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EUROPEAN CITIZENSHIP AND POLITICAL IDENTITY

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CITIZENSHIP OF THE EUROPEAN UNION

The idea of a common European Citizenship dates back at least to the drafting of the Treaty of Rome. After the failure of the European Political Community, which would have dealt with the issue of citizenship directly, the European Economic Community was created by the Treaty of Rome in 1957 to deal mainly with 'economic matters'. The range of these economic matters, however, was so wide that a 'spill-over' effect in the political field, and especially in the field of citizenship, was inevitable, particularly for what concerns the provisions on free movement of economic actors (workers, self-employed, providers and receivers of services), and for all other provisions involving, directly or indirectly the rights of the individual.

After the Single European Act (SEA) of 1987, the spill-over of the economic sphere into the political one assumed large proportions, because of the effects which the completion of the single market could have on the position of the individual citizens of the Member States. The same SEA provided for measures of compensation for the deregulatory effect of the single market, like article 100a EC, which introduced qualified majority voting for harmonisation of national standards legislation.

The issue of citizenship has been dealt with, for the first time directly, by the Treaty on European Union (TEU), which has inserted in the EC Treaty a new title called 'Citizenship of the Union'. The Treaty on European Union, like the EEC Treaty and the Single European Act, does not introduce a 'constitutional concept of citizenship'. It has been argued in Chapter IV that European citizenship should be multiple in character, in so far as it should allow allegiances to a various set of institutions including the EU, the nation state, and other supranational and sub-national entities. In this sense it would be different from a full national citizenship, which locks the citizens in a relationship of allegiance to one sovereign nation.

European citizenship, however, should maintain the features of a 'complete constitutional citizenship' for what concerns the rights conferred upon the individual (with particular attention to the issues of equality and liberty) and its independence from other national status of citizenship.

The concept of citizenship of the Union lacks three fundamental elements to realise a European constitutional citizenship: (1) direct relationship Union - citizens; (2) complete catalogue of citizenship rights; (3) general equality of the citizens.

(1) The EC Treaty, as amended by TEU, fails to create a direct relationship of citizenship between the citizens and the Union because of the link between citizenship of the Union and nationality of the Member States. EU citizenship is a derived status of Member States' nationality. Like in the case of free movement of economic actors, all EC rights are a consequence of the status of national of one of the Member States.

(2) This 'derived status nature' of EU citizenship results in incompleteness of the catalogue of rights and additionality to national citizenship.[107] In fact, it is not necessary to cover fundamental aspects of civil, social and political rights, as long as national citizenship remains the principal status. However, if on one hand only an autonomous EU citizenship would require a complete catalogue of rights, on the other hand a progressive extension of the current catalogue could contribute to the creation of an autonomous EU citizenship. In this sense the role of Article 8e EC, which allows the Council 'to adopt provisions to strengthen or to add to the rights laid down in this part,' assumes fundamental importance.

(3) The provisions of Article 8 to 8e EC represent an extension of the principle of equality in the fields of free movement, electoral rights and diplomatic protection. However, the final result is a status of citizenship which is still characterised by relevant areas of inequality among EU citizens. Inequalities result from: (a) exclusion of Union citizens from some political rights (i.e. voting at national elections, access to public offices); (b) differential treatment in the field of free movement between economically active citizens, who can enjoy the benefit of the Treaty provisions on free movement, and other categories of citizens who can rely on the less generous treatment of Directives 364-365-366/1990; (c) 'reverse discrimination' against nationals, which could be acceptable in a context of mere free

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[107] The complementary nature of Union citizenship was recently restated by the Amsterdam Treaty, which added the following sentence to at the end of paragraph one of Article 8 EC: 'Citizenship of the Union shall complement and not replace national citizenship.'

movement and economic integration, but sharply contrasts with a status of equal citizenship; and (d) exclusion of third country nationals permanently resident from Union citizenship, due to the link with Member States' nationality.[108]

Despite all its limits, Citizenship of the Union performs a determinant symbolic role in the process of European political integration. The presence of the norms on citizenship in the EC Treaty, rather than in the intergovernmental parts of TEU, where most of the other 'political matters' have been relegated, is an important step in the direction of 'politicisation' of the Community. The scope of the EC Treaty can no more be said to cover only economic matters. In its First Report on Citizenship of the Union of 21 December 1993, the Commission underlined the importance of the 'political link' created by the citizenship provisions, and of their place in the Treaty immediately after the fundamental principles of Part One. With reference to the role of the Court of Justice the Commission also added:

> 'the rights flowing from citizenship of the Union are in effect granted constitutional status by being enshrined in the Treaties themselves. These rights are to be construed broadly and exceptions to them are to be construed narrowly, in accordance with the general principles of Community law recognised by the Court of Justice. Thus, in so far as these provisions relate to rights which were already laid down in Community law, the status of these rights has now been fundamentally altered.'[109]

The Court of Justice can play a fundamental role in the interpretation of the new provisions on citizenship of the Union. In the past, in absence of any Treaty provision on citizenship, the Court has struggled to create a *de facto* European economic citizenship by conferring enforceable community rights on individual citizens, in what has been referred as an attempt to 'constitutionalise the Treaty' (Mancini 1989). The role of the Court with respect to the catalogue of Union citizenship rights could be that of expanding the application of these rights, by confronting them with the prohibition of discrimination on the ground of nationality of Article 6 EC. The Court, however, would have no power to create new rights of citizenship or extend the principle of equality - and therefore EU citizenship - to resident third country nationals. These remain tasks for the Community legislator.

In summary, Union citizenship with all its limits in terms of entitlements and inclusiveness

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[108] The relationship between Community law and third country nationals, including their access to citizenship rights, is explored in more details in Chapter VII.

[109] Firts Report on Citizenship of the Union of 21 December 1993, COM(93) 702.

is probably at this point in time the best compromise which could be achieved among Member States, who still want to maintain exclusive competence in the fields of national citizenship.

1. Rights of free movement and residence

The right of free movement and residence for all citizens of Article 8a EC is probably the most significant provision in the catalogue of EU citizenship rights, although in practice it was already conferred to economic actors directly by the Treaty, and to the remaining categories (students, pensioners and 'inactive persons') by three Directives 90/364, 90/365 and 90/366. The importance of Article 8a is that it qualifies as a right of citizenship the existing right to free movement and residence for EC nationals (Art. 48 EC).

1.1 From Cowan to general free movement

The Treaty of Rome did not confer a general right to free movement on EC nationals, but reserved it for economic actors, that is to say, workers, self-employed and providers of services. Despite this clear limitation, the Court of Justice attempted a judicial expansion of the concept of free movement and of the rights connected, by widening the categories of economic actors, who would come under the Treaty provisions.

Using Article 48 EC and relying on an autonomous Community definition of 'worker', the Court of Justice progressively extended the right of free movement to part-timers (*Levin*[110], *Kempf*[111]), trainees (*Lawrie-Blum*[112]), and more recently to students undertaking sandwich courses in their state of origin, who do their practical experience in another Member State (*URSSAF*[113]).

The most significant extension of the right of free movement through 'judicial activism' has come from the interpretation of Article 59 EC. In *Luisi and Carbone*[114] the Court extended the scope of Article 59 as to include not only providers of services but also recipients of services, that is to say, 'tourists, persons receiving medical treatment and persons

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[110] Case 53/81, *Levin v Staatssecretaris van Justitie*, [1982] ECR 1035.
[111] Case 139/85, *Kempf v Staatssecretaris van Justitie*, [1986] ECR 1741.
[112] Case 66/85, *Lawrie-Blum v Land Baden-Wurttemburg*, [1986] ECR 2121.
[113] Case C-27/91, *URSSAF v Hostellerie Le Manoir*, [1991] ECR 5531.
[114] Cases 286/82, 26/83, *Luisi e Carbone v Ministero del Tesoro*, [1984] ECR 377.

travelling for the purpose of education or business.' In *Cowan*[115] the Court went a step further, allowing a recipient of services (a British tourist in Paris) access to social benefits (compensation for victims of criminal injuries) on an equal footing with nationals and permanent residents. However, even in *Cowan* the Court fell short of conferring a general right to free movement and residence (including the social rights connected) upon EC nationals. Cowan was able to rely on the provision of non discrimination on grounds of nationality of Article 7 EEC (Article 6 EC, after TEU), because he was considered a recipient of services under Article 59. On the contrary, had he travelled to France for the sole purpose of participating in a political demonstration, he would not have been able to rely on Article 7 EEC, because free movement for political reasons was not within the scope of the Treaty. He was therefore protected from discrimination as a 'consumer' (recipient of services), but not as a 'citizen'.

In *Grogan*[116] the Court found that a student association could not rely on Article 7 EEC against a ban established by Irish law on the distribution of information about the availability of abortions in the United Kingdom. Although the Court was ready to recognise that the provisions of abortion services would come under the scope of Article 59, this did not help the student association, whose purpose in providing the information was neither commercial, nor linked to the providers of services in the UK, but merely gratuitous and for the benefit of the students' awareness in the subject.

Article 8a EC, introduced by the Treaty on European Union, keeps in line with the jurisprudence of the Court as it confers the right to free movement to 'every citizen of the Union.' It represents a generalisation of the right of free movement, and an extension of the principle of equality to include non economic actors. It is an operation which the Court could not do directly, but which it attempted indirectly by expanding the categories of economic actors, thus including most EC nationals. Despite the generalisation provided by Article 8a, the rights of free movement and residence and the rights connected still remain subject to a various range of discriminations among categories of EU citizens and to a basic condition of economic self-sufficiency.

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[115] Case 186/87, *Cowan v Le Trésor Public*, [1989] ECR 195.
[116] Case C-159/90, *Society for the Protection of Unborn Children v Grogan*, [1991] 3 CMLR 849.

1.2 Limitations and conditions

The persistence of discrimination as a feature of EU citizenship is the inevitable consequence of the willingness of Member States to maintain most of their national sovereignty in the field of citizenship. This Thesis emphasises the issue of discrimination because it highlights the difference between an ideal type of European citizenship and the partial achievements of Union citizenship, as the exisiting status of post-national citizenship in Europe.

The general right of free movement of Article 8a is 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.' According to this proviso the creation of a citizenship right of free movement does not take place in a context of full 'equality among EU citizens', because relevant exceptions to general free movement are still allowed in the Treaty and in secondary legislation. There are different orders of discrimination, which can still take place in the field of free movement between national and non-national EU citizens in the Member States.

The first type of discrimination is found in the Treaty exceptions to free movement contained in Articles 48(3), 56 and 66 and the 'public service proviso' of Articles 48(4) and 55. The Court of Justice in *Van Duyn v Home Office* found that complete equal treatment between nationals and migrant workers was not possible under Article 48(3), because of the principle of international law according to which a state cannot deny entry or expel one of its own nationals.[117] However, if deportation and exclusion from entry of non-nationals for reasons connected to public policy, pubic security or public health could be justified in the context of the free movement of factors of productions, they create a fundamental inequality among citizens in the context of EU citizenship.

A similar problem is created by the public service proviso of Article 48(4). Article 48(4) was based on a conception of nationality where loyalty to the state found its parallel in the denial to foreigners of political rights and on the assumption that the legitimate interests of the state could be best served and protected by the recruitment of the state's own nationals to perform certain tasks on its behalf (O'Keeffe 1994). This proviso was legitimate in a context of mere free movement, however, once the rights of free movement are transformed into

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[117] Case 41/74 [1974] ECR 1337. The Court took a more liberal approach to deportation of migrant workers in *R v Bouchereau*, case 30/77 [1977] ECR 1999, where it held that a Member State, wishing to rely on the public policy exception of Article 48(3) to expel a migrant worker, must show a 'genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.'

rights of citizenship, also the public service proviso should come into question. The special relationship of allegiance between the state and the citizens, which is the rationale for the exception, is now paralleled by a new relationship of allegiance between the citizens and the Union, which, like the first one, demands parity of treatment among citizens.

The second type of discrimination takes place between EU citizens who enjoy free movement as workers, self-employed or providers of services, and those who instead are covered by the three Directives on free movement of 'non-economic actors'.[118] The latter enjoy a much more precarious status, because their right of free movement and residence is granted on the condition that they 'have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence' ('own resources' requirement). Once this condition disappears, even without fault on the part of the EU citizen, he is subject to deportation, regardless of the degree of integration in society he and his family may have reached.[119]

'Non-economic' EU citizens do not benefit in the Member State of residence of 'the same social and tax advantages as national workers', which instead are conferred by Article 7(2) of Regulation 1612/68 to migrant workers and their families. An author has noted that this kind of discrimination might result in a sort of two-speed European citizenship, where a complete 'market citizenship' limited to economic actors is opposed to a general but more watered down 'Union citizenship' available for economically inactive individuals (O'Leary 1995).

The last type of discrimination concerns those EU citizens who, because of the 'own resources' requirement are excluded from free movement under any of the three free movement Directives. Again, if on one hand this was justified in a context of free movement of factors of productions, to avoid creating an excessive burden on the social security systems of the most generous Member States, on the other hand in a context of citizenship it creates an unacceptable element of inequality among citizens who can afford free movement and citizens who cannot.

Although the 'own resources' requirement might be consistent with the letter of Article 8a, in so far as it refers to 'limitations and conditions', it certainly contrasts with the broad meaning and the spirit of the Article, which creates a general right of residence for EU

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[118] Directive 90/365 confers the rights of free movement and residence to 'retired' persons, Directive 366/90 to students and Directive 364/90 to the remaining 'economically inactive' individuals.

[119] See, Article 1 and 3 of Directive 90/364.

citizens. Also, the current framework of secondary legislation on free movement, which provides a different Regulation or Directive for each kind of economically active or inactive individual, contradicts the spirit of a general right to free movement and residence. In this sense Article 8a calls for new and more uniform legislation to be introduced to replace the current piecemeal Directives, and introduce a general right of free movement and residence for EU citizens. The most controversial issue, however, concerns the regulation of the rights connected to free movement (especially social rights), which at the moment represent the wider gap between economically active and inactive free movers.

It has been argued that Article 8a might have direct effect, given the clear, precise and unconditional[120] nature of the obligation. Moreover, if Article 8a is to represent a progress with respect to the existing *acquis communautaire*, it should confer a directly enforceable right on all Union citizens. If this was the case it would extend the right of free movement and residence to all Union citizens, regardless of whether they are economic actors or have the means to support themselves. The only limitations and conditions which would remain in place would be those of Article 48(3) and (4) concerning public policy, public morality, public security and access to public offices (O'Keeffe 1996).

The argument in favour of direct effect, however, is weakened by the fact that Article 8a(1) expressly subjects the right of free movement and residence to 'the limitations and conditions laid down in this Treaty,' and by Article 8a(2), which says that the 'Council may adopt provisions with the view to facilitating the exercise of rights referred to in paragraph 1.' Assuming that Article 8a(1) was directly effective, the unconditional nature of such right would pre-empt any secondary legislation which the Council might pass on this subject.

1.3 Reverse discrimination, free movement and citizenship

'Reverse discrimination' takes place when a Member State applies national provisions and refuses to recognise EC law rights to its own nationals, on the ground that the matter is internal to the state concerned. The inapplicability of the provisions on free movement to cases of reverse discrimination, because of the 'wholly internal matter' exception, sanctioned by the Court of Justice, is another element of inequality in the new born citizenship of the

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[120] These were the criteria for direct effect set by the Court of Justice in *Van Duyn v. Home Office*, case 41/74 [ECR] 1337.

Union.

Cases of reverse discrimination are mostly concerned with the rights of entry and residence of the families of workers and self-employed persons. In this particular field the provisions of EC law[121] tend to be more generous than national legislation relating to the rights of non-EC family members of nationals or of resident third country nationals. In other subjects concerning directly the worker or the self-employed person (entry, residence and access to employment), the rights granted by domestic law are the same of those granted by EC law, and there is no risk of reverse discrimination (Greenwood 1987).

The wording of Articles 48 and 59 EC does not preclude the application of the rights of free movement to relations between a worker or a provider/recipient of services and his Member State of origin. Article 52 EC instead expressly refers to 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State,' thus prescribing directly a cross border element for the norm to apply. In the case of Articles 48 and 59, however, the silence of the Treaty was filled by secondary legislation and by the case law of the Court of Justice, both of which have required a cross border element for the application of the provisions on free movement of workers and services.[122]

In its jurisprudence on reverse discrimination the Court of Justice has found that the provisions of the EC Treaty concerning freedom of movement of workers, self-employed and providers/recipients of services do not apply to cases of discrimination exercised by Member States against their own nationals.[123] This kind of discrimination is regarded by the Court of justice as a 'wholly internal matter'. An exception to the 'wholly internal matter' principle is provided by the case in which the national discriminated against by his Member State of nationality can prove a connection with EC law, for example, a person returning to the Member State of origin, after having exercised the EC right of free movement.[124]

The Court of Justice has recently further reduced the application of the 'wholly internal matter' principle in *Surinder Singh*.[125] Mr Singh, a non-EC national married to a British

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[121] See, in particular Articles 10, 11 and 12 Regulation 1612/68, and Article 3 Regulation 1251/70.

[122] Secondary legislation mostly refers to worker or self-employed in a Member State other than that of origin, Article 1(1) and 10(1) Regulation 1612/68.

[123] Cases 35-36/82, *Morson and Jhanian v Netherlands*, [1982] ECR 3723; Case 175/78, *R v Saunders*, [1979] ECR 1129; Case 180/83, *Moser v Land Baden Wuerttenberg*, [1984] ECR 2539.

[124] Case 115/78, *Knoor v Secretary of State for Economic Affairs*, [1979] ECR 399.

[125] Case C-370/90, *R v. Immigration Appeal Tribunal and Surinder Singh ex parte Secretary of State for the Home Department* [1992] ECR I-4265.

national, returned to the UK, after having lived and worked in Germany, where he enjoyed EC law rights as the spouse of an EC migrant worker. In the UK he was granted a limited residence permit. Once his wife commenced divorce proceedings, his right of residence was terminated and he was asked to leave the United Kingdom. The Court of Justice held that the free movement provisions applied to the case in question, and that Mr Singh could rely on Article 52 EC, as, having previously exercised the right of free movement, he maintained a connection with EC law.

An author has noted that the *Surinder Singh* case 'might assume great significance if it is interpreted as requiring Member States generally to refrain from adopting measures which might deter their own nationals from exercising freedom of movement. The next step could be that even those Community nationals who have never exercised freedom of movement could still challenge national rules which were incompatible with the spirit of free movement envisaged by the Treaty as being deterrent to mobility.' (O'Keeffe and Johnson 1994: 1338)

In a context of citizenship, which presupposes equality of status, reverse discrimination is no longer justifiable, independently from actual or potential connection with the provisions on freedom of movement. The difficulty in reading a prohibition on reverse discrimination in the new norms on citizenship of TEU lies in the fact that EU citizenship is still based on a link with Member States nationality, rather than on a general principle of equality. This might allow Member States to argue that discrimination against their own nationals is a 'wholly internal matter' beyond the scope of the Treaty, and thus cannot be caught by the prohibition on non-discrimination on grounds of nationality of Article 6 EC.

