

The public authorities shall promote access to education to Spanish nationals living abroad through the adoption of the necessary agreements with foreign countries.¹¹¹

It should be mentioned that the Education Act, passed in 2006 introduced a new compulsory school subject called Education for Citizenship (*Educación para la Ciudadanía*), in both primary and secondary education, aimed at providing education for human rights focusing on equality between women and men.¹¹² This new subject was introduced in accordance with the recommendations of the UN and the Council of Europe.¹¹³ The subject's programme includes: life in the community; individual interrelationship; education on diversity; rights and duties of citizens;

¹⁰³ Aliens Act, Article 12.1 and 3.

¹⁰⁴ *ibid*, Article 12.2.

¹⁰⁵ *ibid*, Article 12.4.

¹⁰⁶ Law 40/2006, of 14 December, regulating the situation of Spanish Nationals Living Abroad, Article 17.

¹⁰⁷ Constitution, Article 27.1 and 5.

¹⁰⁸ Aliens Act, Article 9.1.

¹⁰⁹ *ibid*, Article 9.3.

¹¹⁰ *ibid*, Article 9.2.

¹¹¹ Law 40/2006, of 14 December, regulating the situation of Spanish Nationals Living Abroad, Article 23.

¹¹² Organic Law 2/2006, of 3 May, on Education, Article 18.3.

¹¹³ UN General Assembly resolution 59/113/A of 10 December 2004, proclaiming the World Programme for Human Rights Education and Recommendation Rec (2002)12 of the Committee of Ministers of the Council of Europe to Member States on education for democratic citizenship (*Adopted by the Committee of Ministers on 16 October 2002 at the 812th meeting of the Ministers' Deputies*) .

participation in society; democratic societies in the 21st Century; and citizenship in a globalized world.¹¹⁴

Hallmark 11 - Right to Employment

The Constitution establishes that all Spaniards have the duty to work and the right to employment, to free choice of profession or trade, to advancement through their work, and to sufficient remuneration for the satisfaction of their needs and those of their families.¹¹⁵ It also states that the law shall establish a Worker's Statute.¹¹⁶

The Statute of Workers stipulates that those with full legal capacity aged 18 or over 16 and authorised¹¹⁷ are allowed to work and also aliens in the same position in accordance with the law.¹¹⁸

Aliens over 16 have the right to work in Spain provided they have a valid work permit.¹¹⁹ The authorities shall consider the national employment situation when granting work permits, which might be limited by territory, sector or activity, not exceeding an initial 5 years duration.¹²⁰

EU citizens have the right to accede to any activity, as employees or self-employed, on equal terms with Spanish nationals.¹²¹

Regarding asylum seekers, the granting of asylum will imply authorisation to work in the territory of Spain.¹²² This right may only be restricted by exceptional circumstances laid down by law.¹²³

Hallmark 12 - Right to Housing

The Constitution states that all Spaniards are entitled to enjoy decent and adequate housing and the public authorities shall promote the necessary conditions and shall establish appropriate standards in order to make this right effective.¹²⁴

¹¹⁴ The introduction of this new subject has been highly criticised by the right wing opposition and the Catholic Church as the new system, in practice, cuts down on the hours of religious teaching and makes the new subject compulsory in all elementary and secondary schools.

¹¹⁵ Constitution, Article 35.1.

¹¹⁶ *ibid*, Article 35.2. The Royal Legislative Decree 1/1995 of 24 March establishes the Statute of Workers.

¹¹⁷ Authorised by their parents, guardians or Institution in charge.

¹¹⁸ Statute of Workers, Article 7.

¹¹⁹ Aliens Act, Article 36.1.

¹²⁰ *ibid*, Article 38.

¹²¹ Royal Decree 240/2007 of 16 February, regulating the entry and stay in Spain of EC nationals, Article 3.2.

¹²² Law 5/1984 of 26 March, (modified by Law 9/1994 of 19 May), on the Right to Asylum and the situation of Refugees, Article 13.

¹²³ *ibid*, Article 16.

¹²⁴ Constitution, Article 47.

Aliens lawfully resident in Spain have the right to housing benefits on equal terms with Spaniards.¹²⁵

The public authorities shall also promote access to housing to emigrants on their return.¹²⁶

Hallmark 13 - Linguistic Rights

Castilian is the official Spanish language of the State and all Spaniards have the duty to know/learn/speak it and the right to use it.¹²⁷ The Constitution further states that the other Spanish languages shall also be official in the respective Autonomous Communities in accordance with their Statutes.¹²⁸ Moreover, the wealth of the different language variations of Spain is a cultural heritage which shall be the object of special respect and protection.¹²⁹

Regarding the right of freedom of expression, the Constitution stipulates that the law shall guarantee access to the social communications media under the control of the State or any public agency to the main social and political groups, respecting the pluralism of society and of the various languages of Spain.¹³⁰

The Autonomous Communities may assume jurisdiction in respect of the promotion of culture, of research and, when applicable, the teaching of the language of the Autonomous Community.¹³¹

The law provides that, within the Autonomous Communities with co-official languages, the right of petition may be exercised in any of them.¹³²

The State shall facilitate descendants of Spaniards living abroad the knowledge of the Castilian language and other co-official languages with the cooperation of the Autonomous Communities concerned.¹³³

Aliens in custody of public Institutions for the duration of procedures for deportation shall have the right to be informed in a language they can understand.¹³⁴

¹²⁵ Aliens Act, Article 13.

¹²⁶ Law 40/2006, of 14 December, regulating the situation of Spanish Nationals Living Abroad, Article 26.4.

¹²⁷ Constitution, Article 3.1.

¹²⁸ *ibid*, Article 3.2. The Autonomous Communities of Catalonia, Galicia, Valencia, The Basque Country and the Balearic Islands have co-official languages.

¹²⁹ *ibid*, Article 3.3.

¹³⁰ *ibid*, Article 20.3.

¹³¹ *ibid*, Article 148. 1.xvii).

¹³² Organic Law 4/2001, of 12 November, on the Right of Petition, Article 5.

¹³³ Law 40/2006, of 14 December, regulating the situation of Spanish Nationals Living Abroad, Article 25.1.

¹³⁴ Aliens Act, Article 62. quater.1.

The Law on Civil Procedure states that the official language of every judicial procedure is Castilian.¹³⁵ However, the judicial organs may use any of the other co-official languages of the Autonomous Communities where the judicial procedure takes place, provided none of the parties object to the use of the co-official language.¹³⁶ The appointment of interpreters is also included in the Law on Civil Procedure where those intervening in the procedure do not know Castilian or the co-official languages in use.¹³⁷ Any document in a foreign language would be also translated into Castilian or the co-official language used.¹³⁸

The Law on Criminal Procedure also provides for the possibility for witnesses who do not speak Spanish to be examined through an interpreter.¹³⁹

Hallmark 14 - Non-discrimination

Equality is one of the highest values of the Spanish legal order.¹⁴⁰ Article 14 of the Constitution states that Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance. Under no circumstances may workers be discriminated against on account of their sex.¹⁴¹

The rights and liberties recognised in Chapter two of the Constitution (including right to non-discrimination) are binding on all public authorities.¹⁴² Furthermore, the Constitution states that any citizen may assert his claim to the protection of the liberties and rights recognised in article 14 by means of a preferential and summary procedure in the Ordinary Courts and, when appropriate, by submitting an individual appeal for protection to the Constitutional Court.¹⁴³

The Constitution stipulates that aliens shall also enjoy the fundamental rights and duties guaranteed in Title I, under the terms to be laid down by treaties and the law.¹⁴⁴ The Aliens Act reiterates this right adding, as a general interpretative criterion, that aliens shall exercise the rights recognised in this law on equal terms with Spanish nationals.¹⁴⁵ Nevertheless, any law regulating fundamental rights of aliens shall be interpreted according to the principles laid down

¹³⁵ Civil Procedure Law, Article 142.1.

¹³⁶ *ibid*, Article 142.2 to 4.

¹³⁷ *ibid*, Articles 142.5 and 144.

¹³⁸ *ibid*, Article 145.

¹³⁹ *ibid*, Articles 398, 440 and 441.

¹⁴⁰ Constitution, Article 1.1.

¹⁴¹ *ibid*, Article 35.1.

¹⁴² *ibid*, Article 53.1.

¹⁴³ *ibid*, Article 53.2.

¹⁴⁴ *ibid*, Article 13.

¹⁴⁵ Aliens Act, Article 3.1.

by the Universal Declaration of Human Rights and International Treaties and Covenants on the same issues in force in Spain.¹⁴⁶

The Aliens Act generally defines discriminatory acts as those which mean distinction, exclusion, restriction or preference against a foreign, based on race, colour, ancestry, ethnic or national origin or religious beliefs, aimed at destroying or limiting the acknowledgment or exercise, on equal terms, of the fundamental political, economic, social and cultural rights and liberties.¹⁴⁷ The same law further states the right to claim for protection of the former rights, under the same procedure established in the Constitution.¹⁴⁸

Hallmark 15 - Duty of Allegiance

The Constitution stipulates that citizens have the right and the duty to defend Spain.¹⁴⁹ It also establishes that the duties of citizens in the event of serious risk, catastrophe or public calamity may be regulated by law.¹⁵⁰

The Civil Code provides as a requirement to acquire Spanish nationality to make an oath of fidelity to the King and obedience to the Constitution and the Laws.¹⁵¹

The Constitution also stipulates a civilian service to be established with a view to accomplishing objectives of general interest.¹⁵²

Furthermore, the Constitution provides that citizens may engage in popular action and take part in the administration of justice through the institution of the jury, in the manner and with respect to those criminal trials as may be determined by law, as well as in customary and traditional courts.¹⁵³ This is a right and a duty of Spanish nationals¹⁵⁴ and the requirements to take part in a jury are: being Spaniard of legal age not disabled and literate, enjoying full political rights and residing in the same province where the crime took place.¹⁵⁵

Citizens registered in a municipality may also be called upon to assist with administrative tasks during the day of the elections, including registering voters, counting votes, etc. The requirements

¹⁴⁶ *ibid*, Article 3.2.

¹⁴⁷ *ibid*, Article 23.1.

¹⁴⁸ *ibid*, Article 24. See Constitution, Article 53.2.

¹⁴⁹ Constitution Article 30.1.

¹⁵⁰ *ibid*, Article 30.4.

¹⁵¹ Civil Code, Article 23.a).

¹⁵² Constitution, Article 30.3.

¹⁵³ *ibid*, Article 125 and Law 6/1985 of 1 July on the Judiciary Organisation, Article 19.

¹⁵⁴ Law 5/1995 of 22 May regulating the Jury, Article 6.

¹⁵⁵ *ibid*, Article 8.

are that they are literate, under 65 years of age and, if appointed as Head of a polling station, citizens must have graduated from Secondary School.¹⁵⁶ The appointment is compulsory and can only be avoided for justified reasons.¹⁵⁷

Hallmark 16 - Duty to Undertake Military or Alternative Service

The obligation to undertake military service was suspended by the Law on Army Personnel 17/1999 of 18 May.¹⁵⁸

Hallmark 17 - Duty to Pay Taxes

The Constitution stipulates that everyone shall contribute to sustain public expenditure according to their economic capacity, through a fair tax system based on the principles of equality and progressive taxation, which in no case shall be of a confiscatory scope.¹⁵⁹ It is also established that personal or property contributions for public purposes may only be imposed in accordance with the law.¹⁶⁰

The Income Tax Act stipulates that the obligation to pay taxes does not depend on nationality but on residence.¹⁶¹ An individual who is resident in Spain is liable to individual income tax in respect of his worldwide income, regardless of the residence of the payer.¹⁶²

Individuals are deemed to be resident in Spain when their stay in the country exceeds 183 days, their centre of vital interests is in Spain and their spouse and minor dependent children qualify as residents in Spain under the two previous requirements, unless the taxpayer proves that (s)he is resident in another country.¹⁶³

The Aliens Act stipulates that, without prejudice to the treaties on double taxation¹⁶⁴, aliens residents in Spain are generally subject to the same taxes as Spaniards.¹⁶⁵

¹⁵⁶ Organic Law 5/1985, of 19 June, on the General Electoral Regime, Article 26.

¹⁵⁷ *ibid*, Article 27.

¹⁵⁸ Law 17/1999 of 18 May on the Personnel of the Army, Additional Stipulation Thirteen.

¹⁵⁹ Constitution, Article 31.1.

¹⁶⁰ *ibid*, Article 31.3.

¹⁶¹ Spanish nationals, their spouses and children residing abroad on diplomatic or consular missions or public officers working for International Organisations are also liable to individual income tax (Law 35/2006 of 28 November on Income Tax, Article 10). Furthermore, Spanish nationals who prove their new resident for tax purpose in any 'tax haven' territory will not lose their qualification as taxpayers in Spain for five tax periods to which a tax return applies (Law 35/2006 of 28 November on Income Tax, Article 8.2).

¹⁶² Law 35/2006 of 28 November on Income Tax, Article 6.

¹⁶³ *ibid*, Article 9.

¹⁶⁴ Spain has subscribed treaties on double taxation with more than sixty countries.

¹⁶⁵ Aliens Act, Article 15.1.

Non-residents are also liable to pay individual income tax on any Spanish source income under the Income Tax of Non Residents Act.¹⁶⁶

Hallmark 18 - Duty to Pay National Insurance Contributions

Both employers and employees (regardless of nationality) have the duty to contribute to the Social Security System although the employer is responsible for collecting and paying the employee's contributions through wage deductions.¹⁶⁷

¹⁶⁶ Royal Legislative Decree 5/2004 of 5 March, on the Income Tax of non-residents, Articles 12 and 13.

¹⁶⁷ Royal Legislative Decree 1/1994 of 20 June on the Social Security System, Article 15 and 104.

United States Citizenship

Introduction

The Constitution of the United States of America¹ came into force in 1789 and is both the primary law of the United States of America and the main source of the basic rights of US citizens. Although the Constitution mainly codifies the interactions between the branches of the federal government, it does contain some information about the relationship between the people of the United States and the government.

There is, however, no legal definition of a 'United States citizen'² or concise list of the rights and duties of US citizens in the Constitution itself. The Fourteenth Amendment to the Constitution, ratified in 1868, defined who a US citizen can be, and that they are citizens at both a State and federal level³, but not what a citizen actually is. With several notable exceptions⁴, the rights of citizens are determined by the Constitution and case law relating to it.