It remains to see which interpretation the Court of Justice will give of the new provisions on citizenship of the Union, with reference to cases of reverse discrimination. Advocate General Slynn in *Morson and Jhanjan* gave the following justification for allowing reverse discrimination:

> 'since the rights conferred derive from the principle of freedom of movement for workers and not from a right of residence throughout the Community, gaps in the right of a family to live with an individual are at least possible and perhaps inevitable.' ([1982] ECR 3742)

This rationale is now questioned in its validity by Article 8a EC, which confers a general right of free movement and residence throughout the Community to EU citizens, although this is

is still subject to the limitations and conditions established in the Treaty and in secondary legislation. It could be argued that in the light of the new provisions establishing a 'citizenship of the Union', situations, which in a context of mere free movement of factors of productions would have been regarded as 'wholly internal', can now be considered within the scope of the EC Treaty, and therefore subject to the prohibition of Article 6 EC. However, even after TEU the Court of Justice has not yet accepted this line of interpretation, thus reverse discrimination remains, at least for the time being, a matter internal to the Member States and outside the powers of the Community.[125a]

2. Political rights

This Section deals with 'strictly political rights', and in particular with the right to vote and stand as a candidate for European Parliament elections and for local elections in the Member State of residence, conferred by the TEU on all EU citizens. A broader definition of political rights would include the whole spectrum of Union citizenship rights, which have been dealt with under different headings (free movement, diplomatic protection, petition and information).

The provisions of Article 8b EC have the merit of extending the application of the principle of equality among EU citizens in the field of electoral rights. EU citizens resident in a Member State other than that of nationality, have the right to receive the same treatment as the nationals of that Member State, with respect to the rights to vote and stand as a candidate at European and local elections. This, in the case of the right to vote at local elections, is subject to some exceptions specified in the implementing Directive, which slightly compromise the principle of equality of treatment. Secondary legislation implementing the electoral rights contained in Article 8b EC creates an obligation for the Member States to inform Union citizens resident in their territory in good time and in an appropriate manner of their new electoral rights. This is an important aspect of the new entitlements which cannot be fully exercised in the absence of proper information.

The right to vote at local elections represents the affirmation of a principle already accepted by some Member States, and included in the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level. Lawfully resident foreigners should have the right to participate in a decision making process, which directly affects their daily

[125a] See, Cases C-64&65/96 *Land Nordrhein-Westfalen v. Uecker* and *Jacquet v. Land Nordrhein-Westfalen* (n.y.r.), where the Court of Justice stated that Article 8 EC 'is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law'.

lives and in spending decisions, which they contribute to finance. The same argument could be put forward in relation to the right to vote at national elections, but the issue becomes much more controversial, as it calls into question different definitions of national sovereignty and national identity.

Like in the case of the provision on free movement, also Article 8b EC falls short of extending the principle of non-discrimination to the whole spectrum of political rights. Large areas of discrimination still remain, the most evident being the reservation of the right to vote at national general elections and referenda for nationals. Inequalities can be found also in the political aspects of the provisions of free movement, like the possibility of being deported for reason connected to public policy, or the exclusion from employment in the public service of Article 48(4) EC.

2.1 European Parliament electoral rights

Differently from the right to vote at local or national elections, the right to vote for the European Parliament in the country of residence (Article 8b(2) EC) does not creates problems related to national sovereignty. The main issue involved with the right to vote and stand as a candidate for the European Parliament concerns the relationship between the Parliament and the citizens of the Union, in particular whether the Members of the European Parliament should represent national collectivities or simply citizens of the Union, irrespective of the country of nationality.

Before the introduction of the provisions on direct election, there was little doubt that the role of the European Parliament was that of an assembly representing national collectivities, rather than individual citizens, as its members were elected by national Parliaments. The first direct election of the Parliament in 1979 and the formation of cross-national party groups shifted the balance in favour of an assembly representing European citizens, regardless of nationality. However, the lack of a uniform electoral procedure and of a right to vote and stand for elections on the basis of residence, maintained a strong link between the Members of the European Parliament and their countries of nationality.

Article 8b(2) EC clearly goes in the direction of abolishing the link between Parliament and Member States, and of establishing a direct link between Parliament and EU citizens. Moreover, Article 137 EC, as amended by TEU, says that 'the European Parliament shall

consist of the representatives of the people of the States brought together in the Community,' rather than of the representatives of the States.

Despite this progress, the nationality link still survives in two important aspects of the European Parliament's election. First, there is not yet a uniform electoral procedure, with the result that the type of representation (proportional, majoritarian, or mixed) varies according to the Member States of belonging of the MEPs. Second, Directive 93/109[126], implementing Article 8b(2), does not choose residence as the only criterion for the exercise of the right to vote for the European Parliament. Article 4 provides for an alternative by saying that: 'Community voters shall exercise their right to vote either in the Member State of residence or in their home Member State.' EU citizens therefore will be able to choose whether to vote for the MEP standing for election in their place of residence or return to their country and vote for the national candidate. This situation creates great confusion as to whether the Members of the European Parliament should represent national collectivities or individual EU citizens.

An author has argued that the optional nature of the right to vote on the basis of residence, adopted by the Commission in Directive 93/109, is important to guarantee the possibility to vote for the national representatives to those citizens who feel stronger the link with their country of nationality. The right to exercise this option should also be facilitated by allowing EU citizens to vote in the country of residence either for the local MEP or for their national one (Adam 1992). This position reflects the legislation introduced by the Italian government to implement Directive 93/109. Not only Italy has introduced provisions to allow the nationals of other Member States to vote and stand for European Parliament elections in Italy,[127] but it has also provided, for its own nationals resident abroad, the possibility of voting for national candidates in the Member State of residence. As a practical result Italian nationals resident in another Member State have received two electoral certificates, one allowing them to vote for the local candidates, and another one (sent by the local consulate) allowing them to vote for the candidates standing in Italy. This must have led many voters to confusion, and it might also have sounded as an invitation to breach the prohibition of double voting of Article 4 of the Directive.

The principle of 'alternative vote' introduced by Directive 93/109 goes against the spirit of the Treaty provisions on Union citizenship, in so far as Article 8b(2) and Article 137 attempt

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[126] Council Directive 93/109 of 6 December 1993 in OJ L329/34 of 30.12.1993.
[127] Italy has allowed EC nationals to stand for election already at the 1989 European Parliament election.

to de-nationalise political representation in the European Parliament. The argument in favour of a right to choose among national and local representative fails to persuade because it overlooks the very nature of the European Parliament. A directly elected Parliament derives its democratic legitimacy from the citizens it represents, and not from the Member States. Citizens should be represented as equal individuals rather than as members of national collectivities.

If more powers were to be transferred from the Member States to the Community, a second chamber, elected on the basis of regional and national representation, could be established to complement the existing Parliament, in a context of democratisation and general redefinition of the Community institutional framework.

However, as long as most sovereign powers still rest with the Member States and national Parliaments remain the main places of expression of national sovereignty and identity, the European Parliament should maintain a role of representation of individual European citizens, regardless of nationality. If the citizens of the Union had to vote for the European Parliament in the place of residence, regardless of nationality, they would not be deprived of their national identity by the fact that they cannot vote for the candidate standing in their country of nationality. EU citizens could always reinforce their national identity by turning up to vote at national elections in the country of origin, while the vote for the European Parliament on the basis of residence would help reinforcing their identity as European citizens.

In pursuance of the last sentence of Article 8b(2) which refers to 'derogations where warranted by problems specific to a Member State,' Article 14 of Directive 93/109 allows those Member States (Luxembourg), where the number of non-national EU citizens resident exceed 20%, to restrict the right to vote and stand as a candidate for European elections to those who meet certain criteria concerning length of residence. The residence requirement cannot exceed five years for the right to vote and ten years for the right to stand as a candidate. A similar derogation is included in the Directive implementing the right to vote and stand as a candidate at local elections.

The right of Article 8b(2) was exercised by Union citizens at the European elections of June 1994 and at the first European elections in the three new Member States in September 1995 and in October 1996. The overall participation of non-national voters in their Member State of residence was 11.81%, varying between 44.11% in Ireland where this right had been available since 1979 to 1.55%, in Greece. Only one non-national candidate was elected in her

Member State of residence. The low turnout should be considered in the light of the continuing steady decline in national voters' participation in European Parliament elections, from 63.0% in 1979 to 56.5% in 1994. Moreover, at least other two factors contributed to the low turnout: the novelty of the right (the adoption and the implementation of the rules allowed for very little time to fully inform both the citizens and the competent national authorities) and the fact that the election campaigns in the Member States were focused almost exclusively on internal policy issues.[128]

2.2 Local elecoral rights

The right to vote and stand as a candidate at local elections in the country of residence for EU citizens might raise problems relating to the exercise of national sovereignty, and the reservation of this prerogative for nationals. Because of differences in the legal and political traditions of the Member States, the question of sovereignty with respect to local elections (and electoral rights in general) does not affect all Member States in the same way. For this reason it is more interesting to start approaching the issue from the point of view of constitutional differences among Member States, rather than from that of the limits set in secondary legislation to the right to vote of Article 8b(1).

The differences among the Member States are of two orders: (a) differences concerning the sub-national constitutional structure; (b) differences concerning the nature of national identity and the relationship of sovereignty. The first order of differences affects the right to vote at local elections, while it is considered below how the second one is also important with respect to national elections.

2.2.1 Issues of sub-national constitutional structure

There might be more than one level of sub-national institutions in a Member State (states, regions, provinces, local authorities, neighbourhood councils, etc.), and each level might not correspond to a similar one in another Member State. As a consequence some levels of sub-national government can be directly involved in the exercise of national sovereignty in some Member States, while they stay out of the national political process in others.

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[128] See, European Commission, Second Report on Citizenship of the Union, 27 May 1997.

In France there were two main problems with respect to the right to vote and stand as a candidate at local elections for Union citizens. First, local councillors participate in the election of the Senate, the national upper chamber, which shares legislative powers with the National Assembly. Second, the mayor and the deputy mayor of any town possess police powers. In the first case the implementation of Article 8b(1) EC would have allowed non nationals to participate in the national political process and in the second case to exercise public official authority.

If on the one hand it could be argued that in a context of European citizenship and general equality among EU citizens, every European citizen should be allowed to participate in the national political process and admitted to public offices[129], on the other hand Article 8b(1) created a problem in so far as it would have involved EU citizens in matters related to national sovereignty only in France and not in those Member States, where local councillors and mayors did not have the same powers. For this reason Directive 94/80[130], implementing Article 8b(1), allows Member States to reserve for their own nationals certain elective offices, entailing the exercise of public authority or the election of a parliamentary assembly (Article 5(3),(4)).[131] An author has argued that the exclusion of EU citizens from the posts of mayor and deputy mayor in France could be in violation of Article 8b(1) which provides that the right to vote should be exercised 'under the same conditions as nationals of that state.' This is particularly relevant when mayor and deputy mayor are directly elected (Adam 1992).

In Italy the difficulty was created by the various number of sub-national elected institutions. Regions in particular are involved in the procedure to elect the President of the Republic and have legislative powers in a number of areas listed in the Constitution. Lower levels are represented by provinces (*Provincie*), municipal authorities (*Comuni*) and local neighbourhoods (*Circoscrizioni*).

While Article 1(1) of Directive 94/80 confers a general right to vote and stand as a

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[129] Currently, this is not possible because of the absence from the Union citizenship catalogue of a right to vote at national elections in the place of residence and because of the proviso of Article 48(4) which consents the exclusion of non-nationals from employment in the public service.

[130] Council Directive 94/80 of 19 December 1994 in OJ L 368 of 31.12.1994, recently modified by Council Directive 93/60/EC of 13 May 1996 in OJ L 122/12 of 22.5.1996, to include the references to basic local government units in the three new Member States.

[131] In its Second Report on Citizenship of the Union of 27 May 1997, the European Commission notes that 'this derogation to the principle of non-discrimination is therefore in conformity with the provisions of Articles 48(4) and 55, according to which the exercise of state devolved functions may be reserved for nationals. Its implementation however must be carried out in the respect of the principle of proportionality and it may not restrict more than necessary the possibility for other Member States' nationals to be elected.'

candidate in municipal elections, Article 2(1) provides some useful definitions to determine which level of local government should be made accessible to EU citizens. 'Municipal elections' are defined as 'elections by direct universal suffrage to appoint the members of the representative council and, where appropriate, under the laws of each Member State, the head and members of the executive of a basic local government unit.' A 'basic local government unit' is defined as containing bodies which are 'elected by direct universal suffrage and are empowered to administer, at the basic level of political and administrative organisation, certain local affairs on their own responsibility.' The Directive also has an Annex listing for each Member State the administrative entities coming under the definition of basic local government unit.

In the case of Italy the definition of Article 2(1) and the Annex exclude regions and provinces, but include the rest of sub-national institutions, that is to say, *Comuni* and *Circoscrizioni.* The exclusion of Italian *Provincie* is difficult to explain especially if compared to the inclusion of English Counties in the Annex. From an administrative point of view, English Counties perform a function very similar to that of Italian *Comuni* and *Provincie*.

2.2.2 Issues of national identity and sovereignty

The right to vote and stand as a candidate at local elections presents also problems related to the basic constitutional principles of some Member States. These principles usually concern the definition of national identity and popular sovereignty of a particular country, and prevent foreigners from participating in the political life of that country, even if only at municipal level. In France this issue was parallel to that of the constitutional structure of the state at local level, and was resolved by a constitutional reform allowing EU citizens to participate at local elections, but excluding them from the posts of mayor and deputy mayor and from taking part to the procedure to elect the Senate.

In other countries, however, even when there was not a practical issue concerning the exercise of sovereignty or public authority by foreigners (because the local political process is separated from the national one), the constitutional provisions on political rights and the underlying concept of national identity prevented non-nationals from taking part in local elections.

This was the case in Germany, where, according to the Constitution, only German citizens

could vote at national and local elections. Until recently German nationality law was based on a perfect coincidence between political community (citizenship) and ethnic community (*volk*), so that only the members of the *volk* could enjoy political rights of citizenship, including all kind of electoral rights. In 1992 the Constitutional Court overturned regional legislation by three Länder (Hamburg, Bremen and Schleswig Holstein) granting the right to vote at local elections to foreign guestworkers with more than five years of residence, on the ground that foreign guestworkers were not members of the *volk* and therefore could not enjoy political rights under the Constitution.[132]

A constitutional reform modifying Article 28.4 of the German Basic Law was necessary to allow the implementation of Article 8b(1) EC and introduce the right to vote and stand as a candidate at local elections for EU citizens, who, similarly to other foreign guestworkers, are not members of the *volk*. The importance of this constitutional reform lies in the fact that, by allowing EU citizens to participate in local political life, the link between ethnic and political community, which had characterised German national identity for centuries, was severed for the first time. This might have important consequences also for the status of millions of third country guestworkers, who, despite length of residence or even birth on German soil, are still excluded from all political rights.

In Italy the implementation of Article 8b(1) did not require a constitutional reform, despite the wording of Article 48 of the Constitution, which confers electoral rights exclusively to Italian citizens and of Article 51 which limits access to public and elected offices to Italian citizens. For the implementation of Article 8b(1) EC, it was possible to rely on the interpretation given by the Constitutional Court of Article 11 of the Constitution, allowing direct derogations from the Constitution by EC Treaty provisions. Article 11 provides in general for derogations to the principle of national sovereignty and for transfers of sovereignty to supranational institutions in specified circumstances. In the case of local electoral rights for EU citizens, the mechanism of Article 11 was sufficient to avoid a constitutional modification. However, it has been argued that, if new Treaty rules were introduced to allow EU citizens to participate in national elections in the country of residence, it would be necessary to modify the Constitution, as the same source of sovereignty would be affected

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[132] EuGRZ, 1990, 443. On the matter see, Faist (1994a). The ethnic exclusivity of German citizenship has been recently relaxed by a reform of nationality and naturalisation laws, allowing for membership by means of cultural assimilation.

(Adam 1992).

It has been noted above that in France and Germany the relationship between local electoral rights, sovereignty and national identity required constitutional reforms for the implementation of Article 8b(1). In Italy this was not necessary for local elections, but it would be inevitable if national elections were involved. The cases of France, Germany and Italy could be compared with the situation in the United Kingdom, where the issue of local electoral rights for EU citizens presented no constitutional difficulties. Before TEU Irish nationals and all Commonwealth citizens could already take part in both local and national elections in the United Kingdom on condition of residence.[133] An EU-wide right to vote at national elections for EU citizens in the country of residence would not create major constitutional problems in the UK, while putting into question the same concept of sovereignty and national identity in countries like France, Germany and Italy. This may sound paradoxical if confronted with the fact that the United Kingdom is among those countries which most strongly resist further transfer of national sovereignty to the Community.

The answer to this question, however, must be found in the different nature of the concepts of national identity and national sovereignty in the Member States. In the United Kingdom, differently from France, Germany and Italy, the national community is not defined by the exercise of political rights, but by the possession of the right of abode. This a result of the passage from the 'imperial model' of citizenship to an artificially defined national one, which has taken place in the 1960s with the dissolution of the British Empire and the introduction of limits to immigration for non-UK British subjects. The main principle underlying British national identity is immigration and not political franchise so that, once having gained access to the United Kingdom, all Commonwealth citizens enjoy political rights[134] (see, Chapter III).

2.2.3 Other limits and conditions to EU local electoral rights

The main purpose of Directive 94/80 is to implement the principle of equality stated in Article 8b(1), that EU citizens resident in a Member State other than their own be allowed to exercise local electoral rights 'under the same conditions as nationals of that State.' It has been seen above how this principle is subject to some exceptions required by the different legal and

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[133] Section 1, Representation of the People Act 1983.

[134] On the matter of British citizenship and national identity see, Gamberale (1995); Nicol (1993); Oliver and Heater (1994).

political traditions of the Member States. For other matters, all conditions which apply to nationals must apply to EU citizens as well.

Minimum periods of residency in the 'basic local government unit' of voting can be applied on an equal basis to national and non-nationals (Art. 4(3)), however, with respect to minimum residence in the State of voting, EU citizens shall be able to take into account periods spent in any other EU Member State (Art. 4(1)). This provision creates a situation of reverse discrimination for those nationals of a Member State, who, having resided in another Member State for a period of time, return to their Member State of nationality. Here they might be subject to a minimum period of residence before being allowed to vote at local elections, without at the same time being able to rely on periods of residence spent in other EU Member States. The Directive implementing Article 8b(1) applies only to any citizen of the Union who 'is not a national of the Member State of residence' (Art. 3(b)).

Other conditions concerning incompatibility (Art. 6), deprivation of the electoral right (Art. 5), duty to vote (Art. 7), and inscription on the electoral roll (Arts. 8 and 9) apply equally to nationals and non-nationals. In those countries where voting is compulsory, non-nationals must vote, if they have asked to be entered on the electoral roll.