Aliens are given some rights and duties in United States federal law. The United States Constitution and various federal statutes govern the admission, supervision and expulsion of aliens. The Immigration and Nationality Act of 1952, and the Homeland Security Act of 2002 (which created the administrative bodies, the Bureau of Border Security and the Bureau of Citizenship and Immigration), are two of many federal statutes affecting the rights and duties of aliens.

Acquisition of citizenship

It is possible to acquire United States citizenship either automatically or by naturalization⁵. Under the Fourteenth Amendment to the US Constitution, citizenship is automatically awarded to those who are born within United States territory⁶ and under the jurisdiction of the United States⁷,

¹ For full text see: <http://www.archives.gov/national-archives-experience/charters/constitution_transcript.html>.

² A general definition of the term 'citizen' was provided by the US Supreme Court in *Luria v United States*, 231 US 9, 34 SCt 10, 58 LEd 101 (1913): 'Citizenship is membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society.'

³ 'All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.'

⁴ For example, the Immigration and Nationality Act of 1952 regulates the right of a US citizen to travel with a passport.

⁵ 8 USCA s 1101 (a)(23): 'The term 'naturalization' means the conferring of nationality of a state upon a person after birth, by any means whatsoever.'

⁶ US Const Amend XIV s 1.

⁷ *US v Wong Kim Ark*, 169 US 649, 18 SCt 456, 42 LEd 890 (1898). This excludes those who were born within the United States but: (1) American Indians who were members of recognized tribal nations; (2) children of occupying forces born in US territory occupied by those forces; and (3) children of foreign diplomats. All other persons born in the United States are 'subject to its jurisdiction' under the Fourteenth Amendment. See 2 Immigr Law & Business s 5:17.

regardless of the citizenship of their parents.⁸ A person is deemed a national of the United States⁹ when they are born within United States territory (the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the United States Virgin Islands¹⁰) or outlying possessions (American Samoa and Swains Island¹¹ citizens are non-citizen nationals¹²). The Commonwealth of the Northern Mariana Islands are citizens under the Fourteenth Amendment¹³, but have limited rights and responsibilities compared to full US citizens¹⁴. Native Americans (also known as, 'Tribal Members', or 'a member of an Indian, Eskimo, Aleutian or other aboriginal tribe'¹⁵) are also US citizens at birth, but are so by statute¹⁶, as they are considered to be outside the jurisdiction of the United States¹⁷.

To those persons born outside of United States territory, different rules apply before they can acquire US citizenship. There are two types of acquisition available to children, automatic¹⁸ and by application¹⁹. Both routes to acquisition require children born outside of US territory to have at least one US citizen parent. To automatically acquire citizenship, the child must be under 18 years of age and be, 'residing in the United States in the legal and physical custody of the United States citizen parent, pursuant to a lawful admission for permanent residence.'²⁰ To apply for a certificate of citizenship, a child must be under 18 years of age and,

- (2) The United States citizen parent has been physically present in the United States or its outlying possessions for at least 5 years, at least 2 of which were after the age of 14, or the United States citizen parent has a United States citizen parent who has been physically present in the United States or its outlying possessions for at least 5 years, at least 2 of which were after the age of 14;
- (4) The child currently is residing outside the United States in the legal and physical custody of the United States citizen parent; and
- (5) The child is temporarily present in the United States pursuant to a lawful admission and is maintaining such lawful status in the United States.²¹

⁸ *Tomoya Kawakita v US*, 343 US 717, 72 SCt 950, 96 LEd 1249 (1952).

⁹ 8 USCA s 1101: '(21) The term 'national' means a person owing permanent allegiance to a state. (22) The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.'

¹⁰ *ibid* (a)(38).

¹¹ *ibid* (a)(29).

¹² Immigration & Nationality Act s 308 (8 USCA s 1408).

¹³ See the Covenant between the Commonwealth of the Northern Mariana Islands and the United States, 48 USCA s 1801. Also, *Sabangan v Powell*, 375 F3d 818 (2004).

¹⁴ For instance, their citizens do not vote in US Presidential elections.

¹⁵ INA s 301(b), 8 USCA s 1401(b).

¹⁶ *Elk v Wilkins*, 112 US 94, 5 SCt 41, 28 LEd 643 (1884).

¹⁷ *ibid* (n 15).

¹⁸ 8 CFR s 320.2. *N.B.*: 'To be eligible for citizenship under section 320 of the Act, a person must establish that the following conditions have been met after February 26, 2001.'

¹⁹ *ibid* s 322.2.

²⁰ *ibid* s 320.2 (a).

²¹ *ibid* s 322.2 (a).

If adopted, the child must conform to the preceding rules and is subject to additional requirements.²²

A person may be naturalized and obtain United States citizenship if they have reached the age of 18, been a lawful permanent resident of the United States for at least five continuous²³ years, conform with residency requirements, can read, write and speak English²⁴, is a person of 'good moral character'²⁵ who is 'attached to the principles of the Constitution of the United States' and is 'favourably disposed toward the good order and happiness of the United States'²⁶, is not a deserter of the United States armed forces²⁷ and have renounced any former citizenship. Spouses of United States citizens must fulfil the conditions above, but are subject to a reduced residency requirement.²⁸

Administrative requirements of naturalization include the filing of a form²⁹, the payment of a fee³⁰, and the submission of a copy of the person's Alien Registration Card (Form I-551).³¹ The person will be subject to investigation by immigration officers and must further pass an examination³² to establish their familiarization with the language and customs³³ of the United States.³⁴ If successful in their application, the United States Citizenship and Immigration Services (USCIS) will send the applicant a form³⁵ admitting the applicant to take the Oath of Allegiance³⁶ to the United States (a copy of which must be signed by the applicant) in a public ceremony.³⁷ Once the oath has been given, the alien will surrender their Permanent Resident Card and receive a Certificate of Nationality. Any hereditary titles or positions of nobility that the person may hold must be relinquished at the ceremony.³⁸

²² Applicable to adopted children under the Immigration and Nationality Act of 1952, s 101. See: 8 USCA s 1101.

²³ 8 CFR s 316.5.

²⁴ *ibid* s 312.1.

²⁵ *ibid* s 316.10.

²⁶ *ibid* s 316.11.

²⁷ *ibid* s 316.2.

²⁸ *ibid* s 319.1.

²⁹ Applications are made using Form N-400 (Application for Naturalization). See 8 CFR s 334.2.

³⁰ *ibid* s 103.7.

³¹ *ibid* s 334.2.

³² See 8 CFR s 335.2 and 8 CFR s 332.1.

³³ J Preston, 'New Test Asks: What Does "American" Mean?', International Herald Tribune, (Paris, 27 September 2007).

³⁴ For sample questions, see <<http://www.uscis.gov/civicsflashcards>>.

³⁵ 'Notice of Naturalization Oath Ceremony' (Form N-455).

³⁶ See <<http://www.uscis.gov/naturalization>>: 'I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform non-combatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God.' In some cases, USCIS allows the oath to be taken without the clauses: '. . .that I will bear arms on behalf of the United States when required by law; that I will perform non-combatant service in the Armed Forces of the United States when required by law. . .' Additionally, USCIS may allow the oath to be taken by a solemn affirmation or without references to God.

³⁷ 8 CFR s 337.1.

³⁸ See generally: Form M-476, 'A Guide to Naturalization,' available at <<http://www.uscis.gov/natzguide>>.

Dual citizenship

The Immigration and Nationality Act of 1952 does not provide a definition of dual citizenship or make specific provisions regarding dual citizens. The concept has been defined in case law as, 'A person who is claimed as a subject or citizen by two States is said to possess a dual nationality.'³⁹ A person may obtain dual citizenship by several means, including by being naturalized in a foreign State.⁴⁰

The United States does not expressly recognize dual citizenship; however a United States citizen, 'does not lose (their) American citizenship by asserting the rights or assuming the liabilities of (their) citizenship in another country.'⁴¹ The Supreme Court of the United States stated in *Kawakita v US* that dual citizenship is a 'status long recognized in the law,' and that 'a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact he asserts the rights of one citizenship does not without more mean that he renounces the other.'⁴²

Loss of citizenship

American citizenship can only be lost⁴³ if done so outright or by committing certain proscribed acts with intent to relinquish citizenship⁴⁴. The case *Afroyim v Rusk*⁴⁵, a US Supreme Court decision, limited the power of Congress to remove a person's US citizenship without their consent. Thus, the intent to relinquish citizenship is of paramount importance⁴⁶, even though establishing the required intent is not necessarily a simple process.⁴⁷

A US national can expatriate themselves by voluntarily performing an act specified in the Immigration and Nationality Act of 1952. These acts include: (1) obtaining naturalization in a foreign State after reaching the age of 18, (2) taking an oath of allegiance to a foreign State after reaching the age of 18, (3) entering the armed forces of a foreign State if the armed forces are engaged in hostilities against the United States, or serving as a commissioned or non-commissioned officer, (4) performing the duties of any office, post, or employment under the

³⁹ *Tomasicchio v Acheson*, DCDC 1951, 98 F Supp 166 (1951).

⁴⁰ See A Fragomen Jr et al, 'Dual Citizenship', *Immigration Law and Business*, 2 *Immigr Law & Business* s 5:19.

⁴¹ C Pellegrino, 'Asserting Rights or Assuming Liabilities of Dual Citizenship in Foreign Country', *Corpus Juris Secundum*, 14 CJS Citizens s 21. See also *Kawakita* (n 8).

⁴² *Kawakita* (n 8).

⁴³ See generally: <http://travel.state.gov/law/citizenship/citizenship_778.html>.

⁴⁴ Immigration and Nationality Act 1952, s 349(a).

⁴⁵ *Afroyim v Rusk*, 387 US 253, 87 SCt 1660, 18 L Ed 2d 757 (1967).

⁴⁶ *Vance v Terrazas*, 444 US 252, 100 SCt 540, 62 L Ed 2d 461, 5 Fed R Evid Serv 273 (1980).

⁴⁷ S Goodman, 'Protecting Citizenship: Strengthening The Intent Requirement In Expatriation Proceedings', *George Washington Law Review*, 56 *Geo Wash L Rev* 341 (January, 1988).

government of a foreign State after reaching the age of 18, having acquired the nationality of the foreign State, or performing the duties of any office, post, or employment under the government of a foreign State after reaching the age of 18 that requires an oath of allegiance, (5) making a formal renunciation of nationality before a US consular officer in a foreign State, (6) making a formal written renunciation of nationality in US territory whenever the United States is in a State of war and the Attorney General approves that such renunciation is not contrary to the interests of national defense, (7) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, and being convicted thereof by a court martial or by a court of competent jurisdiction.⁴⁸ There are further provisions regarding those who have renounced their US citizenship for tax purposes.⁴⁹

Categories of citizenship

There are several categories of citizenship in the United States. Categories include those born in the United States as citizens, naturalized US citizens, US nationals of territories, and aliens (defined as, 'any person not a citizen or national of the United States,'⁵⁰). There are numerous subcategories⁵¹ of aliens, from resident aliens⁵² to asylees⁵³, and there are different rules and regulations pertaining to each category.

There are scores of federal statutes that contain different rules for citizens and non-citizens, and these rules are often further dependant on residency status. Only US-born citizens have full rights under the US Constitution. All other categories of citizen, national, and alien have limited rights. For instance, naturalized citizens, while in possession of full rights of citizenship, are not capable of becoming President of the United States.⁵⁴ Nationals are allowed to work and reside freely in US territory, but cannot vote or hold office⁵⁵ (although, somewhat confusingly, there is usually no distinction on US passports between US nationals and US citizens). Aliens have the most restricted rights.⁵⁶ Aliens who are legally resident are afforded Constitutional rights to property and person.⁵⁷ However, they are frequently subject to burdens over and above those of

⁴⁸ INA (n 44). See also 8 USCA s 1481.

⁴⁹ PL 104-191 contains provisions for taxation of US citizens who lose US citizenship. See also <<http://www.irs.gov/pub/irs-pdf/i8854.pdf>>.

⁵⁰ 8 USCA s 1101.

⁵¹ *ibid* s 1101(a)(15).

⁵² *ibid* s 1101(a)(20): 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.'

⁵³ *Marincas v Lewis*, CA 3 (NJ) 1996, 92 F3d 195 (1996): 'Asylum' is form of discretionary relief which Attorney General may grant to alien who proves he possesses a 'well-founded fear of persecution.' See generally: 8 USCA s 1158.

⁵⁴ US Const Art II, s 1, cl 4. See also: *Baumgartner v US*, 322 US 665, 64 S Ct 1240 (1944).

⁵⁵ *US v Valentine*, 288 F Supp 957 (1968).

⁵⁶ See D Ytreberg, 'Status', *Corpus Juris Secundum*, 3 CJS Aliens s 5.

⁵⁷ *Valerio v Mulle*, 148 F Supp 546 (1956). See also: *Carlson v Landon*, 342 US 524, 72 S Ct 525 (1952).

citizens, an example being the additional requirements regarding the payment of income tax⁵⁸. The delineation between the rights of citizens and those of the people of the United States will be further explored via the Hallmarks of citizenship.

The Hallmarks of Citizenship

Hallmark 1 – Freedom of Movement

US citizens have the fundamental right to free movement⁵⁹, subject to reasonable regulation,⁶⁰ which is secured and protected in the US Constitution, although it is not expressly mentioned⁶¹. The right of free movement in the United States encompasses the rights for citizens to move freely between States, to be treated as a ‘welcome visitor’ within each State and to be treated like a citizen of each State when they elect to become permanent residents of that State.⁶² It also includes a right for US citizens to travel abroad.⁶³

The right to travel is one of the privileges and immunities⁶⁴ held by US citizens⁶⁵, and is thus protected by Article Four of the United States Constitution and by Amendment Fourteen to the United States Constitution.⁶⁶ Amendment Fourteen holds that the privileges and immunities of US citizens cannot be infringed upon without due process of law (this applies to travel within the United States⁶⁷ and internationally⁶⁸). US citizens can challenge unreasonable deprivations of their right to free movement under the due process clause.⁶⁹

Aliens also have certain rights to free movement, as the Fifth Amendment to the United States Constitution refers to ‘persons’, not ‘citizens’.⁷⁰ Amendment Fourteen, as above, similarly applies

⁵⁸ IRC s 6851.

⁵⁹ *Nunez v City of San Diego*, 114 F3d 935 (1997).

⁶⁰ *Navis v Henry*, 456 F Supp 99 (1978).