The Directive does not include a prohibition against exercising the right to vote both in the country of residence and in that of nationality. Article 1(1) with reference to the Member State of residence simply provides that EU citizens 'may exercise the right to vote and to stand as a candidate there in municipal elections', thus leaving the option open to the voters. Article 1(2) also states that nothing in the Directive shall affect the right to vote and stand as a candidate in the country of nationality for EU citizens, when so provided by Member States. Therefore it will be up to Member States to maintain or withdraw the right to vote at local elections in the country of nationality for those nationals who are no longer resident.[135]

Article 12 of the Directive implements the last sentence of Article 8b(1) which allows for 'derogations where warranted by problems specific to a Member State.' These derogations are provided for those countries where the proportion of nationals of other Union countries exceeds 20% (Luxembourg) and for a limited number of local government units in Belgium. The right to vote and stand as a candidate may be restricted to those EU citizens who meet

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[135] Eleven Member States do not permit their own nationals to vote or to stand if they reside outside their territory. Greek and Italian voters living abroad must travel back to their country of origin to vote. Only France and Spain allow their citizens resident abroad to retain their voting rights in full (European Commission, Second Report on Citizenship of the Union, 27 May 1997).

certain criteria regarding length of residence, and the composition of the lists may be subject to criteria aimed at the integration of non-national EU citizens.

The purpose of these derogations, stated in the preamble of the Directive, is to avoid the risk of polarisation between lists of national and non-national candidates, and to favour a better integration of non-national EU citizens. Also, in the case of Belgium, there is the necessity of taking into account particular features and balances between different communities and linguistic groups provided in the Belgian Federal Constitution. The derogations obtained under Article 12, differently from the exceptions of Article 5(3),(4), are subject to the condition that the 'problems specific to a Member State' of Article 8b(1) are still in place. The Commission will check whether the derogations are still warranted by December 1998 and every six month thereafter.

By 1 January 1997 only eight Member States had fully implemented Directive 94/80. Consequently, the Commission has initiated proceedings, in accordance with Article 169 of the Treaty, against those Member States that have failed to adopt the necessary laws. 'Reasoned opinions', according to Article 169 EC, were issued in the case of France, Greece, Belgium, Spain, Sweden, Austria and Finland for partial implementation of the Directive. In Sweden although the Directive has not been fully implemented, foreign residents have been able to vote since the 1970s, subject to a period of prior residence in the country.[136]

2.3 Other political rights

This Section deals with those political rights which are not directly stated but which might be implied by the new Treaty provisions on EU citizenship and with other political rights which have not been granted to Union citizens.

The first issue concerns the principle of 'political neutrality'. The EEC Treaty being mainly concerned with economic matters, the existence of a duty of political neutrality on EC migrant workers, in a Member State of residence other than their own, was never considered to be in breach of the prohibition of non-discrimination on grounds of nationality of Article 7 EEC (6 EC). In *Rutili*[137] the Court of Justice moved in the direction of abolishing the principle of political neutrality, by holding that EC nationals could no longer be expelled from the

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[136] See, European Commission, Second Report on Citizenship of the Union, 27 May 1997.
[137] Case 36/75, *Rutili v Minister for the Interior*, [1975] ECR 1219.

Member State of residence for failure to respect the obligation of maintaining their political neutrality. The Court held that a breach of political neutrality could not amount to a public policy ground to limit the free movement of workers under 48(3) EC. This judgment, however, fell short of establishing that Member States could not sanction by means other than deportation breaches of political neutrality by EC nationals.

The operation of the principle of political neutrality in EC law was considered by the European Court of Human Rights in the *Piermont v. France*[138] case. The Human Rights Court was asked whether a violation of Article 10 of the European Convention on Human Rights (ECHR) - right to freedom of expression - was justified under Article 16, which provides for an exception to the freedom of expression concerning 'political activity of aliens.' The Court found that although a 'citizenship of the Union' had not yet been established at the time the facts at issue in the case took place, the exception of political neutrality of aliens to the freedom of expression contained in Article 16 ECHR did not apply to the nationals of an EU Member State - who also happened to be a member of the European Parliament - in another Member State. The reasoning of the Human Rights Court hints at the complete elimination of the principle of political neutrality in the EU, following the introduction of a 'citizenship of the European Union':

> 'The Court cannot accept the argument based on European citizenship, since the Community treaties did not at the time recognise any such citizenship. Nevertheless, it considers that Mrs Piermont's possession of the nationality of a Member State of the European Union and, in addition to that, her status as a member of the European Parliament do not allow Article 16 of the Convention to be raised against her, especially as the people of the OTs *(French Overseas Territories)* take part to the European Parliament elections.'

After the introduction of the provisions on citizenship of the Union and in the light of the judgements in *Rutili* and *Piermont*, it is hardly possible to sustain the existence of a duty of political neutrality for EU citizens resident in Member States other than their own. The rights to vote and stand as a candidate at local and European election 'under the same conditions as nationals' necessarily imply other corollary political rights such as the right of expression, the right of political association and the right of assembly. It would be absurd if EU citizens were

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[138] *Piermont v. France*, 27/4/1995, (1995)20 EHRR.

allowed to take part in the electoral competitions, but were then prevented from forming or joining political parties and conducting an electoral campaign.

There seem to be enough provisions in the new EC Treaty to allow for the application of the provision on non-discrimination of Article 6 EC, in case a Member State tried to limit the political activity of non-national EU citizens, by means other than deportation. However, as the catalogue of rights of Articles 8 to 8e EC does not confer upon EU citizens the right to vote and stand as a candidate at national elections, a Member State wishing to restrict the political activity of EC nationals in situations other than local or European elections could always argue that the matter is out of the scope of the EC Treaty, and that therefore Article 6 EC does not apply. This would be the result of a narrow interpretation of Article 8b EC, and also one which does not take into account the wider meaning of the whole Part Two of the EC Treaty on Citizenship of the Union. It would be a task for the Court of Justice to point to the correct interpretation.

Apart from those rights which can be implied in the provision of Articles 8 to 8e EC, it is regrettable that express provisions guaranteeing other political rights have not been inserted in the EC Treaty along with the local and European electoral rights. This could have taken place without including the highly controversial right to vote at national elections. The right to vote and stand as a candidate at European and local elections and the whole set of provisions on citizenship of the Union give a political dimension to EU citizens resident in a Member State other than their own. The logical consequence would have been to include in the catalogue a right of expression, a right of association and a right of assembly. An author has noted how, differently than in the EC Treaty, the rights of expression, association and assembly have been included, together with the right to vote at local elections, in the Council of Europe Convention on the Participation of Foreigners in Public Life (O'Keeffe 1994). The Spanish Memorandum on European citizenship, drafted in preparation for TEU, proposed the explicit recognition in the EC Treaty of the freedom of expression, association and assembly. The failure to include these political rights in the Treaty could be attributed to the fact that they constitute a link between rights of citizenship and fundamental human rights. The Member States have preferred not to deal with the issue of Community protection of fundamental rights in TEU, because of an existing application of the Community to join the European Convention on Human Rights and Fundamental Freedoms (ECHR), and because this would

have given to the EC catalogue of citizenship rights the consistency of a real 'bill of rights', thus raising very controversial issues involving national sovereignty.

It has been noted above how, despite some exceptions and derogations, the voting rights of Article 8b EC represent an important extension of the principle of equality in the political field. Union citizenship nevertheless still maintains some important areas of political inequality among European citizens. The explicit recognition in the Treaty of the freedom of expression, association and assembly would have eliminated the last doubts regarding inequalities determined by the principle of political neutrality, but the failure to do so, might require the intervention of the Court of Justice, if the issue arises in a concrete case. The question of equality among EU citizens in the political field remains therefore open. Further interventions by the Court of Justice and by the legislator are necessary to define a more consistent status of European political citizenship. It is worth mentioning those new political rights, which, together with the elimination of the exceptions to Article 8b EC and of the principle of political neutrality, would achieve an equal status citizenship in the political field: (1) rights to freedom of expression, association and assembly; (2) right to take part in all national political activities (including national elections and referenda); (3) right to access the public service on the same conditions as nationals; (4) right not to be subject to deportation or to be refused entry.

The issues raised by the rights of expression, association and assembly have been discussed above in relation to the elimination of the principle of political neutrality. If one accepts the argument that this principle has been abolished by the jurisprudence of the Court of Justice and by Article 8b EC, the insertion of those rights in the Treaty catalogue would not add any new right, but it would help to clarify a situation that, before a new intervention by the Court, remains uncertain.

The inclusion of the right to vote at national elections and referenda would be in line with the proposal formulated by the European Parliament for TEU, which referred to a right to complete freedom for any citizen to take part in the political life of the Union and of any Member State of residence.[139] The difficulty in this area of political rights concerns the concepts of national identity and sovereignty of some Member State, which would be directly affected by the extension of the right to vote to non-nationals. Despite these difficulties, it is

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[139] European Parliament Resolution on the constitutional basis of the Union, Article 21, O.J. C19/65, 1991.

hardly possible to imagine further progress in the field of European political integration, if equality among EU citizens is not achieved in this important area of political rights.

The last two rights, (3) and (4), are strictly connected to the provisions on freedom of movement. In order to include them in the Treaty catalogue, not only it would be necessary to insert two new rights, but also to eliminate the exceptions to free movement of Articles 48(3), 48(4), 55 and 56 EC. Before TEU, these exceptions could be considered 'reasonable distinctions' between national and non-national free movers, rather than elements of discrimination among equal citizens. However, the politicisation of the rights of free movement and the introduction of the concept of Union citizenship underline the discriminatory nature of excluding non-national EU citizens from core political rights in the Member State of residence.

3. Right of diplomatic protection

Article 8c EC entitles EU citizens, 'in the territory of a third country in which the Member State of which he is a national is not represented' to 'protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.' This provision extends the applicability of the principle of equality of Article 6 EC to the external sphere of nationality, at least with respect to diplomatic protection.

Assuming the distinction between citizenship and nationality, which considers the first as the internal aspect of state membership and the second as its external aspect,[140] the right to diplomatic protection of Article 8c EC appears like a spill-over of citizenship of the Union in the field of nationality. This kind of spill-over is exactly what Member States intended to avoid in Article 8 EC, which traces a clear distinction between citizenship of the Union and nationality of the Member States, and makes the first entirely dependent on the second. A Declaration on Nationality of a Member State annexed to TEU and a further Decision of the Head of State or Government meeting within the European Council restate and stress the importance of such a distinction.[141]

If the purpose of Article 8a EC and of the Declaration was to limit Union citizenship to the internal sphere, by leaving matters concerned with the external sphere of nationality to the

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[140] See, Chapter III.
[141] Bulletin of the European Communities, 12/1992, pp. 25-26.

exclusive competence of the Member States, then Article 8c EC did not set a very good precedent. Quite to the contrary, the spill over in the external sphere of state membership together with the creation of new rights of citizenship in the internal sphere has been seen as reflecting a certain state-like behaviour on the part of the Community (O'Leary 1992).

The first practical issue involving Article 8c EC and the status of nationality concerns the treatment of diplomatic protection under international law. According to the judgment of the International Court of Justice in the *Tunisia and Morocco Nationality Decrees* case, 'it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.'[142] Although diplomatic protection under Article 8c EC is merely substitutive of primary national protection, the lack of a relationship of nationality between the Union and its citizens requires the Member States and the Union to start negotiations with third countries to have this right recognised under international law. If this were not to happen, the consequence would be that any third country could refuse to recognise Union diplomatic protection on the basis of the lack of the bond of nationality as stated in the *Morocco and Tunisia* case (Closa 1995).

By requiring that Member States shall 'start the international negotiations required to secure this protection,' Article 8c EC remains neutral as to the participation or the exclusion of the Union from such negotiations. The Union, differently from the European Community (Art. 210 EC), lacks international legal personality, and it might be argued that it cannot take part in international negotiations. But looking at the general context in which the provision of Article 8c is inserted, it would be logical to deduce that the Union should take part in international negotiation involving a right conferred upon its own citizens. If this was the case there could be two undesirable consequences for some Member States, which do not favour the spill over of Union citizenship in the field of nationality.

The first consequence could be the acquisition by the Union of international legal personality, by means of international customary law;[143] the second consequence, strictly related to the first, could be the development under international law of a concept of 'Union

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[142] P.C.I.J. - Series A/B, no 76, p. 16.

[143] See, O'Keeffe (1994). Also, the Amsterdam Treaty of October 1997 did not produce an agreement on the legal personality of the Union, however, it gave to the Union the power to conclude agreements for the implementation of the common foreign and security policy and the third pillar, giving it some legal personality. These agreements are negotiated by the Presidency, with the possible assistance of the Commission, and concluded by the Council by unanimity.

nationality', at least for the purposes of diplomatic protection. It would be of course a very incomplete form of nationality, as some very important elements would be missing, but it could set a very significant precedent for the expansion of the Union in the 'external sphere'.

This is still a rather remote possibility as Article 8c EC itself does not establish a 'Union diplomatic protection', but merely a substitutive Member States reciprocal protection. The original Commission's proposal for TEU included a 'Union diplomatic protection' as a counterpart to the right of diplomatic protection conferred upon the citizens of the Union, but this would have entailed the granting of international legal personality to the Union.[144] The Member States instead preferred to opt for a mechanism of delegated diplomatic protection, granted by the Member States to those EU citizens whose country of nationality is not represented in the third state concerned.[145] This kind of delegated protection does not represent a novelty under international law. The Vienna Convention on Diplomatic Relations of 1961 ensures, in case of interruption of diplomatic relations, that the sending state can confer the protection of its interests and of its nationals to a third state acceptable to the receiving state.[146] Similarly the European Convention on Consular Functions of 1967 states in Article 2(3) that: 'upon notification to the receiving state, any contracting party is entitled to entrust the protection of its nationals and the defence of their rights and interests to consular officers of another contracting party.'[147]

There are two fundamental differences between the provisions of international law and the delegated diplomatic protection conferred upon the citizens of the Union. First, Article 8c EC establishes, subject to negotiations with third countries, a permanent mechanism of diplomatic protection, while the cited Conventions require notification on each individual occasion. Second and most important, Article 8c EC is inserted in the catalogue of Union citizenship rights, so that 'delegated protection' is the object of a right of the individual. The Conventions on the other hand refer to relations among States.

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[144] Contribution by the Commission to the Intergovernmental Conference, SEC (91) 500 Bull. EC Supp. 2/91, Article X8.

[145] The Commission estimates that the potential practical impact of the right to diplomatic protection is not negligible. At present, there are only five non-EU countries where all Member States are represented. On the other hand there are seventeen countries where only two Member States are represented (European Commission, Second Report on Citizenship of the Union, 27 May 1997).

[146] Vienna Convention on Diplomatic Relations, Article 45 (c), in Brownlie (ed.), *Basic Documents in International Law*, 1983, p. 212. A similar provision is contained in Article 27 of the Vienna Convention on Consular Relation of 1963, 596 UNTS 261.

[147] European Treaty Series, no. 61.

It is debated, however, whether Article 8c confers an enforceable individual right on EU citizens. According to Article 8c 'every citizen of the Union shall ... be entitled to protection by the diplomatic and consular authorities of any Member State, on the same conditions as the nationals of that State.' By making EU citizens 'entitled' to this kind of protection, the Treaty seems to confer an individual right, rather than merely establishing a mechanism of delegated diplomatic protection among Member States. This individual right is nevertheless qualified by two conditions stated in Article 8c. The first is the subsidiary nature of diplomatic protection for a Union citizen which only operates 'in the territory of a third country in which the Member State of which he is a national is not represented.' The second is the principle of equality between nationals and non nationals, which paradoxically may result in inequalities among EU citizens. In some Member States diplomatic protection is a right of citizenship, while in other Member States it is subject to the discretion of the public authorities (Portugal, United Kingdom). In the United Kingdom in particular, diplomatic protection, like the issuance of passport, is not a right of the individual, but a Crown prerogative, and thus subject to discretion on the part of the government. It is clear how this situation might create disparities among those EU citizens, who would be allowed to enforce a right of citizenship on the same conditions as a nationals and those, who instead would be subject to government discretion on the same conditions as nationals.

The last issue regarding the implementation of Article 8c concerns the choice of Member State's embassy or consulate which Union citizens should address each time their State of nationality is not represented. It has been suggested that a Member State could be designated each time to protect Union citizens, provided of course that it is represented in the third country concerned. This Member State could be the same one holding the presidency of the Council, so enhancing the feature of Union citizenship right of Article 8c EC (Adam 1992). The delegated protection of Article 8c could also evolve in a sort of Union protection, if the Member State holding the presidency of the Council then decided to exercise this protection through the offices of the Union, in those third countries where those offices are available.[148]

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[148] Implementation of Article 8c EC began in May 1993, when a first set of guidelines for the protection of unrepresented Union citizens by Member States' missions in third countries was adopted. Another important step forward was taken on 19 December 1995, when the Representatives of the Governments of the Member States meeting within the Council adopted two Decisions, the first regarding protection for citizens of the Union by diplomatic and consular representations and the second on the implementing measures to be adopted by consular officials. Consular protection is provided in the case of death, serious accident or illness, arrest or detention and to victims of violent crime. The relief and repatriation of distressed citizens is also envisaged

4. Rights of petition and information

Article 8d EC includes among the rights of Union citizens the right of petition to the European Parliament of Article 138d EC, the right of petition to the Ombudsman of Article 138c EC and the right to write and receive a response in any of the twelve Community languages from any European institution (right to information). All these rights are conferred to the citizens of the Union, and therefore to the nationals of the Member States by Article 8d, however, the first two are granted to 'any natural or legal person residing or having its registered office in a Member State' by Articles 138d and 138e. The right to information contained in the third paragraph of Article 8d EC was inserted by the Amsterdam Treaty of October 1997 and is granted to the citizens of the Union only.

The Amsterdam Treaty dealt with the issues of transparency and openness of Community institutions also in an amendment to Article A of TEU and in the new Article 191a EC. The second paragraph of Article A of TEU now reads: 'this Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen,' where the concept of 'openness' (transparency) has been added to that of 'closeness' (subsidiarity) among the guiding principles of Union action. The new Article 191a EC grants a right of access to documents of the European Parliament, the Council and the Commission to 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State.' This right, however, is to be governed by principles and limits to be jointly determined by the three institutions within two years. Each institution will then have to lay down specific provisions in its own rules of procedure governing access to its documents.

In summary, the rights of petition of Articles 138d and 138e and the right of access to documents of Article 191a are the only 'rights of citizenship', which are not enjoyed in the

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together with the possibility for diplomatic representations or consular agents to extend their assistance to citizens in other circumstances. The Decisions are not yet fully implemented as not all Member States have introduced the necessary arrangements. In the meantime, diplomatic and consular posts in third countries have been asked by their respective national authorities to implement the Decisions insofar as possible. A review of these provisions is scheduled after a 5 year implementation period. On 25 June 1996 the Representatives of the Governments of the Member States meeting within the Council, have agreed the rules for the deliverance of an emergency travel document (ETD). The ETD may be issued, for one return journey, to EU nationals who find themselves in distress whilst in a third country because, for example, their travel documents have been lost or stolen. As with the 1995 Decisions, these provisions will take effect only when all the Member States have adopted the necessary procedures for their application. (European Commission, Second Report on Citizenship of the Union, 27 May 1997, p. 11).

capacity of national of a Member State, but flow directly and exclusively from Community law. This is of particular significance for a future development of an autonomous concept of citizenship of the Union, but also in the context of a possible insertion of a catalogue of fundamental human rights in the EC Treaty, next to the catalogue of Union citizenship rights. Although the rights of petition and access to documents do not represent fundamental human rights, they are rights which are conferred upon the individual, not in his capacity as a member of the political community (citizen), but simply as a human being. In this sense they can be considered a kind of 'less fundamental human rights' and their insertion in the EC Treaty could be regarded as an important precedent.