⁶¹ *Attorney General of New York v Soto-Lopez*, 476 US 898, 106 S Ct 2317 (1986).

⁶² *Saenz v Roe*, 526 US 489, 500, 119 S Ct 1518, 143 L Ed 2d 689 (1999).

⁶³ *Boudin v Dulles*, 136 F Supp 218 (1955): ‘...travel abroad is more than a mere privilege accorded American citizens. It is a right, an attribute of personal liberty, which may not be infringed upon or limited in any way unless there be full compliance with the requirements of due process.’ However, the right to international travel under the Fifth Amendment is not unqualified (*Agee v Baker*, 753 F Supp 373 (1990)).

⁶⁴ Const Art IV s 2 cl 1: ‘The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.’ Note: *Snowden v Hughes*, 321 US 1, 64 S Ct 397, 88 L Ed 497 (1944), ‘These privileges and immunities are only those arising from the Constitution and the federal laws of the United States, not those arising from citizenship in an individual state.’

⁶⁵ *Bethesda Lutheran Homes and Services, Inc v Leean*, 122 F 3d 443 (1997).

⁶⁶ Const Amend XIV s 1: ‘All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’

⁶⁷ *Saenz* (n 63).

⁶⁸ *Boudin* (n 64).

⁶⁹ *US v Laub*, 385 US 475, 87 S Ct 574, 17 L Ed 2d 526 (1967): ‘The right to travel is a part of the liberty of which a citizen cannot be deprived without due process of law.’

⁷⁰ Const Amend V: ‘...no person shall be...deprived of life, liberty, or property, without due process of law.’

to aliens. Thus, aliens (who are physically present in the United States) have due process rights, but are not accorded the same rights of free movement as citizens, especially with regard to Immigration and Naturalization matters.⁷¹

Hallmark 2 – Right to a Passport

'A "passport" is a document identifying a citizen, in effect requesting foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers.'⁷² A passport is used to establish the identity, citizenship, allegiance⁷³ and the right of entry⁷⁴ of the bearer. A US passport is the property of the US government⁷⁵ and must be surrendered upon demand by an authorized US government representative.⁷⁶

A United States citizen is barred from attempting to leave or enter the United States without a passport.⁷⁷ Only US nationals⁷⁸ have the ability to apply for a passport. However, US nationals do not have the right to a passport. The Secretary of State has the authority⁷⁹ to issue passports for the United States.⁸⁰ Administrative procedures that must be followed when applying for a US passport for the first time include the filing of a form⁸¹, presenting proof of US citizenship⁸², proof of identity⁸³, two photographs of the applicant and a fee.

Alien residents holding identity cards⁸⁴ are subject to further restrictions, including the inclusion of biometric devices as a means of identification⁸⁵.

⁷¹ *Choudhry v Jenkins*, 559 F 2d 1085 (1977).

⁷² *US* (n 70).

⁷³ *Haig v Agee*, 453 US 280, 101 SCt 2766, 69 L Ed 2d 640 (1981): 'As travel control document, passport is both proof of identity and proof of allegiance to United States, and even under this section, passport remains in a sense a document by which government vouches for the bearer and for his conduct.'

⁷⁴ 8 USCA s 1185.

⁷⁵ 22 CFR s 51.9.

⁷⁶ Additionally, a court can require a citizen to surrender a passport in connection with a judicial proceeding: *US v Praetorius*, 622 F 2d 1054 (1979). For penalties regarding misuse of US passports, see 18 USCA s 1544.

⁷⁷ 8 USCA s 1185(b): 'Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States passport.' This rule also applies to dual citizens with two passports.

⁷⁸ A citizen or a national.

⁷⁹ 22 USCA s 211a.

⁸⁰ Passports are issued by the US Department of State.

⁸¹ Form DS-11: Application for US Passport.

⁸² Accepted forms can include a previous US Passport, a certified birth certificate issued by a the city, county or state, a Consular Report of Birth Abroad, a Certificate of Birth, a Naturalization Certificate or a Certificate of Citizenship.

⁸³ Accepted forms can include a previous US passport, a Naturalization Certificate, a current and valid driver's license, a government ID (city, state or federal), or a military ID (military and dependents).

⁸⁴ 8 USCA s 1101(a)(6): 'The term "border crossing identification card" means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations.'

⁸⁵ *ibid*: '(A) each such document include a biometric identifier (such as the fingerprint or handprint of the alien) that is

Hallmark 3 – Right to Vote

Adult US citizens have the right to vote in both Federal and State elections, subject to certain limitations.⁸⁶ An individual's ability to exercise their right to vote is not derived from their US citizenship or from the US Federal Constitution⁸⁷, but from meeting State eligibility requirements.

The right to vote in federal elections is addressed in the US Constitution in Amendments Fifteen, Nineteen, Twenty-Four, and Twenty-Six. Amendment Fifteen allows for men, regardless of race, colour or former servitude the right to vote, and protects this right from both the Federal and State governments.⁸⁸ The Nineteenth Amendment protected the rights of citizens to vote in Federal and State elections regardless of gender.⁸⁹ The Twenty-Fourth Amendment disallowed Federal and State governments from making the payment of a tax a precondition for voting in federal elections.⁹⁰ The Twenty-Sixth Amendment disallows Federal and State governments from denying those 18 years old and older the right to vote because of their age.⁹¹ The rights derived from these amendments have been secured in legislation that regulates voting, including The Voting Rights Act of 1965, The Uniformed and Overseas Citizens Absentee Voting Act of 1986, The National Voter Registration Act of 1993 (Motor Voter), The Help America Vote Act of 2002, and The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.⁹²

There are limitations on the type of citizen that can vote, which are imposed at both State and federal level. Broadly, States restrict voters on the bases of citizenship, residency, age, and previous convictions. A minimum voting age of 18 years was set by the Twenty-Sixth Amendment in 1971 and ratified by most States by the end of that year. States usually impose a residency requirement in order to register to vote, however, absent US citizens are given the right to lodge an absentee vote under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)⁹³. Many States have rules about a citizen's capacity to vote⁹⁴, but may be eligible to

machine readable and (B) an alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.'

⁸⁶ 42 USCA s 1971. See also <<http://www.usdoj.gov/crt/voting/intro/intro.htm>>.

⁸⁷ *Bush v Gore*, 531 US 98, 121 SCt 525 (2000): 'The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a State-wide election as the means to implement its power to appoint members of the electoral college.'

⁸⁸ US Const Amend XIV.

⁸⁹ US Const Amend XIX.

⁹⁰ US Const Amend XXIV.

⁹¹ US Const Amend XXVI.

⁹² 42 USCA s 1973b. See <<http://www.usdoj.gov/crt/voting/overview.htm>>.

⁹³ PL 99-410 (HR 4393), see also 42 USCA s 1973ff.

⁹⁴ Those deemed mentally incompetent.

return an Alternative Ballot.⁹⁵ Many States also have felon voter disenfranchisement⁹⁶, which may be temporary or permanent, depending on individual State laws.

Hallmark 4 - Right of Petition and to a Referendum

US citizens have a right under the US Constitution to petition their government for redress of grievances⁹⁷, however, there is no federal constitutional right to the initiative and referendum process⁹⁸, nor is there a referendum process at the national level. There are States that permit the initiative and referendum process in their State constitutions, and then only to electors (who must be US citizens).⁹⁹ Currently, there are over twenty States that permit initiatives, and over thirty States permit referenda in a variety of formats. There are also municipalities who have the power of referendum, either through State statutes, through charter processes, or by municipal enactments.¹⁰⁰

Different States have different rights available to their citizens. In New Jersey, 'The terms "initiative" and "referendum" refer to methods by which legislation may be adopted by the people...they have no application to the legislative enactments of governing bodies.'¹⁰¹

In Massachusetts, 'The referendum process is intended to give the people of the Commonwealth the means to participate in government so as to enable them to better protect their individual rights. In other words the initiative and referendum furnish a means through which the public "have some say...with regard to...the laws which shall be enacted."¹⁰²

In Colorado, 'The right of initiative and referendum, like the right to vote, is a fundamental right under the Colorado Constitution. Likewise both the right to vote and right of initiative have in common the guarantee of participation in the political process.'¹⁰³

⁹⁵ See 42 USCA s 1973ee-1 to s 1973ee-6.

⁹⁶ This discrimination was deemed Constitutional by the Supreme Court in *Richardson v Ramirez*, 418 US 24, 94 SCt 2655 (1974). For a discussion on the topic, see C M Keller, 'Re-Enfranchisement Laws Provide Unequal Treatment: Ex-Felon Re-Enfranchisement and The Fourteenth Amendment', *Chicago-Kent Law Review*, 81 Chi-Kent L Rev 199 (2006).

⁹⁷ Const Amend I: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

⁹⁸ *Loonan v Woodley*, 882 P 2d 1380 (1994).

⁹⁹ See for example California State Constitution, Art II, 9-11.

¹⁰⁰ J R Kemper, 'Adoption of Zoning Ordinance or Amendment Thereto as Subject of Referendum', (1976) 72 ALR 3d 1030.

¹⁰¹ *Messer v Burlington Tp*, 172 NJ Super 479, 412 A 2d 1059 (1980).

¹⁰² *Miller v Secretary of Com*, 428 Mass 82, 697 NE 2d 123 (1998).

¹⁰³ *Matter of Title, Ballot Title and Submission Clause, and Summary for the Proposed Initiated Constitutional Amendment '1996-3' Adopted on April 3, 1996, and Motion for Rehearing Denied on April 17, 1996*, 917 P 2d 1274 (1996).

Hallmark 5 – Right to Stand as a Candidate in National and Local Elections

The right to govern is reserved for citizens.¹⁰⁴ US citizens have the right to stand as a candidate in elections, subject to certain exceptions and the qualifications and disqualifications of each office.

A candidate for President of the United States of America must be a native-born, not naturalized, citizen. They must also be at least 35 years old and have lived in the United States for at least fourteen years.¹⁰⁵ The Twelfth Amendment of the US Constitution requires the Vice President of the United States to meet the same eligibility requirements as the President.¹⁰⁶

The Congress of the United States is bicameral and consists of the Senate and the House of Representatives. Members of the Senate, or Senators, are elected by States, each State electing two representatives. A person cannot be elected as a Senator unless they are at least 30 years old, have been a US citizen for nine years, and who must be, at the time of their election, an inhabitant of the State that they represent.¹⁰⁷

A member of the House of Representatives is called a Representative and is elected by a State, the number of Representatives being determined by the State's population. A Representative must be at least 25 years old, have been a US citizen for at least seven years, and must be, at the time of their election, an inhabitant of the State that they represent.¹⁰⁸

A Governor is the chief elected official of a State. The qualifications for Governors vary from State to State, though most State constitutions stipulate that Governors must be US citizens, have reached a certain age, and be a resident of that State.

Qualifications for other elected offices vary considerably. In addition to citizenship requirements, there are often residency requirements and rules regarding a candidate's length of residence.¹⁰⁹ There are also disqualifications preventing those who advocate the overthrow of the government¹¹⁰ and felons¹¹¹ from holding public office.

¹⁰⁴ *Foley v Connelie*, 435 US 291, 98 SCt 1067 (1978).

¹⁰⁵ Const Art II s 1, cl 4.

¹⁰⁶ Const Amend XII.

¹⁰⁷ Const Art I s 3, cl 3.

¹⁰⁸ Const Art I s 2, cl 2.

¹⁰⁹ See, for example, *Reale v Board of Real Estate Appraisers*, 880 P2d 1205 (1994).

¹¹⁰ 5 USCA s 7311. See also Const Amend XIV, s 3: 'No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.'

Hallmark 6 – Right of Access to Public Office

As a general rule, US citizens do not have a vested right to public employment. However, aliens are specifically excluded from certain jobs which are restricted to citizens.¹¹² Generally, discrimination based on citizenship status is not permitted, however, aliens do not have freedom from discrimination because of citizenship status required by laws, regulations or executive orders.¹¹³

In 1973, in the case *Sugarman v Dougall*¹¹⁴, the Supreme Court overturned laws restricting employment in the New York State competitive civil service to citizens. The court held that a State can only require citizenship for an appropriate class of posts, and not 'sweep indiscriminately'.¹¹⁵ In 1978 in *Foley v Connelie*¹¹⁶, the Supreme Court upheld a New York State statute barring non-citizens from working in the New York State police force on the grounds that, 'this country entrusts many of its most important policy responsibilities to these officers, the discretionary exercise of which can often more immediately affect the lives of citizens than even the ballot of a voter or the choice of a legislator... it represents the choice, and right, of the people to be governed by their citizen peers.'¹¹⁷ Then, in 1982, the Supreme Court held in *Cabell v Chavez-Salido*¹¹⁸, that a State (in this case, California) could restrict non-citizens from employment as 'peace officers', despite the class being extremely broad, because the positions were deemed to, 'sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be limited to citizens.'¹¹⁹

In 1976 *Hampton v Mow Sun Wong*¹²⁰, aliens brought action against the Civil Service Commission challenging regulations which barred everyone except US citizens and natives of Samoa from gaining employment in many positions in the federal civil service. The regulations were overturned by the Supreme Court. Several months later, President Gerald Ford¹²¹, amended the Civil Service Rule VII¹²² to include a requirement for US citizenship for employment

¹¹¹ See, for example, *United States v Warden of Walkill Prison*, 246 F Supp 72 (1965): 'The state has a legitimate interest in excluding from office those who would impair efficiency and honesty in government operations. This cannot be doubted. To achieve this end conditions and penalties can be imposed even where they may involve the relinquishment of constitutional rights and privileges, so long as they bear a reasonable relation to the end sought to be achieved.'

¹¹² Exec Order No 11935. See also E Hull, 'Resident Aliens, Public Employment and the Political Community Doctrine', (1983) 36 *The Western Political Quarterly*, 2, 221-240.

¹¹³ 8 USCA s 1324b.

¹¹⁴ *Sugarman v Dougall*, 413 US 634, 93 Sct 2842 (1973).

¹¹⁵ *ibid* 643.

¹¹⁶ *Foley* (n 105).

¹¹⁷ *ibid* 296.

¹¹⁸ *Cabell v Chavez-Salido*, 454 US 432, 102 Sct 735 (1982).

¹¹⁹ *ibid* 445.

¹²⁰ *Hampton v Mow Sun Wong*, 426 US 88, 96 Sct 1895 (1976).

¹²¹ Using his powers under 5 USCA s 3301.