The right of petition to the European Parliament is not an absolute novelty under EC law, as it was already granted to EC nationals by the rules of procedure of the Parliament, and administered by the Committee on the Rules of Procedure and Petitions.[149] The main innovation concerns the fact that it has now been extended by Article 138(d) to all natural and legal persons resident in the Community regardless of nationality, and that it has been configured as a right of citizenship by Article 8d(1).

An interesting feature of the right of petition to the Parliament is connected to the new provision of Article 138b, which allows the Parliament to 'request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing this Treaty.' Once received a petition, requesting legislative action by the Community in a particular field, the Parliament might act under 138(b) and ask the Commission to exercise its right of proposal.

Although a request by the Parliament under Article 138(b) based on a popular petition might exercise a very strong influence on a decision by the Commission to initiate a proposal, this mechanism is still very far from realising a right of popular legislative initiative. There is no obligation on the Parliament to act under Article 138(b), even if so expressly requested in a petition filed according to Article 138(d). Also, the right of legislative initiative remain an exclusive and discretionary power of the Commission. Article 138(b) does not oblige the Commission to act when requested by the Parliament, although it might decide to do so, especially if the request is backed by the support of a petition under Article 138(d).

Any individual or groups of individuals can address a petition to the Parliament 'on a

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[149] European Parliament Rules of Procedure, Rules 128 to 130.

matter which comes within the Community's field of activity and which affects him, her or it directly.' The reference to 'Community field of activity' has been interpreted as including activity carried out by Member States in the implementation of Community law, so that, if relevant to the petition, the Parliament can investigate not only administration by Community institutions, but also by Member States.

This can be contrasted with the right of petition to the Ombudsman of Article 8b(2), which is limited to instances concerning 'maladministration in the activities of the Community institutions and bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.' It is regrettable that the powers to receive complaints and inquiry of the Ombudsman have been limited to maladministration of the Community institutions, given the large range of activities carried out by the Member States in the field of Community law, and considering that most episodes of maladministration are concerned with the *administration communautaire indirecte* (Member States acting in the field of Community law). The Commission's proposal for TEU provided for competence of the Ombudsman also in the field of *administration communautaire indirecte*, through the creation of a Community Ombudsman and of national Ombudsmen dealing with Community matters in each Member State, but such proposal was not followed up in the Maastricht conference.

The Ombudsman conducts independent enquiries either on his own initiative or following a complaint. He does not, however, have the power to order an administrative authority to change a decision or grant redress, by awarding damages or annulling administrative decisions. Such a role is reserved for the Court of First Instance and the European Court of Justice acting in their judicial capacity.[150]

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[150] The Union's first Ombudsman (Mr Jacob Söderman) was appointed by the European Parliament on 12 July 1995 and was sworn into office before the Court of Justice on 27 September 1995. The main institutions subject to inquiries are the European Commission (187 cases), the European Parliament (19 cases) the Council of the European Union (4 cases) and the Court of Auditors (5 cases). Out of the 210 cases where inquiry has been started, 102 were closed by the end of December 1996. No maladministration was found in 82 cases. Regarding the European Commission, by the end of December 1996, the Ombudsman had requested information on 166 cases. The Commission forwarded information in 113 alleged instances of maladministration. Following this, 35 cases were filed. Of the 131 cases regarding the Commission still under examination, most complaints deal with transparency and access to information, fraud, environmental issues, contracts between the Commission and private enterprises and recruitment procedures. In 1996, the Ombudsman initiated three investigations on his own initiative, all of which relate to information and transparency. The first concerns the rules of access to documents followed by Community institutions other than the Commission and Council, where a code of conduct is already in place. The second focuses on information in the recruitment procedure and the third one deals with the information given to citizens who complain to the Commission alleging a breach of Community law (European Commission, Second Report on Citizenship of the Union, 27 May 1997, p. 13).

The Amsterdam Treaty of October 1997 has added two new 'rights of citizenship'. The first one, contained in Article 8d(3) EC is qualified as a formal right of citizenship and is conferred upon EU citizens only. According to Article 8d(3) 'every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 4 in one of the languages mentioned in Article 248 and have an answer in the same language.' The second one is contained in Article 191a EC and, unlike Article 138d and 138e, is not reproduced as a 'right of citizenship' under Part One of the Treaty. Article 191a confers a general right of access to documents of the European Parliament, the Council and the Commission upon 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State.' Paragraph two of Article 191a subordinates the right of access to documents to 'general principles and limits on grounds of public or private interest' to be determined by the Council within two years of the entry into force of the Treaty of Amsterdam.

Articles 8d(3) and 191a introduce an important element of transparency in the Community decision making process. The new emphasis on transparency is also evident in the reference to openness inserted in Article A of TEU (*supra*). There are, however, at least two main difficulties regarding the new rights to information. First, it is not clear why Article 191a is not reproduced as a right of citizenship under Part One of the Treaty. Such an operation was done with Articles 138d (right of petition to the Parliament) and 138e (right of petition to the Ombudsman), which are reproduced in paragraphs (1) and (2) of Article 8d respectively. Second, it is arguable that the right of Article 8d(3) should be conferred only upon Union citizens. If on the one hand it could not be expected that every person would be given the right to write and receive a response in his/her own language, on the other hand it would have been desirable that resident third country nationals had been given the right to write and receive a response from the institutions in any of the twelve Community languages. In fact, third country nationals living in the Union might be as affected by the action of the European institutions as Union citizens, especially after the Amsterdam Treaty, which has dramatically increased the impact of Community policies on third country nationals, by operating a large scale transfer of powers to the Community in the areas of asylum and immigration policies (*infra*, Chapter VII).

CHAPTER VI

A LEGAL APPROACH TO EUROPEAN CITIZENSHIP

The provisions on citizenship of the Union of the EC Treaty might represent a turning point in the constitutional development of the Community. Despite the incompleteness and the limits of Union citizenship, the insertion of a catalogue of citizenship rights in the EC Treaty has an important symbolic value, because it overcomes the traditional scheme of the mere 'socio-economic scope' of the Treaty and adds a new 'political scope'. This is evident not only in the provisions of Article 8 to 8e EC, but also in Article B TEU, which puts citizenship among the objectives of the Union. The change of name of Article 1 EC, from European Economic Community to European Community symbolises this passage, in which the original scope of the EEC Treaty to bring about economic integration must now be complemented by political integration.[151]

In the context of political integration the provisions on citizenship of the Union are neither the final result nor the beginning of the construction of a full European citizenship. Despite the material economic scope of the EEC Treaty, an embryonic form of European citizenship has emerged much before the drafting of the Treaty on European Union, thanks to the constitutional interpretation of the Treaty given by the European Court of Justice. Citizenship of the Union, however, cannot be considered the coronation of this process, because it fails to realise a full status of citizenship. The elements which distinguish Union citizenship from a complete citizenship are its additionality, its dependence on Member States nationality and the failure to realise equality among EU citizens. Major legislative and judicial developments are therefore needed to achieve the goal of a full European citizenship.

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[151] See, Commission's First Report on Citizenship of the Union of 21 December 1993, COM(93) 702.

The development of a full European citizenship, however, is not imaginable without the support of a common European political identity, which would provide democratic legitimacy to the new constitutional status. If further legislative and judicial progress in the field of political integration are to succeed, they will have to be based on a new post-national identity bringing together all the peoples of Europe. The Commission's First Report on Citizenship of the Union refers to the question of identity by linking it to the new political nature of the Treaty:

> 'for the first time the Treaty has created a direct political link between the citizens of the Member States and the European Union such as never existed with the Community, with the aim of fostering a sense of identity with the Union.'[152]

Article F(3) TEU rules out the merging of Member States national identities into a common European national identity, by saying that 'the Union shall respect the national identities of its Member States'. A common European identity would have to be post-national, in the sense that it would have to overcome many of the founding principles of identity in the nation state. The legal development of citizenship and the construction of a common identity are two parallel process, which mutually need each other if a complete and democratically legitimate European citizenship is ever to be achieved.

The model of community membership which is adopted in the analysis of the legal development of Union citizenship is the one linked to the experience of the nation state. In the legal and political context of the nation state, citizenship *strictu sensu* is used as a concept referring to the internal aspect of state membership, which defines a status of rights and obligations vis-à-vis the community and its members. Nationality instead is used to define the external aspect of state membership, where the rights and obligations of the individual towards the state exist in relation to other nation states and their members.[153] From the national perspective therefore the fields which are available for the emergence of a complete European citizenship are two: citizenship *strictu sensu* and nationality. A Declaration of the Head of State or Government, meeting within the European Council of Edinburgh of

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[152] *Supra*, Note 151.

[153] An alternative definition of citizenship and nationality based on elements of identity was considered in Chapters III and IV. According to such definition citizenship would refer to the political self-determined community of law and nationality to the pre-political ascriptive community of culture and descent (Habermas 1992b).

December 1992, attempts to halt development of European citizenship in both fields by stating that the provisions on citizenship of the Union 'do not in any way take the place of national citizenship' and that 'the question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.'[154] Regarding citizenship, the Declaration stresses the additionality of EU citizenship to national citizenship, a consequence of the link with Member States nationality. The additional nature of Union citizenship was restated by the Amsterdam Treaty, which added the following sentence at the end of paragraph one of Article 8 EC: 'Citizenship of the Union shall complement and not replace national citizenship.' Regarding the external sphere, on the other hand the Declaration restates the exclusive right of Member States to determine their own nationals, and prevents any exploitation by the Community of the link between EU citizenship and nationality of the Member States for the purpose of acquiring competence in the field of domestic nationality law.

Most of the efforts in creating a European citizenship have so far concentrated on citizenship as internal membership, and on the rights and obligations attached to it. The efforts of the Court of Justice to establish a link between the individual citizen and Community law as well as the extensive interpretation of the provision on freedom of movement (in order to include a very broad category of economic actors), have contributed to the creation of a new status of the individual, which has been referred to as Community citizenship.[155] The provisions of TEU on citizenship of the Union represent a major step forward in the direction of creating a full status of internal citizenship, but they still fall short of realising this objective.

It was considered in Chapter V on Union citizenship how the interpretation of the Court of Justice might play a fundamental role in a further extension of the principle of equality in the political field and therefore in the strengthening of European citizenship. However, the main role in extending the rights of citizenship under EC law, remains that of the legislator, which has the power to complete the catalogue of existing rights by granting new political rights, and by including fundamental human rights and social rights. This would help realising a European citizenship on the model designed by Marshall (1992), where civil, political and

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[154] Section A of the Declaration of the Head of State or Government meeting within the Edinburgh European Council, Bull. EC 12/1992, pp. 25-26; see, also Declaration on Nationality of a Member State attached to the Treaty on European Union, Final Act of the Conference, 7 February 1992, Declaration No. 2.

[155] Supra, Note 89.

social rights characterise the status of the citizen in the internal sphere.

The alternatives for the European legislator in the field of citizenship *strictu sensu* are currently two. The first is the accession by the Community of the European Convention on Human Rights and the extension of the current catalogue of Article 8 to 8e EC to include full political rights and social rights. The second one is the drafting of an European bill of rights in the EC Treaty protecting social and political rights, as rights of citizenship, and civil rights, as fundamental human rights, granted to every person regardless of citizenship.

The external aspect has so far been excluded from the development of European citizenship, because the EEC Treaty, being limited to socio-economic matters, did not provide any Community competence in the field of nationality. Similarly the Single European Act and the Treaty on European Union, which have created large new areas of Community competence in the field of citizenship, have maintained the exclusivity of national competence in the field of nationality. A couple of exceptions are contained in TEU and in the recent jurisprudence of the Court of Justice and they seem to provide reasonable ground for the development of European citizenship also in the field of nationality. One is the right of diplomatic protection, which although it is a right traditionally belonging to the external sphere, has been included in the catalogue of Union citizenship rights. The other exception concerns the interpretation given by the Court of the link between EC law and Member States nationality laws, and of the right of Member States under international law to determine their own nationals.

The following Sections look at possible developments of European citizenship both in the internal and in the external spheres. Section one is devoted to the history of the emergence of the concept of citizenship under European law, while Section two looks at the link between nationality and European citizenship. Sections three and four deal respectively with developments in the internal and in the external spheres. Section five concentrates on the analysis of a particular method used by the Community to acquire competences from the Member States and finally Section 6 considers the consequences of a state-like approach to citizenship in a federal process.

1. From Costa v Enel to TEU

At an early stage of the history of the Community the Court of Justice took the view that the EEC Treaty could not be regarded as an ordinary statute of international law, because of two fundamental reasons: the limitation of sovereignty accepted by Member States with the consequent transfer of sovereign powers to the Community, and the unlimited duration of the Community itself (Article 240 EC). In *Costa v ENEL* the Court reached the conclusion that by limiting their own sovereignty and by transferring sovereign powers to the Community, the Member States had created a body of law which bound both their nationals and themselves. Once accepted that EEC law was part of the internal legal systems of the Member States and bound private individuals as well as Member States, the Court proceeded to affirm the supremacy of EEC law over national legislation.[156] From this point the Court started an operation which has been referred to as a 'constitutionalisation of the Treaty' (Mancini 1989). An original act of international law (treaty) was transformed into a sort of constitutional charter, where a classic relationship of international law among sovereign states was paralleled by other relationships involving individuals and the Community and individuals and the Member States. In *Les Verts* the Court stated that 'the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.[157]

From a procedural point of view the link between individuals and EEC law originating from *Costa v ENEL* was reinforced by the jurisprudence on direct effect of Community law. *Van Gend en Loos*[158] and *Van Duyn v Home Office*[159] marked the definitive emergence of the individual under EEC law, by providing first for direct effect and enforceability of Treaty

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[156] Case 6/64 [1964] ECR 585.

[157] Case 294/83, *Parti Ecologiste 'Les Verts' v European Parliament*, [1986] ECR 1339. See also, Opinion 1/91 on the EEA Agreement, [1992] ECR I-6102, in which the Court of Justice affirmed that the 'EEC Treaty constitutes the constitutional charter of a Community based on the rule of law' and that that 'the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals.'

[158] Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1.

[159] Case 41/74 [1974] ECR 1337. In its following caselaw the Court of Justice limited direct effect of Directives to vertical relationships between individuals and Member States, excluding horizontal relationships between private individuals. The reason given by the Court for this exclusion was that Directives are addressed to Member States and individuals cannot be blamed for late implementation. Case 152/84, *Marshall v Southampton Area Health Authority*, [1986] ECR 723; Case C-91/92, *Faccini Dori v Recreb Srl*, judgment of 14 July 1994.

provisions and secondly of Directives, whose deadline for implementation had expired. In *Marleasing*[160] the Court of Justice established a principle of 'indirect effect' of Directives by holding that national courts should interpret all national law in the light of relevant Directives, regardless of the fact that the national law had been passed before or after the Directive was adopted.

The constitutional interpretation of the provisions on freedom of movement by the Court of Justice has given substance to the link between individuals and Community law. It was considered in Chapter V on citizenship of the European Union, that the emergence of a Community citizenship predates the insertion of a catalogue of citizenship rights in the EC Treaty. This happened mainly through the progressive expansion of the categories of economic actors (originally only workers, self-employed and providers/recipients of services) entitled to the rights granted by the Treaty. In *Cowan*[161] the Court went as far as establishing equal access to social benefits in the country of residence under EEC law for recipients of services such as tourists. This judicial development, however large the category of recipients of services may be, fell short of conferring a right to equal access to social benefits for all EC nationals, on the basis of Community citizenship.

There are two fundamental reasons why the jurisprudence of the Court of Justice fell short of creating a complete status of Community citizenship. Firstly, the Court has applied the provisions on freedom of movement to an even larger number of individuals not on the basis of a common Community citizenship, based on equality of treatment, but by extending the categories of economic actors as to include as many citizens of the Member States as possible. This has allowed for many areas of discrimination among nationals and non-nationals to be maintained, especially in the case of non-economic citizens. Secondly, all the efforts by the Court to favour the emergence of the individual under EC law have not achieved the purpose of creating a direct relationship between individual citizens and Community public sphere. The link between EC law and individual citizens created by the Court is, in the largest majority of cases, mediated by the Member States. The Member States remain the only significant 'public sphere', with which citizens entertain a relationship, both under domestic and Community law. The rights of freedom of movement granted to economic actors under the Treaty fail to achieve full equality among all citizens and merely allow for the equal

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[160] Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentation SA*, [1990] ECR I-4135.
[161] Case 186/87, *Cowan v Le Trésor Public*, [1989] ECR 195.

treatment of free movers and nationals under the law of the Member State of residence. This is a consequence of the link between freedom of movement and the status of nationality and creates a situation in which most Community individual rights are enjoyed via the legal system of the Member State of residence or of nationality.

Moreover, the individual rights flowing from the principle of direct effect, are enforced through the means of the national courts, in a relationship of EC law, which intervenes between the individual and the public sphere of a Member State. In the field of judicial remedies, clearer examples of this lack of a direct link between individuals and EC public sphere are the cases of 'indirect effect' (*supra*) and 'Francovich type damages'.[162] In both cases the relationship between the individuals and the Community is mediated by the institutions of the Member States (courts) as well as by their domestic legislation. In the case of 'indirect effect' the mediating element allowing the individual to enforce his Community right is the domestic legislation which must be interpreted according to the Directive, while in the case of 'Francovich type damages' is the domestic legislation on civil liability, which is supposed to compensate individuals who suffer damages because a Member State has failed to implement a Directive. The only rights which put the individual in a truly direct relationship with the Community public sphere are the rights to vote and stand as a candidate for the European Parliament, the rights of petition to the Parliament, the right of petition to the Ombudsman, and the judicial remedies of Article 173 and 175 EC, in case of direct and individual concern[163] (O'Leary 1995).

Citizenship of the European Union, as introduced by the TEU, does not achieve the objective of general equality of treatment among citizens, nor that of creating a direct link between Union citizens and Community public sphere. Instead, it maintains those features of Community citizenship, which are expressed in two criteria: additionality and dependency. First, Union citizenship is a limited status which is additional to national citizenship, and therefore only intended to complement the main rights of citizenship granted under national law. This justifies its incompleteness and the large areas of inequality, which still exist among citizens, especially in the field of social and political rights. Second, Union citizenship is a

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[162] Cases C-6, C-9/90, *Francovich and Others v Italy*, [1991] ECR I-5357.

[163] The Amsterdam Treaty of October 1997 has added to this list the right to write and receive a response from any of the European institutions or bodies in any of the twelve Community languages, which is granted to EU citizens only, and the right of access to Union documents of Article 191a EC, which is granted to any natural or legal person resident in the Union.

status entirely dependent on Member States' nationality. According to Article 8 EC 'every person holding the nationality of a Member State shall be a citizen of the Union.' This does not create a link between EU citizens and the Union, but merely a link between EU citizens and Member States, having consequences under Community law. Both these features, additionality-inequality and dependency present the same patterns under Community citizenship and under Union citizenship, and are the main reasons for the failure to create a European constitutional citizenship.

The question of inequality has been widely explored in Chapter V, in the following Sections the analysis focuses on the relationship between nationality law and European citizenship.

2. The link between nationality and European citizenship

The link between nationality and Community citizenship expressed in the Treaty and in secondary legislation, is reinforced by Article 8 EC with respect to the newly established citizenship of the Union. Once the existence of this link is accepted, the main question concerns whether the Member States have an exclusive competence to determine who are their own nationals for the purposes of Community law, or whether the Community should play any role in this determination.

In the case of Community citizenship and with reference to the free movement of workers, the Court of Justice has held that domestic legislation cannot be used to limit or annul the effect of the provisions on free movement of workers. In order to achieve the goal of the independence of Community law, the Court has adopted autonomous definitions of concepts such as 'worker', 'self-employed person' and 'public policy' and it has disregarded that national legislation whose application undermined the scope of the free movement provisions.[164]

In *Giagounidis*[165] the Court found that national legislation on passports and identity cards could not prejudice the provisions on free movement concerning the issuance of residence permits. The German authorities had refused the renewal of a residence permit to a Greek

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[164] Case 53/81, *Levin v Staatssecretaris van Justitie*, [1982] ECR 1035; and case 36/75, *Rutili v Minister for the Interior*, [1975] ECR 1219 at 1231.

[165] Case C-376/89, *Panagiotis Giagounidis v Stadt Reutlingen*, [1991] ECR I-1069.

national on the basis of his valid identity card. The applicant had left Greece using his passport, which however had not been renewed, because of his failure to perform military service. Under Greek law his identity card was not a valid document for expatriation, but the Court held that it was enough to obtain a residence permit in the EC country of residence.

In *Airola*[166] the Court was faced with the case of a Belgian woman who had been refused an expatriation allowance under Community staff regulations, because she had compulsorily acquired the nationality of her Italian husband under Italian nationality law. The Court held that the concept of 'national' contained in the staff regulations had to be interpreted in such a way as to avoid any discrimination between female and male officials, and that, as a consequence, the compulsorily acquired Italian nationality of the applicant had not to be taken into account, in applying the staff regulations concerned.

In both cases referred to above the Court went very near to ruling on the compatibility of nationality laws with EC law, and therefore on the influence that the latter can exercise on the former. However, the provisions of domestic law at issue in *Giagounidis* concerned national legislation on passports and identity cards, which, although it is a related area, it is still separate from nationality law and direct determination of nationals. In *Airola* the Court looked at some provisions of Italian nationality law, which if applied would have led to an infringement of the principle of Article 119 EC, 'equal pay for equal work' for male and female workers. The Court avoided ruling on the matter of compatibility of Italian nationality law with the Treaty, by holding that, in applying the staff regulations, the Italian nationality of the woman should have not been taken into account.

If on the one hand the Court has often ruled on the inapplicability of domestic legislation limiting the provisions on free movement and it has imposed concepts of EC law autonomous from national legal orders, on the other hand it has never questioned Member States' nationality laws. The reasons must be that, as nationality law is the means through which individuals enjoy citizenship rights under EC law, any interference by the Community in the field of nationality would undermine Member States sovereignty and open the way for a Community competence in the sphere of nationality and citizenship. An author has argued that the acquisition of such competence by the Community might determine the end of the Member States because it would touch such a fundamental element of sovereignty (d'Oliveira

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[166] Case 21/74, *Airola v Commission*, [1975] ECR 221.

1993).

This fundamental element of sovereignty is codified as a principle of international law in Article 1 of the Hague Convention of 1930,[167] which states that 'it is for each State to determine under its own law who are its nationals.' The principle of national competence in the field of nationality was restated with respect to European law in a Declaration attached to the TEU, following the introduction of the catalogue of Union citizenship rights. The Declaration affirms that whenever in the EC Treaty 'reference is made to nationals of the Member States, 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.'

In *Micheletti*,[168] for the first time directly, the Court of Justice dealt with the issue of the relationship between Community law and Member States nationality law. The case concerned an issue of dual nationality, where an Argentinian national who possessed a second Italian nationality tried to rely on the provisions of the EEC Treaty to establish himself in Spain. The Spanish authorities denied him the right of establishment under EEC law on the basis of Article 9 of the Spanish Civil Code which considers as true nationality only the nationality based on residence. The Spanish government tried to rely on the *Nottebohm* case, in which the International Court of Justice established that the existence of a 'genuine link or true bond of attachment' between the state and the claimed national was the criterion for determination of nationality under international law.[169]

The European Court of Justice, however, disregarded *Nottebohm* and found that any nationality of a Member State, even a nominal one, is enough for the applicability of the provisions on free movement. The Court also restated the principle of international law that it is for Member States to determine who are their own nationals under their national laws. The Commission in its First Report on Citizenship of the Union of December 1993, takes the view that the Declaration on Nationality of a Member State attached to the TEU 'keeps with the judgment of the Court of Justice in *Micheletti*', in so far as it reserves the domain of nationality law for the Member States.[170]

The rationale in *Micheletti*, to be understood in its entirety, must be put in the context of

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[167] Convention on Certains Questions relating to the conflict of Nationality Laws, The Hague, 1930.
[168] Case C-369/90, *M V Micheletti and others v. Delegacion del Gobierno en Cantabria.*
[169] *Liechtenstein v. Guatemala*, commonly known as the *Nottebohm* case, Second phase, 6 April 1955, [1955] ICJ Rep 15 at 23.
[170] *Supra*, Note 151.

the whole judgment, and in particular of an *obiter dictum* concerning the limits of Member States' right to determine their own nationals. After having restated the competence of the Member States, the Court added that such competence 'has to be exercised in respect of Community law.' This is in line with the second paragraph of Article 1 of the Hague Convention, which says that a state's determination of its own nationals must be 'consistent with international Conventions, international customs and the principles of law generally recognised with regard to nationality.' *Micheletti* establishes a principle of respect for EC law as a criterion for the exercise of Member States' exclusive competence on nationality. This has been interpreted as a warning by the Court of Justice to the Member States that were they to abuse of the principle of exclusive determination of nationality so as to affect the provisions on free movement and citizenship, the Court would intervene to limit the application of such principle (Closa 1995).

However, with reference to future developments of European citizenship, the *obiter dictum* in *Micheletti* also leaves the door open for Community competence in the field of Member States nationality. The Treaty provisions on citizenship of the Union could have represented the right opportunity to create Community competence in this field, but the formulation of Article 8 EC and the Declaration on Nationality attached to TEU, have excluded this possibility. EU citizenship therefore remains a status entirely derived from Member States nationality, and Member States maintain an exclusive competence on the determination of their own nationals.

The above discussion concerns the current status of Union citizenship and Community citizenship. Further legal developments could take place both in the internal and in the external spheres of European citizenship. In the first case they will affect citizenship *strictu sensu*, while in the second one nationality. The next Section looks at possible developments in the sphere of citizenship, while the following Section considers the possibility of creating a European nationality, by means of Community acquisition of competence in the field of Member States nationality law.

3. Rights of the citizens and of the man under EC law

Two main alternatives are considered for the creation of a full European citizenship in the internal sphere: (1) accession of the European Convention for the Protection of Human Rights

and Fundamental Freedoms (ECHR) by the EC and separate expansion of the catalogue of citizenship rights of Articles 8 to 8e EC to include full political rights and social rights; (2) drafting of a complete EC Constitutional Charter including civil, social and political rights. Both options include the protection of fundamental human rights next to strict rights of citizenship such as social and political rights. In option (2) reference to civil rights is meant to include fundamental human rights. Following Marshall's classic model of citizenship the term civil rights has been used to refer to those rights which are intended to protect the individual from abuses of the public sphere. They include fundamental and less fundamental human rights and are granted to all persons regardless of citizenship. Civil rights are often referred to as 'negative liberties', because they represent the residual sphere of individual liberty as opposed to the listed and limited public powers, which are founded on 'positive liberties', namely social and political rights. Negative liberties do not presuppose any active role on the part of the citizen or of the state to be put into effect, while positive liberties, require state action and citizen participation to be effective.

Before moving to the analysis of the two models outlined above it is necessary to consider the reasons for the protection of fundamental rights under Community law, and the evolution of this protection.

3.1 Fundamental rights and EC law

The reason for the protection of fundamental human rights in a catalogue of European citizenship rights must be found in the relationship between European citizenship and European identity, which was considered in Chapter IV. In order to justify the inclusion of human rights in a catalogue of rights of European citizenship, it is important to emphasise how they can play an important role in the shaping of a European political identity deprived of ethnic and national characteristics. Such European political identity would be based on a political culture rooted in a common 'European resistance'[171] against totalitarism during the last world war and in the defeats of those forces, which had tried to affirm a national identity and culture based on the denial and disregard of human rights. This link between political identity and protection of fundamental human rights exists already in the constitutions of

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[171] For the concept of 'European resistance', as foundation of a common European political identity see, Chapter IV and Tassin (1992).

some Member States, which protect human rights next to citizenship rights in a single catalogue of fundamental rights. Important examples are the German and Italian constitutions, which have performed the task of expressing a new political identity for those peoples, whose experience of suppression of fundamental rights and liberties had been worst.

It was the German Constitutional Court, followed later by the Italian, which started the debate on fundamental human rights under EC law. Faced with the affirmation of the supremacy of EC law over all kinds of national law by the European Court of Justice in *Costa v ENEL*, the German Constitutional Court refused to recognise the supremacy of EC law over the fundamental human rights protected by the German Constitution. The rationale for this refusal was that, although the Community had acquired an area of competences large enough to affect substantially the sphere of the individual, it did not provide protection of fundamental human rights. To meet the demands of the German Court, the Court of Justice developed a case law on fundamental rights, in which it declared that the Community protects fundamental human rights as part of the general principles of Community law, which are founded on Article 164 EC. The substance of the fundamental rights, protected as general principles of Community law, was derived from the constitutional traditions of the Member States and from those international treaties to which Member States have collaborated or are signatories.[172]

The efforts of the Court of Justice in the field of human rights were complemented by a Joint Declaration by the Parliament, the Council and the Commission, which undertook, in the exercise of their powers, to respect fundamental rights, as derived from the constitutional traditions of the Member States and from the European Convention on Human Rights.[173] More recently Article F(2) TEU committed the Union to 'respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

Before the Amsterdam Treaty of 2 October 1997, Article F(2) was a statement of intention comparable to the 'Joint Declaration' with no legally binding force. The only legally binding instrument was the Court of Justice's jurisprudence on fundamental rights. This situation was

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[172] Case 29/69, *Stauder v. City of Ulm*, [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, Case 4/73, *Nold v. Commission*, [1974] ECR 491.

[173] Joint Declaration by the European Parliament, the Council and the Commission, 5 April 1979, OJ 1977, C 103/1.

changed by the Amsterdam Treaty, which amended Article L of TEU, giving to the Court of Justice jurisdiction on Article F(2) 'with regard to actions of the institutions, insofar as the Court has jurisdiction under the EC Treaty and under the Treaty on European Union.'

The combined effect of Article F(2) and of the new Article L codifies in the Treaty the Court's jurisprudence on fundamental rights. When ruling on the compatibility of the acts of the institutions with fundamental rights, the Court will be able to rely directly on Article F(2) on the basis of the jurisdiction conferred upon it by Article L, rather than on its own case law. The scope of the jurisdiction conferred upon the Court by Article L - TEU is, however, more limited than that covered by the Court's jurisprudence on fundamental rights. According to Article L the Court of Justice has jurisdiction on Article F(2) only 'with regard to the actions of the institutions' (*administration communautaire directe*), while according to the Court's jurisprudence, the jurisdiction also extended to the actions of the Member States acting in the field of Community law (*administration communautaire indirecte*). It is not clear whether the jurisprudence of the Court on human rights continues to apply with respect to the actions of the Member States acting in the field of Community law, or whether the Amsterdam amendments have taken this power away from the Court.

The Amsterdam Treaty also modified Article F(1) of TEU, which now reads: 'The Union is founded on the principles of liberty, democracy and respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.' This provision has an important symbolic value because it restates the democratic nature of the Union and the commitment to human rights and fundamental freedoms. In practice, however, it does not change the substance of Article F - TEU, which remains a codification of the jurisprudence of the Court of Justice in the field of human rights, conferring no new enforceable rights upon individuals. The main practical consequence of this amendment probably consists in setting some minimum standards for membership of the European Union, which are recalled in Article O of TEU, dealing with accessions and in Articles Fa (*infra*), allowing for action by the Union in the event of a breach by a Member State of one of the principles listed in Article F(1). Article O has been amended to take account of the commitment to democracy and human rights expressed in the new version of Article F(1). The first sentence of paragraph one of Article O now reads: 'any European State which respects the principles set out in Article F(1) may apply to become a member of the Union.' This is an important benchmark, which might prove useful in the negotiations on the

accession of new Members from Central and Eastern Europe and from the Mediterranean, where in some cases human rights and democracy standards might be relevant.

The new Article Fa of TEU represents the most substantial reform introduced by the Amsterdam Treaty in the field of human rights. It provides for action by the Union in the event of a breach by a Member State of one of the principles on which the Union is founded, which are listed in Article F(1). According to Article Fa (1) - TEU:

> 'the Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article F(1), after inviting the government of the Member State concerned to submit its observations.'

If the Council has determined that a Member State has engaged in a serious and persistent breach of one of the principles of Article F(1), it may decide to suspend certain of the rights deriving from the application of this Treaty to the State in question acting by a qualified majority. The rights which may be suspended include the voting rights of the representative of the government of that Member State in the Council. In determining the existence of a breach and in deciding on the sanction to be applied, the Council shall act without taking into account the vote of the representative of the Member State concerned. A new Article 236 has been inserted in the EC Treaty to supplement the 'human right procedure' of Article Fa. It provides that if a decision has been taken to suspend voting rights with respect to TEU, such suspension would also apply to the EC Treaty and it allows the Council to suspend a Member's right under the EC Treaty if found in violation of Article F(1).

Article Fa - TEU represents an important novelty as it makes Member States accountable to the Union on human rights and democracy standards. This accountability, however, intervenes only at the intergovernmental level between the Member States and the Union, while individuals acquire no right of redress before the European Court of Justice, if a Member State breaches one of their fundamental rights. It also appears that the Council will take action only in extreme cases, given the draconian nature of the remedy. Article Fa (1) refers to a 'serious and persistent breach' and Article Fa (2) says that in deciding on the sanctions 'the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.' If the Council were to determine

that a Member was in breach of one of the principles on which the Union is founded and suspended its Treaty rights, it would lead to considerable tension among the Member States. It is much more likely that a negotiated solution would be reached before any vote actually took place in the Council, at which point in time the Member States would be heading for a serious and potentially dangerous fracture.

The intergovernmental nature of the procedure of Article Fa presents two major inconveniences: (a) it does not create any Community individual rights against breaches of fundamental rights by Member States; and (b) it creates an adversarial system for the protection of fundamental rights, where the Member States in the Council are required to judge on the fundamental rights and democracy standards of another Member State. Regarding the first point, it is considered later in this Section how the European Court of Justice has no powers with respect to Member States' action in the field of national exclusive competences, even if those actions are in breach of a fundamental right. Regarding the second point, the adversarial nature of the 'human right procedure' is more likely to produce tensions among the Member States than predictability and uniformity in the application of fundamental rights. Only the European Court of Justice would have the authority to rule on infringements of Treaty rules by Member States, without being accused of pursuing a particular national interest behind the 'excuse' that a principle of democracy or a fundamental right have been violated.

For the reasons exposed above, Article Fa cannot be compared with the evolution of fundamental rights protection in the Constitution of the United States where the respect of fundamental rights was extended from the federal government to the States. Under American law the constitutional obligations for the States to respect fundamental rights was introduced after the Civil War by the anti-slavery amendments and by the jurisprudence of the Supreme Court. In particular the 14th Amendment obliged the States to guarantee to all persons the equal protection of the law (Lenaerts 1991). In *Gitlow v State of New York* the Supreme Court extended to the States all limitations applying to the Federal Government contained in the Bill of Rights.[174] The American Bill of Rights was the result of a constitutional federal process in which the Federal Government and the Supreme Court played a fundamental role in extending the protection of human right to all States. In the Community until now the process

[174] 268 US [1925], 652.

has been the opposite. It is the Community which has derived its protection of fundamental rights from the constitutional traditions of the Member States. The Member States' legal orders remain the main source for the protection of fundamental rights, while the Community, like in the case of citizenship rights, performs a role, which is merely complementary.

The new 'human rights procedure' introduced by Article Fa - TEU of the Amsterdam Treaty falls short of imposing Community human rights standards upon the Member States on the model of the US Constitution. The principal difference is that under US law the Bill of Rights became enforceable by individuals in state and federal courts against any infringing State, while Article Fa simply gives to the Council the power to sanction a Member State found in a serious and persistent breach of one of the principles on which the Union is founded. Action by the Union will intervene only in extreme cases and only after a series of fundamental rights violations, where no rights are granted to individuals under Community law against violation of fundamental rights by Member States out of the scope of Community law. In such cases individuals would have to rely on national law and eventually on the ECHR directly.

The Chapter on fundamental rights and non-discrimination of the Amsterdam Treaty includes also three Declarations to the Final Act and some other provisions dealing with non-discrimination (Article 6a EC) and data processing (213b EC). Article 6a gives to the Council the power to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The content and the meaning of Article 6a were considered in Chapter V, dealing with Union citizenship. Article 213b has been inserted to complement Article 213 EC, which gives to the Commission the power to collect information and carry out any checks required for the performance of the tasks entrusted to it. According to Article 213b(1) 'from 1 January 1999, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty.' Paragraph (2) also requires that, before the date referred to in paragraph one, the Council 'shall establish an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies and shall adopt any other relevant provisions as appropriate.'

The Amsterdam Treaty also modifies Article 2 and 3 of the EC Treaty, dealing respectively with the objectives and with the activities of the Community. 'Equality between men and

women' has been included among the objectives listed in Article 2 EC, while according to a new paragraph of Article 3 EC 'in all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.'

The Declarations to the Final Act deal respectively with the status of churches and non-confessional organisations, the abolition of the death penalty, and persons with a disability. The first Declaration commits the Union to respect and not to prejudice the status under national law of churches, religious associations or communities and philosophical and non-confessional organisations in the Member States. The second Declaration refers to Article F(2), which binds the Union to the fundamental rights principles of the ECHR and recalls Protocol 6 of this Convention, which provides for the abolition of the death penalty. It also recalls that a large majority of the Member States has ratified Protocol 6 of the ECHR and that since its signature (28 April 1983) the death penalty has been abolished in most of the Member States of the Union and has not been applied in any of them. Finally in the third Declaration the Member States agreed that 'in drawing up measures under Article 100a, the institutions of the Community shall take account of the needs of persons with a disability.' Article 100a is one of the key provisions allowing the Council to pass measures for the establishment and the functioning of the internal market.