¹²² Civil Service Rule VII (5 CFR Part 7).

in the federal competitive civil service. This was challenged in 1978 in *Vergara v Hampton*¹²³, and the requirement was upheld.

Employee Rights

When a citizen becomes a public employee, some of their rights of citizenship may be changed and be subject to limitation.¹²⁴ The individual's right to First Amendment freedom of speech is maintained, but can be limited in certain circumstances.¹²⁵ An employee may also be subject to the Hatch Act, which is a group of federal statutes which regulates a State or federal employee's political activities.¹²⁶

Hallmark 7 – Right to Protection

There are three guarantees of protection in the US Constitution. First, that the United States guarantees to protect individual States from invasion and domestic violence.¹²⁷ Second, that the President, being the Commander in Chief of the Army, Navy, and the Militia¹²⁸, has an oath to protect and defend the Constitution¹²⁹. Third, that the Constitution guarantees people within the jurisdiction of the United States equal protection of the laws.¹³⁰ The protection of laws include security against unreasonable searches and seizures¹³¹, the protection of those accused of crimes¹³², and the provision that persons cannot be deprived of life, liberty, or property without due process of law¹³³. The right to bear arms has been a highly contentious and litigated right, but it maintains a person's ability to keep, subject to each State's regulations¹³⁴, certain weapons.¹³⁵ The Supreme Court has said that, 'It is "obvious and unarguable" that no governmental interest is more compelling than the security of the Nation,'¹³⁶ and accordingly, none of these rights and protections are specific to US citizens.

Specific protections for US citizens are varied. Citizens cannot be either prevented from entering or deported from the United States.¹³⁷ Citizens, whether naturalized or US-born, are entitled to

¹²³ *Vergara v Hampton*, 581 F 2d 1281 (1978).

¹²⁴ For instance, employee freedoms under the Fourth Amendment to the US Constitution may be infringed if the federal government has a reasonable need to do so. See *National Treasury Employees Union v Von Raab*, 816 F 2d 170 (1987).

¹²⁵ See for example, *Snepp v US*, 444 US 507, 100 SCt 763 (1980).

¹²⁶ See 5 USC ss 7321-7326 and 5 USC ss 1501-1508.

¹²⁷ Const Art IV s 4.

¹²⁸ Const Art II s 2, cl 1.

¹²⁹ Const Art II s 1, cl 7.

¹³⁰ Const Amend XIV s 1.

¹³¹ Const Amend IV.

¹³² Const Amend V-VIII.

¹³³ Const Amend V.

¹³⁴ *United States v Cruikshank et al*, 92 US 542, 2 Otto 542, 1875 WL 17550 (USLa), 23 L Ed 588 (1875).

¹³⁵ Const Amend II.

¹³⁶ *Haig* (n 74).

¹³⁷ See INA s 242(b)(5) and (e)(2)(A) (at 8 USCA s 1252(b)(5) and (e)(2)(A)) as amended by IIRAIRA s 306(a)(2).

'protection of persons and property' abroad.¹³⁸ If a citizen is unjustly detained in another country, they are entitled to an investigation by the US government of the detainment and further action if necessary, short of an act of war.¹³⁹ Those people who are tried in the US court system will only be tried by judges and jurors who are citizens.¹⁴⁰

Hallmark 8 – Right to Welfare Benefits

The Preamble to the United States Constitution states that, 'We the People of the United States, in Order to form a more perfect Union...promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.'¹⁴¹ Although the Preamble does not confer substantive powers¹⁴², it does clarify that promotion of the general welfare is one of the purposes of adopting the United States Constitution.

American citizens do not have an express right to welfare benefits.¹⁴³ Welfare benefits are not a fundamental right, and thus neither the States nor the Federal Government are under any constitutional obligation to guarantee minimum levels of support.¹⁴⁴

Certain aliens have access to welfare benefits¹⁴⁵, but there is no constitutional duty for congress to provide aliens with the welfare benefits provided to citizens.¹⁴⁶

Hallmark 9 – Right to Health Care

United States citizens do not have a right to health care. US citizens possess the right to enjoy their health as a fundamental liberty under the Federal Constitution and certain State constitutions.¹⁴⁷ As such, citizens possess the right to the enjoyment of health free from unreasonable restriction.¹⁴⁸ Depending on their State of residence, citizens possess the right to

¹³⁸ 22 USCA s 1731. The Overseas Citizens Services (OCS) in the State Department's Bureau of Consular Affairs is responsible for the well-being and location of US citizens who are overseas. The American Citizens Services and Crisis Management (ASC), an office of the OCS, is responsible for assisting US citizens in medical or financial emergencies, for the burial US citizens who die abroad, for whereabouts and welfare inquiries, and for assisting those US citizens who have been arrested abroad. See further <http://travel.state.gov/law/info/info_615.html>.

¹³⁹ *ibid* s 1732.

¹⁴⁰ *Foley* (n 105).

¹⁴¹ For full text see: <http://www.archives.gov/national-archives-experience/charters/constitution_transcript.html>.

¹⁴² *US v Kinnebrew Motor Co*, 8 F Supp 535 (1934).

¹⁴³ *Alcala v Burns*, 545 F 2d1101 (1976).

¹⁴⁴ *Lavine v Milne*, 424 US 577, 96 SCt 1010, 47 L Ed 2d 249 (1976).

¹⁴⁵ 8 USCA s 1611.

¹⁴⁶ *Mathews v Diaz*, 426 US 67, 96 SCt 1883, 48 L Ed 2d 478 (1976).

¹⁴⁷ *Right to Choose v Byrne*, 169 NJ Super 543, 405 A 2d 427 (1979).

¹⁴⁸ *ibid*.

choose a health care provider without government interference¹⁴⁹ and the right to refuse medical treatment.¹⁵⁰

Medicare¹⁵¹ is a health insurance programme administered by the US government that provides for those who meet certain criteria or who are 65 years of age or older¹⁵². Eligibility for the programme is determined by the Social Security Administration and its administration is controlled by the Centers for Medicare and Medicaid Services (CMS). Medicaid is a medical assistance programme¹⁵³ for low-income individuals, administered by States.¹⁵⁴ The programme is paid for partially by federal sources and partially by State sources, so Medicaid benefit levels differ from State to State.¹⁵⁵ The statute regarding Medicare and Medicaid does not confer a private right of action on individual beneficiaries.¹⁵⁶ However, it has been decided that, 'Medicaid is a statutory right for those entitled to receive it.'¹⁵⁷

Hallmark 10 – Right to Education

Although education has been recognised as, 'the very foundation of good citizenship,'¹⁵⁸ the right to education for individuals is not protected by the US Constitution.¹⁵⁹ However, the right to a free public¹⁶⁰ education is often protected by individual State constitutions¹⁶¹ and is not, in most cases, dependant on possession of US citizenship¹⁶². Schools which are not usually included in an individual's State constitutional right include private schools, parochial or religious schools, colleges or universities, and technical or professional schools.

Generally, public schools are government-provided, free to attend, and open to all equally.¹⁶³ Schools may not discriminate with regard to the right to access to education. In *Brown v Board of Education of Topeka*,¹⁶⁴ the Supreme Court held that the opportunity of education, 'where the

¹⁴⁹ *Armstrong v State*, 296 Mont 361, 989 P2d 364, 1999 MT 261 (1999).

¹⁵⁰ *Steele v Hamilton Cty Community Mental Health Bd*, 90 Ohio St 3d 176, 736 NE 2d 10 (2000).

¹⁵¹ Social Security Act, ss 1831 et seq, 1836(2) as amended 42 USCA ss 1395j et seq, 1395o(2).

¹⁵² 42 USCA s 1395o.

¹⁵³ *ibid* s 1396d.

¹⁵⁴ *ibid* s 1396.

¹⁵⁵ *ibid* s 1396a.

¹⁵⁶ *MAC v Betit*, 284 F Supp 2d 1298 (2003): 'The authorizing provision of the Medicaid Act does not contain rights-creating language unequivocally conferring an individual right to support a cause of action...'

¹⁵⁷ *Olson v Wing*, 281 F Supp 2d 476 (2003). See also *Goldberg v Kelly*, 397 US 254, 90 S Ct 1011, 25 L Ed 2d 287 (1970).

¹⁵⁸ *Brown v Board of Education of Topeka*, 347 US 483, 74 S Ct 686 (1954).

¹⁵⁹ *San Antonio School District v Rodriguez*, 411 US 1, 93 S Ct 1278 (1973); *Plyler v Doe*, 457 US 202, 102 S Ct 2382 (1982).

¹⁶⁰ 'Public schools' are state-funded and consist of elementary (*Hull v Albrecht*, 190 Ariz 520, 950 P 2d 1141 (1997): 'A common school pupil is a pupil enrolled in programs for preschool children with disabilities, kindergarten programs, and grades one through eight.') and secondary schools (*Dickinson v Edmondson*, 120 Ark 80, 178 SW 930 (1915)).

¹⁶¹ *New York Civil Liberties Union v State*, 4 NY 3d 175, 791 NYS 2d 507 (2005).

¹⁶² *Plyler* (n 160).

¹⁶³ See *Council of Organizations and Others for Educ About Parochial, Inc v Governor*, 455 Mich 557, 566 NW 2d 208 (1997).

¹⁶⁴ *Brown* (n 159).

State has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁶⁵

Often the State's legislature requires the provision of public education, and school authorities are subject to governance by the legislature according to the State's constitution.¹⁶⁶ The Federal government provides both guidelines and funding for State school programmes.¹⁶⁷

Hallmark 11 – Right to Employment

There is no explicit right to employment for US citizens in the Federal Constitution. However, the Fourteenth Amendment of the US Constitution has been held by the courts to include the right of a citizen to a fair opportunity to pursue an occupation.¹⁶⁸ This Fourteenth Amendment right has been held not include the right to, 'make a living,'¹⁶⁹ or the right for a person to, within a chosen occupation, have, 'the right to a particular employment or position.'¹⁷⁰ Eligibility to pursue work is not dependant on US citizenship, but on legal residency within the United States.

There are specific rights that individuals can claim when applying, or once within employment. These include rights derived from a series of federal laws which aim to prevent job discrimination, including legislation preventing discrimination based on race, colour, religion, age, disability, and gender.¹⁷¹ It is also not legal to discriminate against a lawfully-resident person because of their citizenship status or national origin.¹⁷²

A State is legally allowed to require reasonable qualifications for some professions,¹⁷³ however, the State cannot discriminate when requiring such qualifications.¹⁷⁴

¹⁶⁵ *ibid* at 493.

¹⁶⁶ See, for example, *Judd v Board Of Education Of Union Free Sch Dist, etc*, 278 NY 200, 15 NE 2d 576, 118 ALR 789 (1938).

¹⁶⁷ National education goals were provided in the Goals 2000: Educate America Act of 1996 (20 USCA ss 5801 et seq), and more recently, the No Child Left Behind Act (NCLBA) (20 USCA ss 6301 et seq). Federal programmes such as this include initiatives such as work-based learning (20 USCA ss 6101 et seq).

¹⁶⁸ *Butchers' Union, Etc, Co v Crescent City, Etc, Co*, 111 US 746, 4 SCt 652, 28 L Ed 585 (1884): 'I hold that the liberty of pursuit-the right to follow any of the ordinary callings of life-is one of the privileges of a citizen of the United States.' And in *Truax v Raich*, 239 US 33, 36 SCt 7 (1915): 'It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.'

¹⁶⁹ *Medeiros v Vincent*, 431 F3d 25 (2005): 'The right to "make a living" is not a "fundamental right," for either equal protection or substantive due process purposes.'

¹⁷⁰ *Levin v Civil Service Commission of Cook County*, 52 Ill 2d 516, 288 NE 2d 97 (1972).

¹⁷¹ The Civil Service Reform Act of 1978 (CSRA) (5 USCA s 2302) promotes fairness with regard to federal employees. Some of the laws enforced by the US Equal Employment Opportunity Commission (EEOC) include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, Sections 501 and 505 of the Rehabilitation Act of 1973, Title I and Title V of the Americans with Disabilities Act of 1990, and the Civil Rights Act of 1991.

¹⁷² See the Immigration Reform and Control Act (IRCA) at 8 USCA s 1324b. The class of people protected by this legislation includes US citizens, US nationals, aliens lawfully admitted for permanent or temporary residence, special agricultural workers performing seasonal agricultural services in the US, and refugees or persons granted asylum.

¹⁷³ See *Dent v State Of West Virginia*, 129 US 114, 9 SCt 231, 32 L Ed 623 (1889). See also, *Thompson v Schmidt*, 601 F 2d 305 (1979).

Hallmark 12 – Right to Housing

The national housing goal, as Stated in the 1949 Housing Act, of ‘a decent home and a suitable living environment for every American family,’¹⁷⁵ does not extend to a constitutional right to housing for US citizens.¹⁷⁶ Similarly, there is no right for housing of any quality, or any statutory duty for the government to provide low-income housing.¹⁷⁷ However, citizens do have certain housing-related rights which are derived from statutes.

The declaration of policy of The Fair Housing Act (Title VIII of the Civil Rights Act of 1968)¹⁷⁸ states that, ‘It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.’¹⁷⁹ The right to ‘fair housing’, essentially means the right to choose housing, subject to an ability to pay the rent or a mortgage, free from discrimination.¹⁸⁰ There is extensive legislation that applies to fair housing.¹⁸¹ While the right to buy or rent housing may not be denied in a discriminatory manner, there is no constitutional requirement that States provide housing for citizens.¹⁸²

There is a right in some cases to privately-owned subsidized housing or public housing¹⁸³. There is also the federal Housing Choice Voucher Program (Section 8)¹⁸⁴, which allows those citizens who are eligible (including the elderly, the disabled and those with a low income) to use a federal voucher to pay for rent or to purchase a house. Eligibility is based on gross annual income and the size of the family applying, and the programme is limited to US citizens and specified categories of non-citizens depending on their immigration status.¹⁸⁵

¹⁷⁴ *Application of Griffiths*, 413 US 717, 93 S Ct 2851 (1973).

¹⁷⁵ 42 USCA s 1441.

¹⁷⁶ See also C Hartman, ‘The Case for a Right to Housing’, (2006) 148 Shelterforce: The Journal of Affordable Housing and Community Building at <<http://www.nhi.org/online/issues/148/righttohousing.html>>.

¹⁷⁷ *Acevedo v Nassau County, New York*, 500 F 2d 1078 (1974). See also, *Lindsey v Normet*, 405 US 56, 92 S Ct 862 (1972): ‘We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.’

¹⁷⁸ 42 USCA s3601- s3639. The Fair Housing Regulations can be found at 24 CFR s 1.1 et seq.

¹⁷⁹ *ibid* s 3601.

¹⁸⁰ See also The Fair Housing Act summary at the US Department of Housing and Urban Development (HUD) website: <<http://www.hud.gov/offices/fheo/FHLaws/yourrights.cfm>>.

¹⁸¹ This includes Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973,

Section 109 of Title I of the Housing and Community Development Act of 1974, the Architectural Barriers Act of 1968, the Age Discrimination Act of 1975, Title IX of the Education Amendments Act of 1972, and Title II of the Americans with Disabilities Act of 1990. Applicable Executive Orders include Executive Order 11063 (prohibits discrimination with regard to certain federal property), Executive Order 11246 (barring discrimination in federal employment), Executive Order 12892 (affirmatively furthering fair housing), Executive Order 12898 (environmental justice), Executive Order 13166 (English proficiency barriers), and Executive Order 13217 (regarding community-based living arrangements for persons with disabilities).

¹⁸² *Smalls v Ives*, 296 F Supp 448 (1968).

¹⁸³ Further information can be found at 24 CFR.

¹⁸⁴ 24 CFR s 982.1.

¹⁸⁵ See the US Department of Housing and Urban Development’s ‘Housing Choice Vouchers Fact Sheet’ at <http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm#9>.

Hallmark 13 – Linguistic Rights

'The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution...'¹⁸⁶ The right to language for US citizens in the United States is a wide-ranging and frequently unclear issue, but it remains that US citizens do not have express linguistic rights.¹⁸⁷ Case law on the topic of linguistic rights is wide-ranging.¹⁸⁸

Importantly, there is no official language in the United States.¹⁸⁹ Individual States have enacted non-prohibitive, symbolic laws stating that English is the State language,¹⁹⁰ and other States' laws requiring State governments to act in English have been deemed to be unconstitutional, in breach of the First Amendment of the US Constitution.¹⁹¹

Anti-discrimination

Executive Order 13166, enacted in 2000 by President Clinton, improves linguistic access to federally-assisted and federally-conducted programs and activities for those who don't have full proficiency in English due to their national origin.¹⁹² This was made in accordance with Title VI of the Civil Rights Act of 1964¹⁹³ which states that, 'No person in the United States shall, on the ground of race, colour, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'¹⁹⁴ It has been suggested that linguistic minorities can be included in 'national origin' groups.¹⁹⁵ Specifically employment-related discrimination legislation makes it illegal to discriminate against employees because of their 'foreign accent'¹⁹⁶, by making unnecessary workplace fluency requirements¹⁹⁷, and by adopting 'English-Only' rules for discriminatory purposes¹⁹⁸.

¹⁸⁶ *Meyer v State Of Nebraska*, 262 US 390, 43 S Ct 625, 29 ALR 1446, 67 L Ed 1042 (1923).

¹⁸⁷ B Porto, "'English Only' Requirement for Conduct of Public Affairs", (2001) 94 ALR 5th 537.

¹⁸⁸ See *Smother v Benitez*, 806 F Supp 299 (1992).

¹⁸⁹ *Harris v Rivera Cruz*, 710 F Supp 29 (1989).

¹⁹⁰ *In re Initiative Petition No 366*, 46 P 3d 123, 2002 OK 21 (2002).

¹⁹¹ *Ruiz v Hull*, 191 Ariz 441, 957 P 2d 984 (1998).

¹⁹² Exec Order No 13, 166, 2000 WL 1152059 (Pres Exec Order), 65 FR 50121.

¹⁹³ 42 USCA ss 2000d et seq.

¹⁹⁴ *ibid* s 2000d.

¹⁹⁵ See *Smother* (n 189).

¹⁹⁶ 29 CFR s 1606.1.

¹⁹⁷ See *Shieh v Lyng*, 710 F Supp 1024 (1989).

¹⁹⁸ 29 CFR s 1606.7.

Naturalization Process

The ability to demonstrate an understanding of the English language, including the ability to read, write and speak ordinary words is part of the process of naturalization required to become a US citizen.¹⁹⁹ However, certain persons²⁰⁰ are exempt from demonstrating their understanding of English and may be permitted to take the required history and government examination in their native language with the use of an interpreter if their English is insufficient.²⁰¹

Court Proceedings

Court proceedings are conducted in English in the United States, this includes the United States District Court for the District of Puerto Rico, a Spanish-speaking territory.²⁰² A defendant in a criminal trial who has difficulty speaking or understanding the English language has the right to an interpreter.²⁰³ This applies to both US citizens and non-citizens.

Schools

There are several pieces of legislation that affect the abilities of students to learn in languages other than English. Federal acts such as the Bilingual Education Act²⁰⁴, Foreign Language Assistance Act of 1994²⁰⁵, and the Emergency Immigrant Education Programme²⁰⁶ provide for funding for language-related programmes. Under the Equal Educational Opportunities Act (EEOA)²⁰⁷, educational agencies must, 'take appropriate action to overcome language barriers that impede equal participation by students in...instructional programs.'²⁰⁸

Voting

US citizens who are part of a certain linguistic minority²⁰⁹ may be able to get ballots and other election materials in their own language as well as English, subject to guidelines.²¹⁰

¹⁹⁹ 28 CFR s 312.1.

²⁰⁰ *ibid* s 312.1(b).

²⁰¹ 8 CFR s 312.2(c).

²⁰² 48 USCA s 864. See also *US v Valentine* (n 56).

²⁰³ *US v Gallegos-Torres*, 841 F 2d240 (1988).

²⁰⁴ 20 USCA ss 7401 et seq.

²⁰⁵ *ibid* ss 7511 et seq.

²⁰⁶ *ibid* ss 7541 et seq.

²⁰⁷ *ibid* s 1703.

²⁰⁸ *ibid* s 1703(f).

²⁰⁹ These groups currently include American Indians, Asian Americans, Alaskan Natives, and Spanish-heritage citizens. Language minority provisions are contained in Sections 203 and Section 4(f)(4) of the Voting Rights Act (42 USCA 1973b(f) and 1973aa-1a).

²¹⁰ See also 28 CFR s 55.1-55.3.

Hallmark 14 – Non-discrimination

Rights to non-discrimination that are specifically dependant on US citizenship are rare, as most non-discrimination legislation applies to those people who are legally resident in the United States.²¹¹

Employment legislation is the largest area of non-discrimination law, encompassing race and colour²¹², national origin²¹³ (including citizenship²¹⁴), sex²¹⁵ (pregnancy²¹⁶ and sexual harassment²¹⁷), disability²¹⁸, religion²¹⁹, and age²²⁰. It applies to the legally employed, as those who do not have employment authorization have limited rights. There is also legislation regarding equal pay.²²¹ Federal employees have additional rights under statute²²², as do veterans of the Armed Forces²²³.

Other rights to non-discrimination in the areas mentioned above (race and colour, national origin, sex, disability, religion, and age) include voting, education, housing and credit. The Civil Rights Act of 1964 is the main source of legislation in these areas. The Act has extremely broad provisions, including outlawing discrimination in restaurants, hotels and public accommodation; prohibiting the denial of access to public facilities on grounds of religion or ethnicity; allowing for the desegregation of public schools; prohibiting discrimination by government agencies which receive federal funding; disallowing discrimination by employers on the basis of race and colour, national origin, sex or religion; barring discrimination with regard to interracial marriage; and prohibiting retaliation against employees who oppose discrimination. Minimum federal protections may be augmented by State legislation.

²¹¹ For a notable exception, see *Espinoza v Farah Mfg Co*, 414 US 86, 94 SCt 334 (1973): A legally-resident Mexican citizen was discriminated against because of her lack of US citizenship and the Supreme Court held this not to be in violation of the Civil Rights Act rules about discriminating on the basis of national origin. Statute now makes it illegal for companies of a certain size to discriminate against aliens with work authorization (see 8 USCA s 1101).

²¹² Title VII of the Civil Rights Act of 1964 (42 USCA s 2000e).

²¹³ *ibid*, regulations at 29 CFR Part 1606. See also the Immigration Reform and Control Act of 1986 (8 USCA s 1101), which prohibits employment discrimination against legal workers because of their citizenship status or national origin.

²¹⁴ Discrimination because of citizenship is limited to that discrimination whose 'purpose or effect' is to discriminate on the basis of national origin. See the US Equal Employment Opportunity Commission Compliance Manual on National Origin Discrimination, Section 13 at <http://www.eeoc.gov/policy/docs/national-origin.html#N_53_>.

²¹⁵ Title VII of the Civil Rights Act of 1964 (42 USCA s 2000e), regulations are at 29 CFR Part 1604.

²¹⁶ *ibid*. See also the Pregnancy Discrimination Act of 1978, which amended Title VII.

²¹⁷ *ibid*, regulations are at 29 CFR Part 1604.11.

²¹⁸ Americans with Disabilities Act of 1990 (42 USCA s 12101), regulations are at 29 CFR Part 1630, 29 CFR Part 1640, and 29 CFR Part 1641.

²¹⁹ *ibid* (n 213), regulations are at 29 CFR Part 1605.

²²⁰ See The Age Discrimination in Employment Act of 1967 (ADEA) (29 USCA s 621-634), regulations are at 29 CFR Part 1625-1627.

²²¹ Federal legislation includes Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, Title I of the Americans with Disabilities Act of 1990, and the Age Discrimination in Employment Act of 1967.

²²² Executive Order 13201 (rights to unions), Executive Order 11246 (equal opportunity), Section 503 of the Rehabilitation Act of 1973, as amended (29 USCA s 793) (affirmative action to employ those with disabilities).

²²³ The Uniformed Services Employment and Reemployment Rights Act of 1994 (38 USCA s 4301) and Vietnam Era Veterans' Readjustment Assistance Act of 1974 (38 USCA s 4212).

Hallmark 15 – Duty of Allegiance

'Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other.'²²⁴ The duty of allegiance, which is expected of all US citizens, is expressly required in certain circumstances. For instance, only those owing allegiance to the United States can be issued with a United States passport.²²⁵

Naturalization

An essential requirement for obtaining US citizenship is to take an oath of allegiance²²⁶ before becoming a citizen. There are limited circumstances by which the oath can be altered to allow for removal of religious or military references.²²⁷ Those being naturalized can only be exempted from giving the oath in exceptional circumstances.²²⁸

Pledge of Allegiance

The Pledge of Allegiance²²⁹ is an oath of allegiance to the United States of America. The oath reads, 'I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.'²³⁰ The Pledge should be made while standing at attention with the right hand on heart, and facing the flag.²³¹ The Pledge is said in thousands of public schools every day, but the duty to say it cannot be forced upon any pupil.²³² The administration of the Pledge is governed by State statute.

Office Holders

²²⁴ *Luria* (n 2).

²²⁵ 22 USCA s 212.

²²⁶ See <<http://www.uscis.gov/naturalization>>: 'I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God.'

²²⁷ In some cases, the United States Citizenship and Immigration Services (USCIS) allows the oath to be taken without the clauses: ' . . . that I will bear arms on behalf of the United States when required by law; that I will perform noncombatant service in the Armed Forces of the United States when required by law. . . .' Additionally, USCIS may allow the oath to be taken by a solemn affirmation or without references to God: 8 CFR s 337.1.

²²⁸ Certain persons (eg those who have a physical or developmental disability or mental impairment) are exempted if they are, 'unable to understand [the oath's] meaning.' See 8 USC s 1448(a).

²²⁹ 4 USCA s 4.

²³⁰ *ibid.*

²³¹ *ibid.*

²³² See S Lease et al, 'Flag Salute and Pledge of Allegiance', *American Jurisprudence*, 68 Am Jur 2d Schools s 274.

Allegiance to the United States is required of holders of certain offices, such as the President²³³, the US Congress (and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States)²³⁴, and Federal employees²³⁵. States are permitted to require an oath of loyalty from employees.²³⁶

Jury Duty

US citizens have the duty to serve in a jury²³⁷, dependant on selection. The federal jury selection process is regulated by the Jury Selection and Service Act of 1968²³⁸. The obligation to serve is based on qualification²³⁹, which is subject to citizenship, age, residency, ability to read, write, speak and understand English, physical or mental disability, and being subject to criminal charges or convictions²⁴⁰ that suspend civil rights. Qualified citizens may be exempted²⁴¹ from service or entitled to be excused²⁴².

Allegiance Offences

The offence of treason²⁴³ is dependant on a person owing allegiance to the United States (this includes citizens, nationals and permanent residents). However, acts such as rebellion²⁴⁴, seditious conspiracy²⁴⁵, or advocating the overthrow of the government²⁴⁶ apply to all people, not just citizens.

²³³ The text of the Presidential Oath of Office is enshrined in US Const Art II s 1, cl 7.

²³⁴ This duty is stated at US Const Art VI, cl 3.

²³⁵ The current text of the Oath, which must be taken by individuals (except the President) who have been elected or appointed to an office of honor or profit in the civil service or uniformed services, is available at 5 USCA s 3331.

²³⁶ See generally: M Waldman, 'Oath and Affirmation, Generally', American Jurisprudence, 63C Am Jur 2d Public Officers and Employees s 124.

²³⁷ *Penn v Eubanks*, 360 F Supp 699 (1973): 'Jury service on the part of citizens of the United States is considered under our law in this country as one of the basic rights and obligations of citizenship. Jury service is a form of participation in the processes of government, a responsibility and a right that should be shared by all citizens, regardless of race or sex or income.'

²³⁸ 28 USCA s 1861.

²³⁹ *ibid* s 1865.

²⁴⁰ See B C Kalt, 'The Exclusion of Felons from Jury Service' (2003) 53 American University Law Review, 65. Available from <<http://www.wcl.american.edu/journal/lawrev/53/kalt.pdf?rd=1>>.

²⁴¹ 28 USCA s 1863(b)(6): Those specifically exempted include members of the Armed Forces and members of fire and police departments. State codes may make further exemptions, see generally: 47 Am Jur 2d Jury s 160.

²⁴² For classes generally excused, see 28 USCA s 1863(b)(5). For those excused for undue hardship or extreme inconvenience reasons, see 28 USCA s 1866(c)(1). For limitations on time served on a federal jury, see 28 USCA s 1866(e).

²⁴³ 18 USCA s 2381: 'Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States.'