The protection of fundamental right under Community law on the basis of the general principles of Community law as referred to in the case law of the Court of Justice and in Article F(2) of TEU is of a limited nature. There are two main limits to the current Community protection of fundamental rights: (1) lack of a written bill of rights; (2) lack of protection against abuses of Member States in areas outside Community competence.

The first limit is concerned with legal certainty. Only a codified charter of rights can guarantee certainty and continuity in the protection of fundamental rights. The general principles of Community law have the advantage of flexibility, especially when it becomes necessary to protect new fundamental rights, which were not considered such when the charter was drafted. However, they present problems of uncertainty when it is necessary to balance a fundamental right of the individual against the public interest, in order to create an exception to that right. In this case a codified bill of rights can provide in advance for exceptions to some less fundamental human rights in the general interest of the public, without the risk of upsetting the legitimate expectations of the holder of the right. The codification of the Court of Justice's jurisprudence in Articles F(2) and L of TEU (as

amended by the Amsterdam Treaty) represent an improvement with respect to legal certainty, but it still incorporates fundamental rights codified in other jurisdictions (ECHR and Member States) through the general principles of Community law, rather than incorporating or creating an EC bill of rights.

The second limit concerns the problem of protection of fundamental rights in a composite legal order. Both the case law of the Court of Justice and the Treaty Articles on fundamental rights (F and L - TEU) deal with the protection of fundamental rights only within the field of application of Community law. Article L - TEU limits the jurisprudence of the Court on Article F(2) to actions by the Community institutions (*administration communautaire directe*), while the case law of the Court reaches also the Member States when acting in the field of Community law (*administration communautaire indirecte*).[175]

Regarding the *administration communautaire directe*, fundamental rights protection is granted only by the European Court of Justice through Article F(2) and the general principles of the law. National courts are excluded, due to the principle of supremacy of Community law and the ECHR Court has no competence, as the Community is not a Member of the Convention. With respect to *administration communautaire indirecte*, competence is shared between national courts, European Court of Justice (according to its own jurisprudence, but not according to Article L - TEU) and the ECHR Court. The latter is competent because acts of *administration communautaire indirecte* are acts of the Member States, who are parties to the Convention individually. Regarding acts of the Member States coming within their exclusive competence, protection of fundamental rights is ensured only at the national level and via the ECHR. In *Cinéthèque* the Court of Justice stated that it has no power to apply its human rights catalogue, as derived from the general principles of Community law, to actions by the Member States in areas coming 'within the jurisdiction of the national legislator'.[176]

This position has been questioned by Advocate General Jacobs in the Konstantinidis case,[177] who has argued that:

> 'a community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59 EEC is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will treated in

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[175] Case 5/88, *Wachauf*, [1989] ECR 2609; see also case C-2/92, *Bostock*, [1994] ECR I-955.
[176] Joined cases 60 and 61/84, *Cinéthèque v Federation Nationale des Cinémas Français*, [1984] ECR 2605.
[177] Case C-168/91, *Konstantinidis v. Stadt Altensteig-Standesamt*, [1993] 3CMLR.

> accordance to a common code of fundamental values, in particular those laid down in the European Convention on Human Rights.

According to Mr Jacobs' Opinion in Konstantinidis The Community and the European Court of Justice would have human rights jurisdiction on all acts of Member States (including those coming within the exclusive national competence) as long as they affect an EC national who has exercised his right of free movement. The only acts which would continue to escape the jurisdiction of the Court of Justice would be those within the exclusive competence of a Member State, which only affect the nationals of that State (who have not exercised the their right of free movement across the EU). The Court of Justice, however, did not rule on the fundamental rights issue raised in Mr Jacobs' Opinion and decided the case on different grounds, as the rules in question also violated the prohibition on non-discrimination on grounds of nationality of Article 7 EEC (now 6 EC).

Another issue related to the protection of fundamental rights under Community law is that of the exceptions which can be made to some less fundamental rights for reasons of public interests. The Court of Justice has dealt with this issue mainly by referring to the constitutional traditions of the Member States via the general principles of Community law. In *Nold v Commission* the Court recognised the right to property and the right to the free pursuit of an economic activity as fundamental rights protected by Community law. However it held that, differently from other fundamental rights, they cannot be regarded as absolute and unqualified entitlements and that must be 'justified by the overall objectives pursued by the Community.'[178] In *Hauer* the Court of Justice found that a Community measure, alleged to have infringed the right to property and the freedom to pursue a trade or profession, was justified in the general interest and could benefit from an exception to these rights.[179] The Court this time referred to similar provisions in the constitutions of some Member States, where exceptions are provided in the general interest to less fundamental rights like the right to property or the freedom to pursue an economic activity.[180]

However, in the context of a Community of fifteen Member States and likely to grow in

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[178] Case 4/73, *Nold v. Commission*, [1974] ECR 491.

[179] Case 44/79, *Hauer v Land Rheinland-Pfalz*, [1979] 3727.

[180] See, for example Articles 41, 42, 43 and 44 of the Italian Constitution, which recognise the freedom to pursue an economic activity and the right to property, but at the same time provide for general limitations (Arts. 41, 42) and eventually expropriation in the public interest of public utilities in private hands and of private land (Arts. 43, 44).

the near future, the Community public interest which might require the sacrifice of some fundamental rights can be quite different from that considered in the constitutional traditions of the Member States. For this reasons O'Leary (1995) has noted that the Court of Justice, in striking the balance between individual right and public interest, might be called to solve a different equation than a single Member State. The Court might consider as matters of general interest issues such as the integrity of the single market or the necessity to ensure fair competition within the Community, which would not be taken into account as general interest exceptions in a single Member State.

O'Leary also argues that the creation of general interest exceptions to fundamental rights by the Court of Justice poses a problem of democratic legitimacy. If on the one hand in the Member States the general interest which can take precedence over individual rights has been democratically agreed upon, either because it is stated in the constitution or because the Court which finds it operates in the context of a democratic constitutional system, on the other hand the European Court of Justice in its operation of balancing Community interests and individual rights is not supported by a democratic constitutional framework.

3.2 ECHR accession and Treaty catalogue

Considering the limitations of the existing Community mechanisms for the protection of fundamental rights, it would be desirable to introduce further reforms leading to a more coherent and complete fundamental rights framework. The possibility of completing the Community fundamental rights framework by accessing the ECHR seems to be the most realistic, as it builds on the experience of the ECHR, and does not require major constitutional changes beyond the structure of the Maastricht Treaty. Human rights would be protected by the ECHR mechanism, while social and political rights would continue to be a feature of the more restricted European Community.

If the catalogue of political rights of Article 8 to 8e EC was extended to include wider political, social,[181] environmental and consumer rights, it could take the form of a charter of

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[181] In the case of many social rights, EC protection would imply a large reallocation of resources and a correspondent growth of the EC budget, unless an approach aiming at 'uniform protection' of social rights within the Community was followed, rather than an approach aiming at 'central protection'. The first approach is likely to gather more consensus among the richest Member States, as it requires the same standards of social protection and the same patterns of redistribution within each Member State, without need for transfer of

rights of citizenship *strictu sensu*, which are exclusive to EU citizens. Technically this could happen through Article 8e EC, which allows for the extension of the catalogue by strengthening the existing rights or by adding new ones. Those rights which instead are granted to all human beings regardless of citizenship, but which are also an important element of citizenship, would be enjoyed by EU citizens together with citizens of third countries under the ECHR legal order.

The accession of the ECHR would solve the problem of the limited protection of fundamental rights in the EC legal order, which was partly addressed by European Court of Justice in its human rights jurisprudence and by the Amsterdam Treaty amendments. As all Member States are part of the Convention, fundamental right issues of *administration communautaire indirecte* (Member States acting in the field of action of Community law), are already covered by the jurisdiction of the Court of Human Rights. Those issues are also covered by the constitutions of the Member States, when they provide for human rights protection, and by the general principles of Community law. If it is alleged that a fundamental rights has been violated in the implementation of a Community measure by a Member State, the individual concerned has the chance to appeal to Strasbourg (ECHR), if both the national justice system and the European Court of Justice fail to recognise his right.[182]

On the other hand, as the Community is not a Member of the Convention, the compatibility of acts of Community institutions (*administration communautaire directe*) with fundamental rights cannot be examined by the ECHR, nor it can be examined by national courts against national human rights principles, because of the principle of supremacy of EC law over national law. The European Court of Justice is the court of last instance with respect to all acts of Community institutions, regardless of whether they impinge on human rights or not. This situation has led the Court of Justice to develop its jurisprudence on fundamental rights and to guarantee human right protection from acts of *administration communautaire direct* under the general principles of Community law.

Accession of the ECHR by the EC would have the advantage of the more legal certainty provided by a catalogue of human rights in the EC legal order, with respect to a system based on the general principles of the law. However, this solution presents a few legal and

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resources from rich countries to poor ones. However, common high standards of social protection without central redistribution of resources could worsen the economic performance of the poorest countries.

[182] All member States have accepted the right of individual complaint under article 25 of the ECHR.

procedural problems and some inconveniences in the context of the creation of a Community constitutional citizenship.

A strictly legal difficulty is that the Community might be prevented from joining the Convention by the fact that it is not a state under international law, and only states can be part of international treaties. This problem can be solved by adding a protocol to the ECHR, especially providing for membership of the Community. The Council of Europe has declared that there is no legal obstacle to the accession of the Community to the Convention and the European Commission, in its request to the Council to start negotiations for accession in 1990, has noted how 'detailed consideration of the legal problems accession might create shows that there are no major obstacles to warrant postponing it.'[183]

A procedural and constitutional problem would be caused by the fact that the European Court of Justice would see its authority eroded as supreme Court in the Community legal system in the field of fundamental rights. A solution to this problem has been suggested by Lenaerts, who proposes the establishment of a system of preliminary rulings between the Court of Justice and the Court of Human Rights in Strasbourg. In a procedure similar to that of Article 177 EC, the Court of Justice would be bound by the precedents of the Court of Human Rights and would refer issues of human rights when no such precedents exist. This could be realised by an Article in the Treaty authorising the Court of Justice and the Court of First Instance to request a preliminary ruling to the Court of Human Rights, and by a parallel provision in the protocol to be attached to the ECHR on occasion of the accession (Lenaerts 1991).

Another obstacle to the accession of the EC to the ECHR was the opposition of some Member States, in particular the United Kingdom. The reason why the UK has so far vetoed any proposal of accession to the ECHR must be found in the relation between the UK legal system and international law. The respect and the application of international law in the UK takes place through a dualist system; international law has to be translated into national legislation to have any effect in the domestic sphere towards individuals. Monist systems on the other hand provide for automatic adoption by the domestic legal system of international law. With respect to the ECHR the right of individual petition of article 25 is enforceable by UK citizens, but the ECHR is not part of the UK legal system. EC law on the other hand is

[183] Bull. EC 10/1990, p. 74.

not treated like international law and is part of the UK legal system, because of the enabling provisions of the 1972 European Community Act. If the Community were to access the ECHR, the fundamental rights covered by the ECHR would become part of EC law and indirectly of the UK legal system.[184] By opposing accession the UK was therefore trying to avoid what has been called the 'bill of rights from the back door scenario' (Twomey 1994). The main reason for this concern on the part of the UK, was that, in absence of a UK written constitution, a European bill of rights, even if mediated through the means of the ECHR, would compromise UK national sovereignty, at least in terms of the loyalty linked to the protection of fundamental rights. This situation has changed after the election of the Labour government in London in May 1997. In their electoral manifesto the Labour Party undertook to incorporate by statute the ECHR into UK law so as to allow individuals to enforce these rights in national courts. As a logical consequence it appears that the UK government will drop its opposition to accession of the ECHR by the European Community.

Regarding the relationship between fundamental rights and European citizenship, the protection of fundamental rights under the ECHR presents two main inconveniences. The first concerns the lack of protection of some 'less fundamental human rights' under the ECHR, which in the constitutional traditions of the Member States and in Marshall's model of citizenship come under the larger category of civil rights or negative liberties. The second drawback is the interference of the ECHR in the constitutional process of the Community and in the role that fundamental rights could play in the emergence of a European citizenship and identity.

It has been noted above that if the Community acceded to the ECHR for the purpose of protecting fundamental human rights, social and political rights would continue to be protected in the catalogue of Union citizenship rights of the EC Treaty. The same should be possible for other potential rights of citizenship such as environmental and consumer rights, which in incomplete form are already present in other Sections of the Treaty. The rights of the individual which would be left out of this framework are those 'less fundamental human rights', which are protected in the constitutions of some Member States under the general category of civil rights, and which have been protected by the Court of Justice through the general principles of Community law. Among these rights, which normally are not protected

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[184] In a sense the ECHR is already part of the EC legal order, but only indirectly through the means of the general principles of Community law. See, Article F(2) - TEU.

under international Conventions such as the ECHR, there are: rights of defence for legal persons,[185] rights of defence during administrative proceedings, including the right to legal representation,[186] and the lawyer-client privilege with respect to correspondence.[187]

It has been suggested that, if on the one hand the Community could share the protection of fundamental human rights with other non-EC European countries, which are members of the Council of Europe, on the other hand it could provide higher standards of protection within its legal system by recognising some less fundamental human rights. This could continue to happen through the means of the general principles of the law, which have the advantage of greater flexibility than a fixed catalogue of rights, especially with respect to new and less fundamental rights which are still being developed. In this perspective the general principles of Community law would perform a function similar to the Ninth Amendment to the American Constitution, which states that 'the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people' (Lenaerts 1991). The role of the Ninth Amendment is to keep open the category of negative liberties (civil rights), which are residual of the powers conferred upon the government and should not be rigidly limited by a written bill of rights.

The other major drawback of the accession to the ECHR is that although the accession would solve the problem of human rights control over the acts of *administration communautaire directe*, it would not create a uniform protection of fundamental rights in the EC legal order. Fundamental rights affected by acts of *administration communautaire directe* and *indirecte* would be protected by a complicated machinery involving the national courts, the Court of Justice and the Court of Human Rights, with negative consequences on the costs and the timing of judicial protection. As the Court of Human Rights would become the supreme judge in the field of fundamental rights, it would not be possible to speak of an EC constitutional protection of those rights. The constitutional competence of the Community and of the Court of Justice would be limited to citizenship rights and less fundamental rights not protected by the ECHR. It has already been considered above how this would also erode the authority of the Court of Justice as supreme court in the EC legal order.

The constitutional consequences for the Community would be even worse in the case of

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[185] Case 374787, *Orkem v Commission*, [1989] ECR 3283; and joined cases 46787 and 227/88, *Hoechst v Commission*, [1989] ECR 2859.

[186] Case 115/80, *Demont v Commission*, [1981] ECR 3147.

[187] Case 155/79, *AM & S v Commission*, [1982] ECR 1575.

action by Member States in fields of exclusive national competence. This action would remain subject to control by the national courts and in the ultimate instance by the ECHR. The issue of the respect of fundamental rights by Member States, which had played such an important role in the American federal process, would remain out of the Community legal order, and no Community constitutional protection would be afforded to EU citizens in this area. The potential effect that fundamental rights could have in the shaping of a common European identity and in the constitutionalisation of the Community would be partly lost, as those rights would be part of an exclusive relationship between the Member States and the ECHR in areas out of the scope of Community law. Respect of fundamental rights in general would be derived from membership of the ECHR, not of the Community, and this is hardly encouraging if one looks at the records of some countries with respect to implementation of ECHR rulings.

Following a request from the Council in June 1994 the Court of Justice has delivered an Opinion on the compatibility with the EC Treaty of accession to the ECHR by the Community.[188] The Court has ruled that, 'as Community law now stands, the Community has no competence to accede to the European Convention.' In fact, the Court recognised that accession to the European Convention would require the integration of two separate systems for the protection of human rights and that such changes 'would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235,' which was chosen as the legal basis for the accession. Accession to the ECHR could only happen by means of Treaty amendments. It appears that the Court has not ruled out accession of the ECHR by the Community, but it has simply referred the matter to the 'constitutional legislator', and in particular to a future intergovernmental conference (IGC), which would still have the option of choosing between the accession of the ECHR or an independent fundamental rights charter.

3.3 An EC constitutional charter

An alternative for the protection of fundamental rights in the EC legal order and for development of a complete European citizenship is represented by the drafting of a complete

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[188] Opinion 2/94 of March 28, 1996. The request was made by the Council of the European Union acting under Article 228(6) EC.

EC constitutional Charter, including, in an organic fashion, civil, political and social rights. Civil rights would cover fundamental and less fundamental human rights, like in the constitutions of some Member States. This operation appears more difficult than the simple accession of the ECHR by the EC and the gradual development of the other rights in the Treaty. The drafting of an EC constitutional Charter more overtly realises a constitutional operation, which is seen as taking over important parts of state sovereignty, linked to the loyalty deriving from protection of individual rights at the level of the nation state.

An important starting point for the drafting of a Charter of fundamental rights of the man and the citizens under EC law is the Declaration of Fundamental Rights and Freedoms adopted by the European Parliament on 12 April 1989. This Declaration sets a good example for a catalogue of fundamental rights to be inserted in the EC Treaty. However, it is limited to the field of human rights and does not include rights of citizenship. Moreover, Article 25(1) states: 'This Declaration shall afford protection for every citizen in the field of application of Community law,' expressly excluding any competence on human rights in all other fields of actions of Member States.

An EC constitutional Charter including protection of fundamental rights would meet the request formulated by the German Constitutional Court, after the Court of Justice had afforded protection of fundamental rights through the general principles of Community law in the *Internationale*[189] case. The German Constitutional Court, not being satisfied with the solution proposed by the Court of Justice (general principles of Community law), refused to accept the principle of supremacy of EC law in absence of a codified catalogue of human rights in Community law. In advancing this kind of solution the German court had probably in mind the model of the German Constitution, where human rights are protected together with other less fundamental rights and with the rights of citizenship.

A Charter would build on the existing jurisprudence of the Court of Justice in matters of fundamental and less fundamental human rights,[190] and on the political and social rights already protected under EC law. If the competence in the field of human rights is handed over to the Community, it should also involve respect for human rights by the Member States in fields that are still outside the scope of Community law. A similar principle was established by the US Supreme Court in *Gitlow v New York*, which bound the States and the Federal

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[189] Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125.
[190] *Supra*, Notes 172, 175, 185, 186, 187.

Government to the same Bill of Rights (*supra*).

The natural appointment for this work of re-codification of existing rights, and granting of new ones, was the Intergovernmental Conference (IGC) of 1996/7, which had to revise the Maastricht Treaty. It was considered above and in the previous Chapter (V) how the Amsterdam Treaty, which concluded the 1996/7 IGC, introduced some new disciplines in the field of citizenship (Articles 6a, 8d(3), and 191a) and fundamental rights (Article F, Fa and L), but judged it still premature to deal either with the issue of accession of the ECHR by the EC or with the codification of an EC independent bill of rights, bringing together human rights and citizenship rights.

4. European nationality

The sphere of nationality (external membership of the state) is much less developed under Community law than the sphere of citizenship. The catalogue of rights of Union citizenship makes nationality of the Member States the connecting factor for Union citizenship, but it does not impinge on the competence of the Member States to determine who are their own nationals. This is due to the fact that nationality, affecting directly the determination of the members of the community, is considered to be more central to the issue of sovereignty than citizenship, which instead affects sovereignty in terms of participation of the citizens in the life of the national community.