²⁴⁴ *ibid* s 2383: 'Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.'

²⁴⁵ *ibid* s 2384: 'If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.'

Hallmark 16 – Duty to Undertake Military or Alternative Service

Citizens have no right to join the armed services²⁴⁷, but are under a duty to undertake military service if required. Congress has the power to require conscription to raise forces in order to ensure the security of the United States.²⁴⁸

Every male person (including those US citizens living overseas or with secondary citizenship, but excluding non-immigrants) between 18-26 years old is required to register for Selective Service.²⁴⁹ Those required to register for Selective Service are, subject to exceptions²⁵⁰, also required to undertake training and service in the United States Armed Forces if requested to do so.²⁵¹ Those who are conscientious objectors may be eligible for the Alternative Service Program²⁵², which provides for individuals to serve in a civilian capacity.²⁵³

Hallmark 17 – Duty to Pay Taxes

US citizens are under a duty to pay tax²⁵⁴, as are any persons who subject themselves to the jurisdiction of the State.²⁵⁵ All property is subject to taxation unless specifically exempted under statute.²⁵⁶ A person's liability to taxation is generally based on their residence or domicile in the United States and a State of the union in particular.²⁵⁷ US citizens and resident aliens are additionally burdened by being required, regardless of their residence, to file a tax on their worldwide income, including income earned while residing abroad.²⁵⁸

²⁴⁶ *ibid* s 2385.

²⁴⁷ *West v Brown*, 558 F 2d 757 (1977).

²⁴⁸ Military Selective Service Act, 50 App USCA s 451. Selective Service Regulations are contained in Part 1600 of Title 32 of the Code of Federal Regulations (32 CFR s 1600 et seq).

²⁴⁹ *ibid* s 453.

²⁵⁰ *ibid* s 454. See 50 App USCA s 456 for a full list of deferments and exemptions from training and service.

²⁵¹ *ibid* s 454.

²⁵² 32 CFR s 1656.1.

²⁵³ *ibid* s 456(j).

²⁵⁴ The US tax code is called the Internal Revenue Code of 1986 and can be found at Title 26 of the United States Code (26 USC).

²⁵⁵ *Graves v Schmidlapp*, 315 US 657, 62 S Ct 870 (1942).

²⁵⁶ *Evangelical Alliance Mission v Dept of Revenue*, 164 Ill App 3d 431, 517 NE 2d 1178 (1987).

²⁵⁷ *Lawrence v State Tax Commission Of State Of Mississippi*, 286 US 276, 52 S Ct 556 (1932): '...domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government.'

²⁵⁸ 26 USCA s 911. See IRS Publication 54 (2006), 'Tax Guide for US Citizens and Resident Aliens Abroad', <<http://www.irs.gov/publications/p54/index.html>>.

Hallmark 18 – Duty to Pay National Insurance Contributions

Social Security²⁵⁹ is the United States federal social insurance program and is governed by the Social Security Administration (SSA)²⁶⁰. Social Security taxes are collected under the authority of the Federal Insurance Contributions Act (FICA)²⁶¹. Taxes are levied on both employers²⁶² and employees²⁶³ in the United States and territories²⁶⁴.

Taxpayer Identity Numbers (TINs) are issued by the Internal Revenue Service (IRS) and are used to administer tax laws.²⁶⁵ Each US citizen and legally-resident worker²⁶⁶ must have²⁶⁷ a Social Security Number (SSN) in order to maintain an income tax record in the United States.²⁶⁸ Social Security Numbers also regulate the disbursements of money from Social Security programs.²⁶⁹

²⁵⁹ The provisions regarding Social Security can be found at 42 USCA 7 and in the Code of Federal Regulations at 20 CFR Ch III.

²⁶⁰ 42 USCA s 901: The SSA administers the old-age, survivors, and disability insurance program and the supplemental security income program.

²⁶¹ The Act can be found at 26 USCA Subt C, Ch 21 or at IRC T 26, Subt C, Ch 21.

²⁶² 26 USCA s 3111.

²⁶³ *ibid* s 3101.

²⁶⁴ *ibid* s 7651.

²⁶⁵ Types of TIN include Social Security Numbers, Employer Identification Numbers (EIN), Individual Taxpayer Identification Numbers (ITIN), Identification Numbers for Pending US Adoptions (ATIN), and Preparer Taxpayer Identification Numbers (PTIN).

See also < <http://www.irs.gov/businesses/small/international/article/0,,id=96696,00.html>>.

²⁶⁶ For applicable definitions of 'work' and 'employee', see 26 USCA s 3121.

²⁶⁷ Applications are governed by 20 CFR s 422.103(b). The form used to apply for a Social Security number is: Application for a Social Security Card (SS-5). See <<http://www.ssa.gov/online/ss-5.html>>.

²⁶⁸ 42 USCA s 405(c)(2). Social Security numbers are also used as identification numbers in the Armed Forces, and for things like employee records, student records, and for credit tracking purposes. A SSN can be required for a driver's license application, see 42 USCA s 405(c)(2)(c)(vi).

²⁶⁹ *ibid* s 405.

Annex USA Patriot Act

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept And Obstruct Terrorism Act (USA PATRIOT Act) of 2001²⁷⁰ was enacted on 26 October 2001, in the wake of the 11 September 2001 attacks on the United States. The Act expanded the existing authority²⁷¹ of US law enforcement agencies to perform counter-terrorism measures, both domestically and overseas. The Act expands existing laws to include 'domestic terrorism'²⁷², and greatly expands search and surveillance powers domestically. Other provisions of the long and broadly-ranging Act allow non-citizens and permanent residents to be expelled or denied entry to the United States for the advocacy of or association with certain organizations²⁷³, give law enforcement agencies wider powers to conduct secret searches and more thorough surveillance²⁷⁴, and allow for the detention of suspects without a hearing for periods of time²⁷⁵. The Act has been said²⁷⁶ to impact upon rights conferred under the US Constitution, including freedom of religion, speech, assembly, and the press; freedom of deprivation of life, liberty or property without due process of law; the right to a public trial by an impartial jury, to be informed of the facts of the accusation, confront witnesses and a lawyer; freedom from excessive bail, and cruel and unusual punishment; and for all persons in the United States to have access to due process and the equal protection of the laws. US courts have begun to suggest that certain provisions of the Act are unconstitutional.²⁷⁷

Other laws that affect rights in the name of national security include 26 USCA Section 6103(i)(3)(C), which provides that taxpayer information be disclosed by the Internal Revenue Service to Federal law enforcement agencies investigating or responding to a terrorist incident, threat or activity.²⁷⁸ The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)²⁷⁹ broadened federal agents' abilities to access information from private and public databases. The Protect America Act of 2007²⁸⁰ was enacted in August 2007 and further significantly amended the Foreign Intelligence Surveillance Act of 1978 (FISA) to allow for freer surveillance of people reasonably believed to be located outside of the United States.

²⁷⁰ PL 107-56, 2001 HR 3162. The Act was amended and reaffirmed 10 March 2006.

²⁷¹ Mainly the Foreign Intelligence Surveillance Act (FISA) of 1978 (50 USCA ss 1801 et seq.).

²⁷² See USA PATRIOT Act s 802.

²⁷³ *ibid* s 411.

²⁷⁴ *ibid* s 206, 213 and 215.

²⁷⁵ *ibid* s 412.

²⁷⁶ See <<http://action.aclu.org/reformthepatriotact>>.

²⁷⁷ For example, see <<http://www.ord.uscourts.gov/rulings/04-cv-1427Opinion.pdf>> and <<http://abcnews.go.com/US/WireStory?id=3657070&page=1>>.

²⁷⁸ 26 USCA s 6103(i)(3)(C).

²⁷⁹ PL 108-458, 2004 S 2845.

²⁸⁰ PL 110-55, 2007 S 1927.

Rights of Third Country Nationals in Denmark¹

The European Commission published a proposal for a Convention concerning the admission of third country nationals to Member States a few weeks after the signing of the Amsterdam Treaty. This proposal was withdrawn as the Amsterdam Treaty granted competence to the European Union Council of Ministers to make binding rules rather than a Convention. In October 1999 the Tampere Council decided 'a more vigorous integration policy' was necessary and required the fair treatment of nationals who legally reside in the EU. The Council stated that, irrespective of their nationality, third country nationals should not be treated as second-class citizens, but are entitled to equal treatment, secure residence rights and the opportunity of full citizenship.² A Directive was adopted by the Council in November 2003.³ However, Denmark, Ireland and the UK did not take part in the adoption of this Directive. The Directive has three main elements. Firstly, most third country nationals with five years lawful residence in the Member State and who fulfil the other conditions specified in the Directive, are entitled to the status. Secondly, the Directive defines the rights attached to the status: secure residence and equal treatment as nationals in a whole range of fields. Thirdly, it grants a conditional right to work, study or live in another Member State. The implementation date was 23 January 2006.

During the ensuing period, a reduction in the rights of third country nationals with permanent residence status occurred in Denmark (and in the Netherlands), mainly as a result of new restrictions on the right to family reunification.

In Denmark, the Aliens Acts 2002, 2003 and 2004 contained amendments on the rules on family reunifications. Both spouses or partners must be at least 24 years of age and live together in a shared residence, either in marriage or in regular cohabitation of prolonged duration; the sponsor has to be a permanent resident in Denmark and a national of a Nordic country, an officially recognised refugee or a third country national who has held a permanent residence permit for more than three years. This means that a third country national will have to have lived in Denmark for a total of ten years before family reunification with a spouse is possible.⁴ The sponsor residing in Denmark has to provide financial security of DKK 50,000 (about £ 4,800) to cover any future public expense for assistance granted to the applicant under the Active Social Policy Act or the Integration Act and must not have received assistance under these acts within

¹ Most of what follows is taken from a chapter by Kees Groenendijk entitled *The legal Integration of potential Denizens in the EU in the final years before the implementation of the 2003 Directive on long-term resident third country nationals in Acquisition and Loss of Nationality, vol. 1: comparative Analyses, policies and trends in 15 European countries* 385 -410 (AUP 2006), eds.: Rainer Bauböck, Eva Ersbøll, Kees Groenendijk & Harald Waldrauch.

² European Council, Tampere Presidency Conclusions, SN 200/99, Brussels, 16 October 1999.

³ Council Directive 2003/109/EC of 25 November 2003, OJ 2004 L16/44.

⁴ Aliens Act as amended by Act no. 365 of June 2002 s 9(1).

the previous year. The couple's aggregate ties to Denmark ('overall attachment') must be stronger than the couple's aggregate ties to another country.⁵

In 2003, the Aliens Act was amended to stipulate that the 'overall attachment' requirement need not be satisfied if the spouse or partner residing in Denmark has been a Danish national for more than 28 years, has been lawfully residing in Denmark for more than 28 years, and was born and raised in Denmark, or has been living in Denmark since childhood. Moreover, the grounds for refusal that the marriage was not contracted freely by the spouses, which was introduced in June 2003, was made more strict six months later: if the marriage or relationship is between closely related persons, it is assumed to be doubtful whether the marriage or relationship is established at the will of both parties, unless particular reasons indicated otherwise.⁶

In June 2004, further conditions were again introduced. Reunification will not be permitted if the spouse or partner living in Denmark has been convicted and given a final sentence of (un)suspended imprisonment for criminal acts against a spouse or partner within the past ten years.

Acquisition of the status

This has been tightened up: the residence requirement has been extended from three to seven years, although this was then amended by a number of exceptions for third country nationals who:

- have lawfully resided in Denmark for more than the past five years, with a residence permit issued on the same basis for the entire period;
- have for the past three years been regularly employed or self-employed in Denmark and continue to be so;
- have not received social security benefits for the past three years and
- have acquired substantial affiliation to Danish society.

Furthermore, if significant circumstances warrant it, a permanent residence permit may be issued to a person who has lawfully resided in Denmark for more than three years with a residence permit issued on the same basis for the entire period and who meets the other three conditions mentioned.⁷ This brings the required residence period back to five for those with a good employment and integration record, with a further discretion for the authorities to reduce this to the original three years in certain exceptional circumstances.

⁵ *ibid* ss 9(2) - 9(9)

⁶ *ibid* ss 9(7) and 9(8).

⁷ *ibid* ss 11(4) and 11(5).

However, the extra conditions as to uninterrupted lawful residence have made acquisition of the status also more difficult. Denmark appears to be an exception to the general rule in most Member States that the status of the permanent residence permit remained essentially unaltered, even if conditions for acquisition or loss may have become more stringent.

Language and integration requirements

In 1998, Denmark (and, incidentally, the Netherlands) introduced rules on compulsory language courses in their legislation on integration of third country nationals. Although language and integration tests were not originally intended to be used as conditions for admission, but four years later the use of integration tests for this purpose was approved by the Danish (and Dutch) Parliament. Integration tests are now used as an instrument of selection and as a barrier to admission and to the acquisition of a more secure residence status. Even spouses of nationals have to pass the integration test.

Loss of Status

In common with other Member States, new grounds for withdrawal of permanent residence status and removal of long-term residents from the country were introduced as part of legislative programmes aimed at reducing or preventing terrorism. The possibility of issuing an expulsion order irrespective of the actual duration of imprisonment was extended to cover more provisions of the Penal Code, such as crimes against the autonomy and security of the State, crimes against the constitution and the supreme State authorities, the crime of endangering people's lives through the pollution of drinking water reservoirs, the crime of poisoning goods on the market, possessing or trading in particularly dangerous weapons, female circumcision and particularly serious cases of handling stolen goods.⁸

Implementation of the Schengen acquis or the EC Directive on the mutual recognition of expulsion decisions⁹ resulted in the introduction of several new grounds for the revocation of a permanent residence permit through the Immigration Act:

- (a) if a third country national has been registered in the Schengen Information System as undesirable due to circumstances which, in Denmark, could have entailed expulsion¹⁰
and

⁸ *ibid* ss 22 (1) and (6).

⁹ Directive 2001/40/EC of 28 May 2001, OJ 2001, L 149/34.

¹⁰ Aliens Act (n4) ss 19 (2) and (3).

- (b) an administrative authority in another Schengen State or in a State with connections to the EU has made a final decision about the expulsion of that person based on circumstances which, in Denmark, could have entailed expulsion under certain provisions of the Aliens Act.¹¹ If the decision was reached following a criminal offence, the permit can only be revoked if the person has been convicted of a crime resulting in a sentence of at least one year's imprisonment. These grounds do not apply if the person is a family member of an EU national who has made use of the right of freedom of movement.¹²

Although these new provisions may, in practice, be applied to only a very small number of cases, when they were actually used, they have often received much attention in the general media and in immigrant groups, possibly engendering widespread feelings of insecurity and fear of exclusion among long-term immigrants.