The fundamental elements, which would support a status of nationality parallel to a status of internal citizenship are: (a) Union autonomous definition of its own nationals; (b) common foreign policy; (c) common defence policy; (d) passport union; (c) common immigration policy; (e) Union diplomatic protection.

The issue of diplomatic protection being an element of nationality rather than of citizenship was dealt with in Chapter V on citizenship of the Union. Here it is worth remembering that the insertion of a right of nationality in the EC Treaty, albeit of complementary nature and exercised through the means of the Member States delegated protection, is of symbolic importance, were the Union to move in the field of nationality. It also creates an opportunity for the Union to acquire international legal personality through international customary law, if it participates in the negotiations with third countries which are necessary to implement Article 8c EC. Immigration policy has been integrated into

Community competence as a consequence of the abolition of the internal borders by the Amsterdam Treaty (*infra*, Chapter VII). Common foreign and security policy and passport regulation are the object of intergovernmental cooperation and cannot support for the time being a common status of nationality as the relevant competences and citizens' loyalties remain at the national level. The analysis of European nationality in this Chapter focuses on point (a), which concerns the method by which the Union could gradually move into the field of nationality and acquire the power to define its own nationals and citizens.

The most direct solution to the problem of nationality would have been an autonomous definition of Union citizenship in the EC Treaty. In this manner the Union would have acquired the competence to define its own citizens with consequences in the internal as well as in the external sphere. In the external sphere it would have meant the creation of a Union nationality parallel to the Member States' one. However, as there was no intention on the part of the Member States to create an independent status of Union citizenship/nationality, the mechanism chosen by the Treaty on European Union was that of linking EU citizenship to nationality of the Member States. This operation has proved perfectly safe with respect to citizenship, where the link between EU citizenship and nationality of the Member States has confined EU citizenship to certain areas and has made it a complementary status of national citizenship. Moreover, in the field of citizenship the link had already been tested before TEU in the EEC Treaty, where all rights conferred upon economic citizens were mediated by the status of national of the Member States. This link, however, presents some risks in the external sphere, as the close relationship between EU citizenship and Member States' nationality might create grounds for the acquisition of competences by the Community in the field of nationality. The threat to Member States' nationality is perceived in the Declaration of the Head of State or Government meeting within the European Council of Edinburgh,[191] which, if on the one hand stresses the complementary of EU citizenship to national citizenship, a consequence of the 'nationality link', on the other hand it is anxious to clarify that such link does not impinge on the exclusive competence of the Member States to determine their own nationals.

A more gradual approach to nationality under EC law comes from a particular interpretation of the link between EU citizenship and Member States' nationality, which

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[191] *Supra*, Note 154.

leaves margins for the expansion of Community competence in the sphere of Member States nationality. The final result would still be that of creating an independent status of Union citizenship/nationality, but the way followed to achieve this would consist in the Union taking over Member States nationality, rather than creating a new independent status from the outset. The major advantage with respect to the direct creation of an independent Union citizenship/nationality is that such method would build on the premise of the link between EU citizenship and Member States nationality created by TEU, instead of trying to eliminate it. This approach, however, like the previous one, would only be viable in presence of the political will of the Member States, as the Court of Justice does not have the power to create a Union nationality on its own by interpreting existing provisions of Community law. If the Member States were ready to surrender to the Community some fundamental elements of sovereignty concerning nationality, there would be margins for the Court of Justice under EC and international law to expand Community competence in the field of Member States nationality.

The insertion of the catalogue of citizenship rights in the EC Treaty, rather than in the intergovernmental part of TEU is of great importance, because it gives jurisdiction to the European Court of Justice on the provisions on citizenship of the Union. The Commission in its First Report on Citizenship of the Union of December 1993 seems to provide grounds for extensive interpretation by the Court of Justice of the new provisions by saying that the rights flowing from citizenship of the Union:

> 'are to be construed broadly and exceptions to them are to be construed narrowly, in accordance with the general principles of Community law recognised by the Court of Justice. Thus, in so far these provisions relates to rights which were already laid in Community law, the status of these rights has now been fundamentally altered.'[192]

This statement by the Commission can be contrasted with its previous position on the matter of nationality, which excluded any competence of the Community.[193] Although the Report does not imply any new competence in the field of nationality, it encourages a broad constitutional interpretation of the citizenship provisions by the Court of Justice. In contrast,

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[192] *Supra*, Note 151.

[193] See, answer given to written question no. 1674/87 from a Member of the European Parliament, OJ C123/15, 10/5/88.

in the analysis of Article 8(1) EC made in the same report, the Commission emphasised the exclusive competence of Member States in the field of nationality.

The following Sections focus on the influence of international law and Community law on Member States' exclusive competence in the field of nationality. This analysis is conducted in relation to a possible acquisition of competence by the Community in the determination of the nationals of its Member States.

4.1 Nationality under international law

International law does not confer upon states an absolute competence to determine their own nationals. The principle contained in Article 1 of the Hague Convention, that 'it is for each State to determine under its own law who are its nationals', is limited by the second sentence of the same Article, which states that a nationality law will be recognised by other states only 'in so far as it is consistent with international Conventions, international custom, and the principles of law generally recognised with regard to nationality.' In the *Nottebohm* case the International Court of Justice found that, although states are at a liberty to determine who are their nationals under domestic law, under international law other states can refuse to recognise the status of nationality if this is not based on a 'genuine link or true bond of attachment'.[194] In the *Tunisia and Morocco* case of 1923 the Permanent Court of International Justice affirmed that the right of states to determine their own nationals could be restricted by obligations which they might have undertaken towards other states, and added:

> 'the question of whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the developments of international relations. Thus in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within the reserved domain.'[195]

This opens an interesting perspective under international law with regard to acquisition of competences in the field of nationality for the Union. In 1923, when the case was decided, the nation state was the dominant form of political organisation, and the only existing international bodies were of purely intergovernmental nature. A supranational structure such

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[194] *Supra*, Note 169.
[195] *Tunisia and Morocco Nationality Decrees, P.C.I.J.*, Ser. B, Advisory Opinion no 4 [1923].

as the European Community, where a transfer of sovereignty from the Member States to the centre has taken place, could be seen as representing that 'development in international relations', which could impinge on the state reserved domain of nationality.[196]

4.2 Nationality under Community law

Before and after the Treaty on European Union Member States have maintained a very rigid position on their exclusive competence to determine their own nationals. Two Member States, Germany and the United Kingdom, have adopted Declarations defining the categories of their nationals for the purposes of Community law.

In the case of Germany 'all Germans as defined in the Basic Law of the Federal Republic of Germany shall be considered as nationals of the Federal Republic of Germany' for the purposes of Community of law. 'Germans' in the Basic Law were not only actual German citizens, but also all the citizens of the former Democratic Republic of Germany and certain expellees of German stock. The result of the German Declaration was to extend by virtue of an ethnic criterion the status of 'Community citizen' to millions of citizens of third countries, who had no connection with the Community. Community law played no role in this context, nor did it when East Germany was re-unified with West Germany, because nationality law is a matter of exclusive national competence.

The problem was the opposite with the Declaration made by the United Kingdom on accession to the Community in 1972. For immigration reasons the Declaration adopted a restrictive notion of nationals for the purposes of Community law, by including only those nationals who had the right of abode to the United Kingdom, mainly British citizens according to the 1981 Nationality Act. This of course created discrimination among different categories of UK nationals, again with no margin of intervention for Community law. It has been argued that if Portugal, which grants free movement to its nationals from Macao, decided to grant nationality to all Brazilians, more than one hundred million new persons would acquire the status of EU citizens (O'Leary 1992). Looking back at the experience of the German and British Declarations is difficult to imagine how Community law could play a role in such a circumstance.

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[196] See, Opinion 1/91, where the Court of Justice has affirmed the special nature of the EEC Treaty and constitutional standing of the Community.

According to Hartley 'since the criterion of nationality was adopted by a rule of Community law, it is open to Community law to make exceptions to it' (Hartley 1978). This should be enough to allow for the intervention of the Community in matters concerning nationality law, when they affect the field of Community law. The European Court of Justice, as a consequence of the principle of supremacy of EC law over national law, has constantly held that provisions of domestic legislation cannot be used to prevent the applicability of the Treaty rules on freedom of movement. However, despite a few judgments in which the Court has dealt with matters very close to Member States nationality law,[197] it has never ruled on the compatibility of nationality law with the EC Treaty. In *Micheletti*,[198] after having confirmed that Member States have an exclusive competence on the determination of their own nationals, the Court of Justice added in an *obiter dictum* that such a competence has to be exercised in respect of Community law. Although this is in line with the rules of international law referred above, the Member States and the Commission seem to take a more restrictive view of the relationship between EC law and Member States nationality.

The Commission has constantly held that the Community has 'no competence with regard to the conditions for acquisition of nationality' of a Member State[199] and in its First Report on Citizenship of the Union, despite a call for a broad interpretation of the citizenship provisions, it has stated that the declaration on nationality of a Member State attached to the TEU 'keeps with the judgment of the Court of Justice in *Micheletti*', where it reserves the domain of nationality law for the Member States.[200] If on the one hand this is true with regard to the rationale in *Micheletti*, that Member States retain the competence to determine their own nationals, on the other hand the Declaration on Nationality of TEU does not take into account of the *obiter dictum* which establishes the principle of respect of Community law as the criterion for the exercise of Member States' competence on nationality.

It has been argued that the Declarations on nationality which have followed TEU[201] restrict the applicability among the Member States of the principle of international law of the *Nottebohm* case, which establishes that states can question the effectiveness of another state's

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[197] See, in particular, case C-376/89, *Panagiotis Giagounidis v Stadt Reutlingen*, [1991] ECR I-1069 and case 21/74, *Airola v Commission*, [1975] ECR 221.

[198] Case C-369/90, *M V Micheletti and others v. Delegacion del Gobierno en Cantabria.*

[199] *Supra*, Note 193.

[200] *Supra*, Note 151.

[201] Respectively the Declaration attached to the Treaty on European Union, and the Declaration of the Edinburgh summit, *supra*, Note 154.

determination of nationality, if this is not in accordance with the requirement of 'genuine link or true bond of attachment' (O'Leary 1992). The positions expressed by the Member States in the Declarations and by the Commission in its First Report on Citizenship of the Union seem also to be in contrast with the rule of international law of Article 1 paragraph two of the Hague Convention, which subordinates the exclusive competence of states in the field of nationality to obligations undertaken under international law, and with the *obiter* in *Micheletti*, which impose the respect of Community law.

The *obiter dictum* in *Micheletti* and the provisions of international law on nationality raise the issue of whether Member States have undertaken any obligations under Community law concerning nationality. If this was the case, it might compromise Member States' exclusive competence in the field. D'Oliveira (1993) suggests that, although there is no express undertaking in Community law concerning nationality (especially in the light of the Declarations which have followed the various Treaties),[202] there might be 'implied undertakings concerning the architecture of the law of nationality of the Member States.' Article 5(2) EC, which says that the Member States 'shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty', could provide ground for limiting Member States' competence in the field of nationality, although it has never been used for this purpose.

It has been argued that an obligation which could limit the national exclusive competence in the field of nationality is the respect of fundamental human rights. The Advocate General in *Airola*[203] affirmed that the Community would be bound by Member States' determination of nationality, 'so long as it is not repugnant to a fundamental human right' (O'Leary 1992). This limitation of national competence based on the respect of fundamental human rights should be regarded as a restriction deriving from international law according to Article 1 of the Hague Convention, rather than an undertaking taken under EC law. The Court of Justice has extended its case law on fundamental rights to cover the whole field of application of Community law, but it has stated in *Cinéthèque* that it has no power to examine the compatibility with its human rights catalogue of areas of law, which fall within the

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[202] The German Declaration was drafted after the Treaty of Rome in 1957 and the British Declaration after the United Kingdom Act of accession in 1972. TEU was accompanied by two Declarations from the Member States (one at the Maastricht Conference and the other at the Edinburgh Council) and by a Declaration from Denmark.

[203] Case 21/74, *Airola v Commission*, [1975] ECR 221.

jurisdiction of the national legislator.[204] Nationality law is clearly one of those areas, and until a complete catalogue of fundamental rights is included in the Community legal order, limitations of nationality laws deriving from human rights obligations will remain a matter of international law rather than EC law.[205]

It has been noted that the power to define who belongs to a Member State is the most fundamental element of state sovereignty. If the Community acquired such competence it would probably no longer be possible to speak of Member States any more (d'Oliveira 1993). The Community would then move towards a state-like form modelled on the structure of its nation state members. This would be the result of the exploitation of the link between EU citizenship and nationality of the Member States, rather than the building an independent European citizenship. There are two fundamental features of this process, which should be looked at: (1) the issue of transfer of sovereignty by acquisition of definitional power; and (2) a federal process with national features.

5. Definitional power and transfer of sovereignty

The acquisition by the Community of powers in the field of nationality seems to be excluded by the recent Declarations on Nationality of a Member State, which have followed TEU, and by the interpretations given by Commission to Article 8(1), to the TEU Declaration and to the rationale in *Micheletti*. However, in case the Member States agreed to go ahead with further integration and to hand over sovereign powers in the field of nationality to the Community, the current status of international law and the jurisprudence of the Court of Justice (especially the obiter in *Micheletti*) would provide grounds for creating a European nationality by means of acquisition of 'definitional power' by the Community in the field of Member States' nationality. In presence of the political will of the Member States, this would represent a more gradual and more 'national' approach to the realisation of a full European citizenship/nationality, than the creation of an independent status from the outset. If in a

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[204] *Supra*, Note 176.

[205] An interesting perspective has been opened by the new Article Fa - TEU, introduced by the Amsterdam Treaty, which gives to the Council the power to sanction a Member State found in a serious and persistent breach of one of the principles on which the Union is founded, which are listed in Article F(1). If a Member State's nationality law was found to be in breach of one of the principles of Article F(1) (liberty, democracy, respect for fundamental rights and freedoms and the rule of law), the Council would have the power to sanction the Member State according to Article Fa.

similar context the Community were to win, mainly through the jurisprudence of the Court of Justice, the power to define who are the nationals of the Member States for the purposes of Community law, a major transfer of sovereignty from the nation states to the Community would take place in the external sphere of nationality. The transfer would happen without severing the link between nationality of a Member State and Union citizenship, but rather by exploiting this link. In fact, it would result in the creation of an independent Union nationality parallel to Union citizenship, as the Union would have the power to determine who are its own nationals with reference to third countries.

This type of transfer of competence (and sovereignty) is not a novelty under EC law; a similar pattern was followed for the free movement of goods in the case law regarding Article 30 EC. The Court of Justice's extensive and teleological interpretation of Article 30 in *Dassonville,*[206] including in the prohibition against quantitative restrictions any obstacle which 'actually or potentially, directly or indirectly hinders trade between Member States', had the effect of bringing under Article 30 all national measures which altered the patterns of inter-state trade, even without being directly or indirectly discriminatory. It was then up to the Court of Justice to grant exemptions under the *Cassis*[207] rule, if one of the mandatory requirement (reasons why indistinctly applicable rules which hinder inter-state trade can be justified) were satisfied. With this system the Community has maintained the definitional power to decide which measures and for what reason can be exempted from the prohibition of Article 30 EC. The autonomy of EC law in controlling Member States' action has allowed the Community to trace the border line between the requirements of the Common Market (deregulation) and the standards of consumers and environmental protection protected by Member States' legislation. Such definitional power would belong to the Member States, and not to the Community, if they could decide that some indistinctly applicable rules do not come under Article 30 in the first place (Reich 1994). Regarding Article 30 EC the Court of Justice has moved in the direction of handing some definitional power back to the Member States in its recent decision *Keck and Mithouard,*[208] where it has found that some indistinctly applicable measures were out of the scope of Article 30, although they affected the total volume of trade.

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[206] Case 8/74, *Procureur du Roi v. Dassonville*, [1974] ECR 837.

[207] Case 120/78, *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

[208] Joined cases C-267 & 268/91, *criminal proceeding against B. Keck and D. Mithouard*, [1993] ECR I-6097.

If the Court applied a *Keck* approach to Article 48 EC, it would signify that in some areas the Court would be leaving competence to Member States 'for measures affecting the regulation of national life, which were not specifically aimed at national workers, were indistinctly applicable and did not discriminate against migrant workers in law or in fact' (O'Keeffe and Johnson 1994). However, such an approach to Article 48 is substantially ruled out by Article 8a EC, which has constitutionalised the provisions on free movement and residence as rights of citizenship. Thus, if judicial evolution towards nationality can currently be excluded, a regress of the *Keck* type from the current *aquis* in the fields of EU citizenship and free movement of persons seems also highly unlikely.

A pattern similar to Article 30 EC was developed under article 85 EC for the appraisal of agreements restricting competition. The approach of the Commission, partly backed by the Court of Justice, consisted in finding most horizontal and vertical agreements in breach of article 85(1), even when 'economically efficient', and then in granting an exemption under article 85(3), after having conducted a more thorough economic analysis.[209] Also in this case the Community, by retaining definitional power through a central competition authority (the Commission), has subtracted spheres of competences and powers of decision, which otherwise would have been left to market rules (efficiency) or national competition authorities. The major criticism, which has been moved to the Commission in this case, is that its role of central competition authority, retaining large spheres of definitional power under Article 85 EC, is not backed by sufficient human and financial resources in DGIV (the Directorate General dealing with competition policy). This lack of resources undermines the Commission's ability to grant enough individual exemptions for economically efficient agreements under 85(3).[210]

As for the application of a similar method to the definition of the nationals of the Member States and consequently the citizens (nationals) of the Union, it must be repeated that, in the light of the Declarations on Nationality attached to TEU, the Member States do not seem likely to approve any such judicial evolution by the Court of Justice, at least for the time

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[209] The Court of justice went in a different direction and conducted the economic analysis under Article 85(1) EC in case C-234/89, *Delimitis v. Henninger Brau AG*, [1991] ECR I-935, where it found that some vertical restrictions, which were economically efficient, fell out of article 85(1) and did not need an exemption under 85(3).

[210] For an insight in the Commission and the Court economic analysis under article 85(1) and 85(3) see, Korah (1990), pp. 222 ss.

being. Judicial activism by the Luxembourg Court in the field of Community competences has proved most successful in the past when it has enjoyed substantial political support by the Member States.

6. National federalism

The 'legal approach' to European citizenship relies on the definition of citizenship and nationality linked to the experience of the modern nation state. Citizenship refers to the internal aspect of state membership, nationality to the external one (*supra*, Chapter III p. 72). In such context Union citizenship (and nationality) is set to take the place of the national form of membership, but in a context which is legally and politically homogeneous to the nation state. In particular if the Community won the power to define who are the nationals of the Member States, this would lead to a Union nationality and citizenship shaped on the models they have originated from, that is to say the nationality and citizenship of the nation states.