Denmark (like the UK) was not party to Directive 2003/109 on the status of long-term resident third country nationals. Groenendijk points out that it is clear that the measures introduced into Denmark's immigration legislation would not be compatible with the Directive or with the Family Reunion Directive.

Conclusions

The far-reaching changes in respect of status are the exception to the rule that in most Member States the status remained the same. Danish immigration law has changed considerably since 2002. From a country with one of the most liberal systems regarding the treatment settled third country nationals, within a few years Denmark developed into a country with the strictest rules, both regarding family reunification and regarding the status of permanent residents from third countries. It is clear that most of the more extreme new statutory rules could only be enacted because Denmark, under the Protocol to the Amsterdam Treaty, is not bound by the new rules on immigration and asylum, adopted on the basis of Title IV of the EC Treaty. Some of these rules were subsequently changed by further amendments to the Aliens Act within 6 or 12 months of their adoption. Nevertheless, several of the rules introduced by the Act would clearly be in conflict with Directive 2003/109 and Directive 2003/86 if they had been in force in Denmark. It has been made more difficult to obtain permanent residence status and it is easier to lose it. Expulsion after long lawful residence in Denmark has also become easier. Groenendijk says that deleting the explicit references in the Aliens Act to 'the duration of the alien's residence in Denmark' and 'whether the alien came to Denmark as a child or a very young person' as relevant circumstances in expulsion cases, can hardly be considered an incentive for national courts and immigration

¹¹ *ibid* ss 22-25 or 25a(1) or 25a(2),(3).

¹² *ibid* s 19(4) Aliens Act.

authorities to ensure that their decisions are in conformity with the case law of the European Court of Human Rights on Article 8 ECHR.

Groenendijk comments further that, on the one hand, the granting of denizen status has gained growing importance in the European Union and immigrants were perceived to regard acquisition of this status as a positive step, but, on the other hand, it may well become regarded as a second-class status if access to nationality becomes effectively blocked for a large proportion of immigrants.

The development of denizen status would appear to create two dilemmas, according to Groenendijk:

1. How to justify the remaining differences between the rights attached to both statuses? Why are certain rights granted to Union citizens but withheld from third country nationals? Is there sufficient justification for granting certain rights to Union citizens who have made use of their freedom of movement rights within the EU, while excluding third country nationals from those rights even after five years' lawful residence in the country, such as gaining voting rights at local level or access to certain jobs in the public service?
2. What about 'reverse discrimination'? Union citizens who have not made use of their free movement rights remain subject to national law, for example in respect of the right to family reunification, thus according in some cases more rights to denizens under EC rules than to Union citizens under national rules.

We should note the Protocol on the position of Denmark in the recently signed Lisbon Treaty¹³ which adds the following three new recitals after the second recital:

CONSCIOUS of the fact that a continuation under the Treaties of the legal regime originating in the Edinburgh decision will significantly limit Denmark's participation in important areas of cooperation of the Union, and that it would be in the best interest of the Union to ensure the integrity of the *acquis* in the area of freedom, security and justice; WISHING therefore to establish a legal framework that will provide an option for Denmark to participate in the adoption of measures proposed on the basis of Title IV of Part Three of the Treaty on the Functioning of the European Union and welcoming the intention of Denmark to avail itself of this option when possible in accordance with its constitutional requirements;

NOTING that Denmark will not prevent the other Member States from further developing their cooperation with respect to measures not binding on Denmark...

¹³ This Treaty was signed in Lisbon on 13 December 2007 and is starting the ratification process

Furthermore, in a Protocol on Schengen it is stated: 'The participation of Denmark in the adoption of measures constituting a development of the Schengen acquis, as well as the implementation of these measures and their application to Denmark, shall be governed by the relevant provisions of the Protocol on the position of Denmark'.

Citizenship Education: The Nordic Example

As globalization picks up speed, and our societies expand and diversify as a result, one of the key issues on most governmental agendas is integration. In few regions of the world do integration matters find as much resonance as in Scandinavia. Successful societies attract foreigners, and as success is increasingly measured by a number of factors upon which Nordic countries have placed an emphasis, their societies have become beacons for new migrants. For decades now, Scandinavian countries have chosen to invest massively in education and health, placing solidarity high on their scale of values, whilst faring well on the economic front.

One may describe Northern Europe as comprising eight countries. Each of these possesses its own level of development, and its attractiveness to foreign migrants varies accordingly. However, for the purposes of examining integration issues, a broad distinction may be drawn between Nordic countries: Denmark, Sweden, Finland, Norway, Iceland; and the Baltic countries: Estonia, Lithuania, and Latvia. Due to historical and primarily economic reasons, new migrants are more attracted to the former block of countries, than to the latter. As a result, Nordic countries have more experience in tackling migrant-related issues; their economies, and their societies reflect this. However, since the Baltic countries joined the EU, migrants have started seeing their potential and the advantages which could be reaped from living and working there.¹

Since 2003, the EU has started providing funds to support existing integration initiatives, and to encourage Member States to develop enhanced strategies for accommodating the arrival of new migrants on their territories.² It would seem that work in the Baltic countries has only just taken off, as funds are being assigned to Ministries, and sub-ministries are being created to handle integration related issues.³ Although integration policies in Baltic countries are still comparatively unsuccessful⁴, a plethora of new ideas are taking root, as evidenced by the increasing amount of measures put forward by the governments of these countries. In Lithuania, for example, individual integration programmes are set up for each new migrant, and an effort has been made to make public services' information available in a variety of different languages⁵.

¹ Although Estonia, Lithuania, and Latvia only recently joined the EU, the Migrant Integration Policy Index (MIPEX) shows that out of all EU countries, Lithuania has known the largest recent influx of migrants. However, history still plays its part as most third country nationals migrating to these countries are family members of residents or workers from the former Soviet Union, or come from the CIS countries: see www.integrationindex.eu.

² see European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions- Third Annual Report on Migration and Integration (2007) (512 final)- dated 11th September 2007.

³ See government websites of these countries: Estonia (<http://www.valitsus.ee/?lang=en>), Lithuania (http://www.lrv.lt/main_en.php), Latvia(<http://www.ocma.gov.lv/>).

⁴ Estonia, Lithuania, and Latvia rank 19th, 20th, and 28th respectively on the MIPEX study based on 28 European countries.

⁵ Summary Report on Integration Policies in the EU-27- Annexed to COM (2007) (512 final).

It is notable that the more a given society is used to immigration related issues, the more focus it places on the need to appreciate the unique contribution migrants make thereto. In Sweden, where migration has been rising steadily over the past few years⁶, over 86.2 per cent of the population believe that ethnic diversity is a positive contribution to their society. Therefore, it is perhaps no surprise that Sweden's integration policies should be the most successful out of the 28 countries which form the basis for the MIPEX study. Regional coordination and exchanges of best practice may help to accelerate the development of successful integration policies in countries less experienced in dealing with immigration. Iceland exemplifies this point, for although its migration level has been comparatively lower than in other Nordic countries, the government's integration proposal, drawn up in January this year, comprises surprisingly forward-looking, and inclusive policies.⁷

As a direct result of the diversification of our societies, due to the extent of cross-border migration, the concept of belonging has evolved. To a certain extent, Nordic countries have always known a degree of cultural homogeneity, which warrants, for example, the fact that a Norwegian will only have to justify having lawfully resided in Denmark for two years to obtain Danish nationality, whereas a 'true' foreigner will have to justify at least five years of lawful residence. Indeed, formal citizenship, as the most potent symbol of belonging, is more easily granted to those who are similar to us. In an attempt to highlight the importance of belonging, many governments chose to adopt citizenship tests in 2007⁸; but, however much States cling to the idea of promoting citizenship to preserve their cultural heritage, and guarantee civic loyalty, regionalisation and migration have changed the parameters of what constitutes a society, making traditionally perceived citizenship obsolete. The tensions created by integration, the requirements of living in a modern trans-national world, together with the desire to foster peaceful societies, and the importance which anti-discrimination principles have adopted lately, have all led to the development of looser, de facto, more functional concepts of belonging, and therefore citizenship. Citizenship education and integration initiatives for new migrants exemplify how detached citizenship and nationality may have become.

Over the last few years, citizenship education has emerged as a clear priority area in most European countries. Indeed, schools are increasingly perceived as the most appropriate place to promote the values and bases upon which a society chooses to found itself. In this vein, the

⁶ In 2004, Sweden welcomed more than twice as many third country nationals than Denmark, although unemployment figures for 2006 indicate Denmark may have been a better option- see www.integrationindex.eu.

⁷ See Government Policy on the Integration of Immigrants, January 2007- at www.felagsmalaraduneyti.is.

⁸ Denmark implemented a new language test in May 2007, see www.nyidanmark.dk, as of 1st September 2008, a language test will be put in place in Norway, see <http://www.aftenposten.no/english/local/article1260069.ece>.

Council of Europe has developed recommendations for *Education for Democratic Citizenship*⁹ (EDC hereinafter), destined to encourage and influence the content of Citizenship Education in all Member States. Predictably perhaps, given their annual public expenditures in education¹⁰, Nordic countries have been most innovative in developing their respective EDC approaches. A certain amount of coordination also takes place via the work of the Nordic Council, which means that best practices are expanded, and unsuccessful policies dropped.

Significant and revealing is the fact that neither the Council of Europe nor the Member States consider that EDC should be limited to a classical form of civic education, reduced to imparting information on rights and responsibilities, such as freedom of expression, and voting. In addition to more historical forms of textbook-based citizenship teaching, it is believed that students should be brought to reflect upon fundamental values and concepts, such as anti-discrimination. Moreover, dealing with social issues via teamwork, and other innovative approaches, is highly recommended. The content of citizenship education together with the manner in which it is to be imparted reveals how the notion of citizen is detached from considerations of nationality, or origin. Being a good citizen is no longer just about national loyalty, voting, and paying taxes, but also about understanding the parameters of the complex new societies in which we live, and aiming to contribute to the best of our respective abilities, regardless of where we come from. In Denmark, education is stated to be available for all regardless of, for example, 'residential location', or 'cultural or social background'. Furthermore, all students are called to work together on the same questions, regardless of nationality or residence. In Iceland, EDC covers areas which fall outside traditional subjects, such as drug use prevention, consumer education, and handling personal finances. In Sweden and Denmark, EDC includes programmes to combat bullying, and in Denmark, racism and nationalism are raised.¹¹

Most Nordic countries treat integration as a transversal issue, and even where specific ministries are created to deal therewith, believe that all governmental policies should be mindful of integration matters. The process of mainstreaming integration mirrors the treatment of integration policy at the EU level. For example, although Sweden has a Ministry of Integration and Gender Equality, all ministries are deemed to be concerned, and therefore required to be active, in relation to these issues. However, there is a chance Sweden's integration efforts may be reduced as a result of the formation of a new centre-right coalition in September 2006, which led to the Swedish Integration Board being scrapped, and integration efforts being refocused on integration measures necessary to accommodate the needs of the labour market. The refocus could also just

⁹ Referred to as EDC for the remainder of the article- see the Council of Europe at www.coe.int.

¹⁰ Figures released by the OECD for 2004 show that Sweden spent approximately 13, Denmark over 15, Norway 16, Finland 13, and Iceland 17 per cent of their respective total public expenditures on education, see *Education at a Glance*, OECD Education Indicators, 2007.

¹¹ For more information, see 'country profiles' at www.coe.int.

be an attempt to concentrate efforts on reducing unemployment of third country nationals. Indeed, a number of work-related initiatives targeting new migrants have recently been put into place. Having regard to Baltic countries, it appears that they indicate a preference for conferring the integration portfolio on designated existing ministries or sub-ministries. Integration may be dealt with by a ministry which for historical and socio-economic reasons has experience in the area. This is the case in Lithuania for example, where immigration is dealt with by the Ministry of Social Security and Labour, as the rights of immigrants as workers were the first to be considered in that country.

The transversal approach is illustrative of the flexibility and innovation which characterizes Nordic political systems generally. Indeed, when it comes to implementing their policies, for EDC, or in relation to introductory programmes for new migrants, efforts are once more spread out, varied, combining a wealth of approaches, and the expertise of different actors. In most countries, schools have developed a threefold approach to EDC: *about*, *for*, and *through*. The *about* approach is knowledge-based, and may cover more conventional topics, such as history, or geography. The *for* approach deals with fundamental values as they evolve in today's society. In Sweden, for example, this is the most important part of EDC training. Finally, the *through* approach consists in each school creating a democratic system of functioning whereby it is run. All Nordic countries contribute an important number of class hours to fostering the ability of students to create their own councils, and elect representatives, with the aim of taking an active part in the life of their schools. In Norway, 71 class hours, spread over the last three years of high school, are devoted to 'pupil council work'. The extent to which these initiatives really take on importance will depend on the level of innovation existing in a given school, which in turn will depend on the amount of autonomy a school, or municipality, has in determining the content of its curriculum. The curricula in Norway are centralized, and form part of the laws of the State. The Swedish and Danish systems are not so centralized. Initiatives also exist on a broader, trans-local scale. For example, most Nordic countries hold a Young People's Parliament every year.¹²

Programmes for the integration of new migrants also adopt a transversal approach, based on the involvement of a multiplicity of actors in the process. The State is usually responsible for setting out an integration plan which governs the content, duration, and identifies the actors involved in the programmes. Programmes cover language classes, an introduction to living in the chosen host State, assistance with a new job, and sometimes vocational training and mentoring.¹³ Countries are increasingly relying on employers to carry out programmes, and participate in

¹² R Mikkelsen (2004), 'All-European Study on Policies for Education for Democratic Citizenship (EDC) Regional Study Northern Europe Region', EDC 2001-2004 Council of Europe.

¹³ S Spencer & A di Mattia, Introductory Programmes and Initiatives for New Migrants in Europe, Policy Brief, The Ministerial Conference on Turning Principles into Actions, Groningen, 9-11 November 2004.

funding their initiatives. Private companies are also invited to tender to carry out relevant integration initiatives, and specific training.¹⁴

All Northern countries provide language classes for new migrants. Indeed, there seems to be a consensus on the idea that language is the key to successful integration. The host country sometimes also provides tuition in other languages. In Sweden, English classes are provided; in Finland, the migrant may learn Swedish. There is an increasing emphasis on learning a language in a work-related environment, as the best results seem to have been reached where the link between the migrant's linguistic efforts and his livelihood were made. This is the case in Latvia, for example, where integration efforts are still aimed primarily at long term residents, as opposed to the newly arrived. However, work-context language tuition is not always suitable, nor sufficient in itself. Under these programmes, women with young children for example are not catered for. In recognition of the vulnerability of this particular migrant category, many Nordic countries have initiated programmes aimed at progressive integration by providing women with more tailored-made approaches, including social integration measures. Some programmes provide for childcare to enable women to take part in workshops.

If language is a factor of integration, preparing a migrant to actively and effectively participate in the social fabric of his host country, it can also be a considerable barrier to obtaining the requisite skills necessary in order to make that contribution possible. Indeed, as a result of linguistic difficulties, no doubt coupled with the likely alienation that one may suffer from in these situations, the children of migrants have been shown to perform less well than others. This trend has been consistent in the OECD's findings over the past decade. Countries are starting to realise the importance of integration, and that fostering responsible citizens for tomorrow, in an increasing number of cases, rests upon the positive impact which may be made upon all pupils today, regardless of nationality, residency, or date of arrival in the host State. Iceland, for instance, emphasized that it intended to tackle this problem, in addition to providing language tuition and extra-tuition for new migrant children, by also making reasonable allowance for new students to study in their own language, and making exams for migrant children easier. Iceland sees language tuition as a means through which more people are going to be able to contribute to its economy and society, with the added plus of contributing to the expansion of the Icelandic language.¹⁵ This inclusive approach could derive from the fact that Iceland itself is a country of migrants, formed out of the various settlements made there over time by the inhabitants of other Scandinavian countries.

¹⁴ See Government Policy on the Integration of Immigrants (n 7).

¹⁵ See Government Policy on the Integration of Immigrants (n 7).

It is increasingly thought that language tuition alone is not sufficient to realise the successful integration of new migrants. As a result, more encompassing initiatives and courses are seeing the day. On the one hand, employment-related initiatives are on the increase. Promoting the employment of newly arrived immigrants may reduce State dependency, and avoid social alienation which derives from being out of work. To tackle a high unemployment rate amongst third country nationals, Sweden recently came up with a support system to help new migrants to cope with the initial stages of their first employment. On the other hand, social integration courses are usually offered alongside language classes. These courses are designed to provide the new migrant with enough information about his new country, and locality, to be able to participate and contribute effectively. They vary in their approach, but generally cover the host country's traditions, values, and rules of social behaviour. In addition to the courses, a wide breadth of initiatives are taking place on the net, as websites are set up directly by ministries, government agencies, funded projects, or even migrants' organisation (such as *Info Bank*, Finland). In Denmark and Finland for example, web-based information is available in an impressive number of languages including Arabic, Farsi, and Somali.¹⁶ Due to the fact that migration has only picked up recently with membership of the EU, the Baltic States are lagging behind in the field of providing information in foreign languages. Very often, information is provided in the host country's language only, or in English and Russian, but in none of the languages which are likely to be spoken by new migrants to the region.

Other integration methods covered include mentoring, and vocational training, the latter specifically targeting graduate migrants in order to bring them up to date with the particular demands, trends, and opportunities in their given sectors. As a result of Finland's new employment-based angle to integration policy¹⁷, initiatives aimed at maximising the new migrant's potential to contribute have been developed. The *Tailored Training for Working Life for Academic Immigrants* is an example thereof.¹⁸ The cost of all integration initiatives is sometimes taken on by the State, with a growing preference for outsourcing, and the provision of services by private companies. Iceland emphasised in its January 2007 integration proposals that the quality of teaching would be closely monitored, as provision would also be made so that specific training be developed for Icelandic language teachers in order to prepare them to take on the challenge of teaching Icelandic to the children of new migrants.

Broadly speaking, Northern countries do not provide specific EDC training for their teachers. Teachers rely on guidance booklets elaborated at a national level, towards which the relevant ministries and international organisations, such as UNESCO contribute. The reason why specific

¹⁶ S Spencer & A di Mattia, (n 13).

¹⁷ The Finnish government adopted an Immigration Plan on the 19th October 2006, which includes 34 policy guidelines, and details of measures to be adopted. See the website of the Ministry of the Interior, www.intermin.fi/en.

¹⁸ see www.equality.fi, and www.mol.fi/moniq for other similar projects.

teacher training is not a trend in Nordic countries may be twofold. First, Education systems are decentralized in most countries, such as Sweden and Denmark. Much is therefore left to the local, municipal level. Second, the nature of EDC is so vague and its content so broad, that it may be difficult and limiting to elaborate specific training in this field. Nordic countries do not assess students on EDC topics. A student is simply subjected to a 'pass' or 'fail' regime, although Sweden is contemplating new assessment methods. In the United Kingdom, school inspectors released a report on EDC in Britain in autumn 2006, deploring the fact that the subject was not taken seriously enough. As a result, the assessment regime has undergone change, and teachers are receiving citizenship-based training. Inspectors also argued that citizenship ought to be made into a GCSE or A-level subject. To date, and to the knowledge of this author, those suggestions have yet to find their way into the National Curriculum.¹⁹

The total number of language and other classes or hours of tuition for new adult migrants varies from country to country. Some provide for tuition to be available for a certain amount of years. Denmark, for example, offers it for 3 years. Norway provides 300 classes for each new migrant, which may fare up to 3000 depending on the migrant's needs. Iceland's January 2007 proposal targets 200-hour programmes. Some countries require a financial contribution from the migrant. In Denmark, language tuition is free.²⁰ Most countries provide for the educational background, age, and other factors which may potentially hinder learning, to be taken into account. In some circumstances classes are compulsory. In Norway, refugees and migrants as a result of family reunification must take 300 classes. Those in Norway for work-related purposes may take up to 300 classes, but there is no guarantee they will be provided for free.²¹

Why are Nordic countries so intent on elaborating innovative and numerous integration policies? First, it could be that a society based on a strong sense of social solidarity, relying to a large extent on altruistic social reflexes, needs to ensure that newcomers are capable of becoming the truly socially orientated 'citizens' that they need to be in order for Nordic societies to continue functioning. Second, Scandinavian countries tend to foster strong national identities which could render integration in these regions more difficult than in continental European countries²², and warrant enhanced integration efforts. Emphasizing integration may also serve to counter the perception that Nordic societies are racist.²³ From a purely ethnological perspective, an angle of approach which the increasing grasp of political correctness over these issues may prevent us from adopting, the comparative homogeneity in the appearance of Northern Europeans is such

¹⁹ see 'Citizenship lessons "inadequate"', and 'Citizenship lessons prompt debate', at www.bbc.co.uk.

²⁰ see website of the Danish Ministry of Refugee, Immigration, and Integration Affairs: www.nyidanmark.dk.

²¹ see website of the Norwegian Ministry for Labour and Social Inclusion: www.regjeringen.no.

²² Nordic countries' continued reliance on conscription is one of the particularities which no doubt participates in strengthening their identities, see <http://www.nordicway.com/search/Armed%20Forces.htm>.

²³ See the national reports of the European Network Against Racism, at www.enar-eu.org.

that it may in itself be a barrier to easy integration. Despite progressive policies, ghettoisation²⁴ is a reality in Nordic cities, and very often is as much related to the link between migration and poverty, as to the conscious choices made by migrants to create their own communities.

As social integration and societal harmony result from a broad range of factors encompassing all the policies, traditions, habits, and economic trends that pervade a society at any given time, it is difficult to gauge how successful integration policies are. Furthermore, where EDC is concerned, it is almost necessary to wait for the next generation to gauge from societal reflexes what has worked and what needs improving.²⁵ However, observation has led to the recognition that some initiatives may gain from being perfected in a number of ways.

First, initiatives which include the host community in the integration process are often more successful.²⁶ Indeed, by informing nationals and long-term residents about the reasons behind the migrants' arrival, and the positive and enriching impact it may have, local authorities involve them in a dialogue over which they may otherwise feel they have no control. Furthermore, nationals may resent the presence of migrants if they have not previously been given the opportunity to voice their concerns. In its latest integration report, the European Commission commented that Member States have so far not taken sufficient account of the need to consider integration as a two-way process of 'mutual accommodation', and as a long-term challenge. In doing so, it seems to urge governments to recognise that immigration and integration are not issues which can be dealt with by employing ad hoc initiatives, but call for the creation of consistent and durable infrastructures. For example, providing immigrants with the right to vote in local elections signals a long-term commitment towards integration, whilst dealing with fears of community-based identities taking over.²⁷ So far, 12 EU countries including Sweden, Finland, and Lithuania allow third-country nationals to vote. However, duration of residence and nationality qualify the right, which is not available to newcomers.²⁸

Second, language classes and other integration initiatives ought to be tailored to the specific needs of each migrant, taking into account educational background, age, and general learning capacity. Also, it is necessary to recognise the vulnerability of certain categories, such as women with children. Lack of exposure to society renders integration for these women impossible. Moreover, ignoring the problem detracts from integration initiatives in school, as migrant children will have more difficulties integrating where their home setting is not conducive thereto. In 2006,

²⁴ The Danish Ministry of Refugee, Immigration, and Integration Affairs made a priority out of the fight against ghettoisation in its May 2005 integration plan, *A new chance for everyone*.

²⁵ For more information, see Eurydice in Brief, 'Pointers to Active Citizenship in Education Policies in Europe', June 2006, at <http://www.eurydice.org/portal/page/portal/Eurydice/showPresentation?pubid=055EN>.

²⁶ Sarah Spencer & Anna di Mattia, (n 13).

²⁷ see www.coe.int.

²⁸ Third Annual Report on Migration and Integration (2007) (512 final) (n 2).

Finland amended its Integration Act to provide illiterate women and young immigrants with longer personal immigration plans of up to 5 years for.²⁹ In its report, the European Commission noted that very few Member States carry out sufficient evaluation of how successful their programmes are in responding to specific needs.³⁰ In addition, the most successful integration programmes are not limited to the provision of language courses, but aim to integrate new migrants in all the aspects involved in living in any given society.

Thirdly, integration initiatives and EDC which multiply the field of responsible social actors are favoured, as it is believed they counteract crime and misbehaviour in schools. Here, emphasis is placed on parental responsibility to continue the EDC related work at home, and on local authorities to develop initiatives to tackle specific problems faced in their area, such as gang activities, or racism. Iceland has stated, for example, that local authorities are to design ways to ensure that children and adolescents from migrant backgrounds participate in sports and cultural activities organised in their localities.³¹ The idea seems to be that efforts have to be made on all sides to ensure that no one falls out of the loop of opportunities, to avoid alienation, and fight fear.

Last but perhaps most importantly, the benefits of intercultural and inter-faith dialogue are increasingly stressed upon by various actors. Thriving economies are not all that attract new migrants. Many choose to settle in Europe because of the continent's firm attachment to fundamental freedoms, such as freedom of religion, and safety from persecution. It is by living up to its professed standards that a society can ensure respect of its rules, and may avoid the temptation of modifying them. Perhaps no other aspect of integration poses as many difficulties for the future, nor involves the goodwill and the 'mutual accommodation' of as many social actors, as religious diversity. The Council of Europe has emphasised the role of the media in fostering values of tolerance and mutual respect.³² The media has been involved in a series of initiatives across Northern Europe, such as the 'International Tolerance Day' organised in Latvia.³³ In the wake of the Danish-cartoon incident, Nordic countries are becoming gradually more aware of the challenges which religious rifts pose for the future of their societies. Denmark has come up with a wide range of measures, such as dialogue meetings involving the Danish Prime Minister, the Minister for Integration, and organisations representing ethnic minorities. In Finland, a specific working group on intercultural and inter-religious dialogue was created. Baltic countries are also active on this front. Amongst other related projects, Latvia is carrying out an '*Information*

²⁹ see Finland's response to the questionnaire of the Immigration and Asylum Committee of the European Commission in preparation for the Third Annual Report on Migration, available at http://www.mol.fi/mol/fi/99_pdf/fi/04_maahanmuutto/03_kotoutuminen/SUOMEN_kertomus_2005-6_EN.pdf.

³⁰ Third Annual Report on Migration and Integration (2007) (n 2).

³¹ See Government Policy on the Integration of Immigrants (n 7).

³² www.coe.int.

³³ Summary Report on Integration Policies in the EU-27- (n 5).

Campaign on Islamophobia.³⁴ The importance of religious education in promoting an understanding and an appreciation of all faiths has been underlined as a factor which is essential towards ensuring a harmonious society for the future, in which the plurality of faiths is no longer a basis for division, but a guarantee of peace³⁵. Finally, to further promote the issue, the European Commission has decided that 2008 will be the 'European Year of Intercultural Dialogue'.

To conclude, one may say that when it comes to integration, no country has all the answers. Although Sweden's policies appear to be the most effective, the strong rate of unemployment amongst immigrants indicates that more efforts are still required. Furthermore, Nordic countries by no means constitute a homogeneous block when it comes to policies and their effectiveness. If Sweden's practices received the best ratings, and improvements were made in Norway³⁶, Denmark came 21st out of 28, despite its innovative ideas. In addition, although the integration policies of the Baltic countries have fared rather poorly, forward-looking measures are being put in place. Estonia, for example, has been fairly active. Not only has it taken steps to involve immigrants' representatives in the elaboration of integration policies, it has also shown a keenness to ensure its policies are successful, by hiring external contractors to evaluate its integration programmes. In addition, in the field of EDC, Estonia has allocated funds to train educators to teach Estonian as a second language.³⁷ In any event, the way in which Baltic countries shall choose to tackle integration in the future promises to be instructive.

³⁴ *ibid.*

³⁵ See R Jackson and K Steele, 'Problems and Possibilities for Relating Citizenship Education and Religious Education in Europe', The Oslo Coalition on Freedom of Religion and Belief, 2-5 September 2004; and the Minutes of the Oslo Conference on Religion, Democracy, and Extremism, 15-16 May 2007.

³⁶ Norway was 8th in the MIPEX. As a result, the Norwegian Ministry for Labour and Social Inclusion announced mid-October this year that Norway's integration policies had been successful, and that as a result the Plan for Integration and Social Inclusion of the Immigrant Population would be strengthened in 2008, see www.regjeringen.no.

³⁷ Summary Report on Integration Policies in the EU-27- (n 5).

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