The acquisition of definitional power by the Community on nationality matters would realise a transfer of national sovereignty from the Member States to the Union. This operation would take the form of a federal process, in which Member States give up part of their sovereignty in favour of a central federal authority. However, in such context the federal bargaining process would take place exclusively between the nation states and the central subject. All other kind of associations (regions, provinces, local authorities, groups of individuals and individual citizens) would be excluded. It has been argued that such a privileged contractual relationship between nation states and a future federal state is founded on an Anglo-Saxon model of federalism, where the power is transferred in a one way direction from the nation state to the federal state (Emiliou 1994). Federalism is mainly understood as a centralising process which brings together nation states for the purpose of realising a larger federal nation state, which maintains the same legal and political features of the previous national entities. Such an understanding of federalism in Anglo-Saxon countries relies on the example of the American federal process, and it might be seen as a consequence of an idea of the community where the private sphere of the individual is separated by the public sphere of the government. It is only the public sphere (national government) which is endowed with sovereignty and that as such can transfer this sovereignty to a new (federal) public sphere. This vision of federalism does not overcome the structure of the nation state,

but it is rather a reformulation of the nation state legal and political model at a higher level. The strong opposition which the federal idea encounters in the United Kingdom is often the result of the above mentioned vision, rather than a prejudiced opposition to European integration.[211]

The legal approach is based on the substance of the existing concepts of citizenship and nationality in the nation states and on their extensions in the institutional structure of the Union. The main advantage of this approach is its reliance on concrete experiences of citizenship and nationality, contrary to approaches which define European citizenship from above, according to ideal and sometimes abstract post-national principles. An important drawback, however, is represented by the little attention given to the issue of political identity and belonging in the legally defined new European polity. A post-national political identity might demand other institutions and a different status of citizenship than those dominant in the nation state system. In this perspective the legal approach to European citizenship and the underlying national federalism, which have been considered above, not only could be challenged as patterns of development of European citizenship on their legal merits, but also they do not represent a viable alternative without the support of a common European political identity.

[211] The paradox of the Maastricht Treaty is that it is substantially a 'federal treaty' (though limited in scope), but it never mentions the word 'federal', as this would have determined the prejudicial opposition of the United Kingdom.

CHAPTER VII

EUROPEAN UNION IMMIGRATION POLICY

The implementation of the 'third pillar' of the Treaty on European Union (TEU - Title VI - Justice and Home Affairs) has seen the convergence of the Member States on restrictive common immigration and asylum policies, at least with respect to fundamental principles and lines of action. This would appear as an unexpected development in the light of the fact that 'immigration policy' has always been regarded by the Member States as a matter of national sovereignty and exclusive competence, because of the proximity with issues of membership and citizenship. In the past, and particularly before the Single European Act (1987), the Member States have traced a clear distinction between the rights of free movement of their own nationals, which came under Community competence, and all matters affecting third country nationals, which remained in the sphere of exclusive national competence.

Intergovernmental against Communitarian competence

Despite the emerging of patterns of common immigration and asylum policies, the position of the Member States with respect to the issues of national sovereignty and exclusive competence remained substantially unchanged after TEU. Part VI of TEU did not bring immigration and asylum under Community competence (materially the 'EC Treaty'), but only created mechanisms for improved intergovernmental co-operation among the Member States, which maintained exclusive competence in the fields (Article K.1 - TEU listed immigration and asylum policies as 'matters of common interest'). This was changed by the Amsterdam Treaty of 2 October 1997, which transferred the Schengen rules on the abolition of border controls, immigration policy and asylum policy under Community competence. In this perspective it is to be welcomed that the Amsterdam Treaty brings those policies under

Community competence and therefore under the jurisdiction of the Court of Justice and the scrutiny of the European Parliament.

This Chapter considers the difference between intergovernmental and communitarian approaches to immigration and asylum policies, and how they affect issues of national sovereignty and citizenship regarding the Member States and issues of democracy and fundamental rights regarding third country nationals. Intergovernmental policies tend to be non-transparent in so far as they escape the judicial and parliamentary scrutinies, which characterise national or community policies. It is discussed how most intergovernmental policies are not subject to democratic control by Community institutions and do not provide supranational guarantees for the protection of fundamental rights. Moreover, some of the most recent intergovernmental EU Conventions on asylum and immigration have forced constitutional changes in some Member States, leading to lower standards of fundamental rights protection.

Union policies on immigration and asylum (regardless of their intergovernmental or communitarian nature) should also be flanked by common policies to counter racism and xenophobia, as the message of restrictive immigration policies is often one of exclusion and intolerance of outsiders. Such intolerance and sense of the outsider is often the consequence of the negative images, which are associated with immigration. The Treaty on European Union, like many other national and European legislative instruments, dealt with immigration and asylum policies under the same Title as common policies to counter international drug trafficking, crime and terrorism (Title VI - Justice and Home Affairs). This association might have been dictated by practical reasons (all those issues, like immigration, come under the competence of home affairs ministers and involve border controls and policing), however, the association with policies to counter racism and xenophobia would have the merit of shifting the debate on immigration policies from the negative logic of crime, drugs and terrorism, where it is often relegated, to the positive logic of integration.

Restrictive against liberal immigration policies

Separate from the issue of democracy and fundamental rights is the substance of the emerging EU immigration and asylum policies. Before immigration and asylum policies were brought under Community competence by the Amsterdam Treaty, national ministers agreed at intergovernmental level an highly restrictive approach to immigration policy ('fortress

Europe'). Albeit separate, the issue of 'fortress Europe' is linked to the problem of the democratic deficit of intergovernmental policies (it is still possible to have a democratic 'fortress Europe' immigration policy). Restrictive immigration and asylum policies are more likely to affect the fundamental rights of third country nationals than more open or relaxed policies. In the first case there is therefore, at supranational level, a stronger need for judicial and democratic controls, which are absent in an intergovernmental context.

Arguments concerning scarce economic resources (jobs, welfare entitlements, etc.) and national cultural exclusivness are often advanced at national level as the reasons for rejecting immigrants. There is, however, a set of 'European' arguments, parallel to the national ones, which have been put forward to halt the current migratory flows from the Third World to Europe. Behind the recent European initiatives in the field of immigration there is the idea that a more restrictive immigration policy is essential for the success of the internal market (economic aspect) and of Union citizenship (political aspect). In economic terms 'fortress Europe' protects scarce economic resources for European citizens (jobs, welfare, education, etc.) from competition of third country nationals. In political terms it favours the formation of a closer European identity among 'Europeans', without the permanent cultural threat represented by Third World immigrants. These European economic and political arguments against immigration are just as flawed as the national ones.

The 'European economic' argument against immigration fails to consider that the 'internal market', which has recently seen a steady growth in unemployment, could in the next twenty years or so need those workers, that now are being rejected at the borders in order to protect the European job market. The demographic explosion in the Third World is paralleled by the falling in birth rates in the North of the world, and in particular in Europe. The European Commission estimates that as Europe's population ages in the second decade of the next century, net immigration could be allowed to raise from the current level of 500.000 a year to seven millions (Doyle 1996).

The 'European political' argument against immigration is based on a cultural definition of European identity and citizenship. Like in modern nation states, the exclusion of cultural outsiders could be used to cement a common European cultural identity based on kinship among Europeans (culture, language and religion). However, even without stressing linguistic diversities, it would be very difficult to base a common European identity on 'kinship'. It was argued in Chapter IV that a European political identity and citizenship would have to

accommodate different cultures and traditions within Europe. Internal pluralism would make it impossible to close off the European political community to other cultures coming from non-European countries. It is therefore very difficult to formulate a 'European political' argument against immigration, analogous to the national one, if it is assumed that - differently from the nation state - Europe should evolve as an entirely political community, where political membership eliminates the need for cementing a European cultural identity and citizenship based on the exclusion of cultural outsiders.

External border controls and free travel

Apart from the issue of external border control (access to the European Union), third country nationals, who are already resident in a Member State, cannot move freely within the European Union. There is a strong economic argument, based on the completion of the internal market, calling for the right of free movement of third country nationals permanently resident in the European Union. As an important factor of production, third country workers should be allowed to circulate freely within the internal market in order to avoid distortions of the European labour market. Goods, once having entered the internal market, are free to circulate between Member States, regardless of the fact that they have originated in a non-EU country (Article 9 EC). There is not a similar provisions for workers in the EC Treaty, however, although secondary legislation and the Court of Justice jurisprudence on the matter have limited free movement to EU nationals, Article 48 EC merely refers to 'freedom of movement for workers' without mentioning a nationality requirement.

There are also some significant political arguments in favour of the free movement of permanently resident third country nationals in the EU, relating to the issues of equality with EU citizens, and access to EU citizenship. Last but not least there is a practical argument regarding the abolition of internal border controls for third country nationals travelling between the Member States of the Union. If internal border controls were abolished for EU citizens, it would be practically difficult to maintain them for third country nationals. It is considered how this issue does not involve 'freedom of movement' (which implies rights of travel, residence, access to work and social rights), but just the 'right to travel', which normally allows a short period of residence (three months). Also, freedom of movement and access to EU citizenship (full equality) would be granted to permanently resident third country nationals, while the right to travel would be granted on all third country nationals entering the

Union.

The Amsterdam Treaty has introduced important changes in this area: it grants the right of free travel to third country nationals by providing for the Community abolition of internal border controls within five years and gives to the Council the power to adopt 'measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.'

This Chapter deals with the legal and political framework of European Union immigration policy, by looking at its historical evolution and at the issue of democratic control and individual rights of third country nationals. It focuses on European Union's policies towards third country nationals with respect to their access to the Union (external border control) and to their movement within the Union (internal border control). In the first case it is argued that a more 'democratic' immigration policy is needed,[212] while in the second case (free movement within the internal market) it is argued that the Treaty rules should establish equality between permanently resident third country nationals and EU citizens (with respect to free movement and political rights of citizenship).

1. From exclusive national competence to SEA

In the early years of the Community third country immigrants were not regarded as a competitive threat to EC nationals, but rather as an additional resources to sustain economic growth. The economic crisis and the first oil shock at the beginning of the seventies changed this perception, so that non-European immigrants began to be perceived as a threat to employment and social balance within the Community. The new situation determined a radical change of policies of western European governments towards non-Community immigration. The rise in unemployment in Europe ended the policy of recruitment of foreign guestworkers, which some governments had followed in order to support the economic growth of the previous years with the necessary workforce. In the 1970s recruitment of guestworkers was replaced by national policies limiting the number of third country nationals who could enter western European states for working reasons (economic immigrants). The Paris Summit of 1973 signalled the start of Community interest in the matter of third country

[212] In previous Chapters it was considered that European immigration policy should also be more open.

immigration. The Summit launched the idea of 'special rights' for Community citizens (at the origin of the debate on European citizenship) and suggested common legislation for 'foreigners' (Etienne 1993). This bifurcation between the rights of EU citizens (then 'nationals of the Member States') and the treatment of third country nationals, was the foundation of the current 'fortress Europe' immigration policy and of the exclusion of third country nationals from EU citizenship.

The 1975 Tindemans report on European citizenship took a different approach by advocating rights of European citizenship through the protection of individual rights, the protection of the environment and the general recognition of fundamental economic and social rights with redress through the European Court of Justice (Geddes 1995:203). The emphasis on individual rights, rather than on nationality of a Member State, distinguishes some early proposals on European citizenship from the current bifurcation between EU citizens and third country nationals. It has been noted how the post-war trend towards universally recognised human rights has resulted in the emergence of a concept of supranational citizenship based on 'universal personhood' rather than national belonging (Soysal 1994). In contrast, the current EU citizenship and immigration policy are still founded on national belonging and exclusivity of citizenship rights (reserved for the nationals of the Member States), so that third country nationals cannot benefit from the emergence of a supranational EU citizenship based on universal individual rights.

The development of special rights for EU citizens has been sanctioned by the jurisprudence of the European Court of Justice and by recent EC constitutional reforms: the Single European Act of 1987 and the catalogue of citizenship's rights in the Treaty on European Union of 1993. Third country nationals enjoys two different sets of rights under EC law: (1) rights derived from the relationship with an EU citizen; (2) direct rights under agreements between the EU and third countries. The rights derived from a relationship with an EU citizen are similar to the rights enjoyed by the family members of EU migrant workers, who are EU nationals themselves. However, non-EU family members, who are not spouses or dependent children, do not have a right to access employment in the Member State of residence of the EU migrant worker, on whom they are dependent. In the case of indirect rights, the emphasis is not on third country nationals, but on the EU migrant worker and on his right to family life while moving within Europe.

Direct rights are enjoyed under various co-operation agreements between the Union and

third countries. On several occasions indirect rights have been limited by the European Court of Justice's restrictive interpretation of co-operation agreements. The Court has found that interpretation depends on the nature and the scope of each agreement and on this basis it has denied an equally broad interpretation to provisions in co-operation agreements, which were equivalent to other provisions contained in the Treaty of Rome (in the case of the EEC Treaty the Court has often relied on the *effect utile* of the provision, i.e. teleological interpretation, in order to expand the field of application of Community law).[213] The Court's restrictive interpretation of the provisions conferring individual rights in agreements with third countries must be read in the light of the above mentioned bifurcation between rights of citizenship and treatment of third country nationals. The EC Treaty provisions conferring individual rights have been interpreted in the light of an emerging concept of Community citizenship (even before the citizenship's rights catalogue of TEU), while the rights conferred on third country nationals by association agreements have not benefited from the same teleological interpretation, because they stand out of the context of Community citizenship.

Another major difference between the rights of EU citizens and the treatment of third country nationals is that the first have been granted in areas of increasing Community competences (economic, social and political rights), while external immigration policy and third country nationals were within the exclusive competence of the Member States. The logic of citizenship required a communitarian and democratic approach, while matters of immigration policy have been dealt with at intergovernmental level, in order not to impinge on the sovereign power of the Member States to determine access to the national community. This, however, has proved possible only to a certain extent. The single market created by the SEA, the action of the Commission and of the Court of Justice and more recently the Treaty on European Union and the Amsterdam Treaty have upgraded the intergovernmental nature of European immigration policy, and created areas of Community competence.

In 1985 the Commission issued a Decision setting up a mandatory notification and consultation procedure with respect to migration policies and to the cultural and social integration of third country nationals and their families.[214] Some Member States appealed against the Decision to the Court of Justice arguing the lack of Community competence and the invalidity of the procedure, due to the fact that the Commission tried to predetermine the

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[213] Case 270/80, *Polydor v Harlequin* [1982] ECR 329.
[214] Commission Decision 85/381 of 8 July 1985, O.J. L 217 of 14 August 1985.

outcome of the consultation procedure. France in particular argued that the whole immigration matter related to national public policy and security and was therefore outside the competence of the Community. The Court of Justice found the Decision void, but surprisingly, accepted the Commission's argument that there was some Community competence under Article 118 EEC in the field of third country migration policies.[215]

Article 118 EEC gave to the Commission competence in promoting co-operation among Member States in the social field, including matters concerning employment and social security. The argument put forward by the Commission and sustained by the Court was that third country migration could have important effects on the Community social situation - in particular with reference to employment - and therefore there should have been, under 118 EEC, some Community competence in the field of immigration. The Court, however, sustained Community competence only in the social field, ruling out that 118 EEC conferred any competence in the field of cultural integration of third country immigrants. Moreover, the Decision was declared void because the Commission tried to predetermine the outcome of the consultation procedure.

The fact that cultural integration was beyond the reach of 118 EC, while social integration was not, was a consequence of the original economic nature of the EEC Treaty, which allowed the Court of Justice to create Community competence in socio-economic fields by means of its extensive interpretation, but which prevented judicial expansion in the cultural and political fields.

More recently Community competence in the field of immigration as related to social policy has been strengthened by the Agreement on Social Policy of the Treaty on European Union (the 'Social Chapter'). Originally the Agreement was a separate instrument binding only fourteen Member States, as the United Kingdom had secured an 'opt out'. However, following the accession of the United Kingdom to the Agreement, the Amsterdam Treaty has integrated its provisions into the EC Treaty. Article 118(3) EC (formerly Article 2(3) of the Agreement) gives to the Council the power of legislating with respect to the 'conditions of employment for third country nationals legally residing in the Community territory.' This type of Community action, however, requires unanimity in the Council.

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[215] Cases 281, 283, 284, 285 and 287/85, *Germany, Denmark, France and the United Kingdom v Commission*, [1987] ECR 3203.

Apart from the means of the old Article 118 EC,[216] until the Single European Act of 1987 there was a clear distinction between the free movement of EC nationals (EC competence) and the entry and movement of third country nationals (exclusive national competence, only taken up at intergovernmental level). Article 8a EEC (now 7a EC) introduced by SEA blurred this distinction by establishing the internal market as an 'area without internal frontiers in which the free movement of goods, persons, services and capitals is ensured.' The position of the Commission was always that the logic of the internal market and the abolition of the internal frontiers implied rights of free movement for the purpose of travel - but not of residence and establishment - also for third country nationals. These rights were not direct and unconditional, but needed implementing legislation.[217]

It was already clear in the EEC Treaty that the logic of the internal market required free movement of all persons and not only of EC nationals: Article 48 referred to 'freedom of movement of workers' and not of nationals. Article 48 EC, similarly to Article 30 and 9 EC, could have been the legal basis for implementing legislation, allowing unrestricted free movement for all workers within the Community. The implementation of Article 48 instead followed a different path, as secondary legislation and the interpretation of the Court of Justice clearly referred to freedom of movement for workers, who are nationals of the Member States.[218]

Differently from the Commission, several Member States have always maintained that Article 7a EC, like Article 48 EEC, only abolished frontiers and ensured the free movement of EC nationals, as free movement of third country nationals (even if only for the purpose of travel) within the Community was a matter of immigration policy, therefore within the exclusive national domain. A general Declaration on the Articles of SEA dealing with the establishment of the internal market stressed that nothing in those provisions affected the right of Member States to take such measures as they considered necessary to control immigration from non-Community countries. In another Declaration the Member States undertook to co-

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[216] Before the Amsterdam Treaty, however, Article 118 EC provided only limited means to deal with immigration policy, as it merely allowed the Commission to promote co-operation among Member States 'by making studies, delivering opinions and arranging consultations', but it did not confer any decision power on the Community institutions in the field of immigration.

[217] See, Explanatory Memorandum to the Directive Proposal on the right of third country nationals to travel in the Community, where the Commission distinguishes between a right to travel for all persons derived from Article 7a EC (internal market) and a right to free movement for Union citizens (8a EC). COM (95) 346 Final.

[218] Regulation 1612/68 refers to 'any national of a Member State', so do Directive 68/360, Directive 64/221 and Regulation 1251/70.

operate in the field of immigration and not to prejudice the powers of the Community. It appears, however, that even this last Declaration stressed the purely intergovernmental nature of European co-operation in the field of immigration policy.[219]

Due to the opposition of the Member States, the Commission did not take action, as mandated by SEA, to implement the abolition of internal border controls, including the freedom of movement for third country nationals (albeit limited to travel). Instead, the matter of the abolition of internal frontiers was taken up at intergovernmental level with the Schengen Agreement. The inaction of the Commission was criticised by the European Parliament, which in 1993 sued the Commission before the Court of Justice for failure to act (Article 175 EC) in implementing Article 7a EC (8a EEC) by the deadline of 31 December 1992 (the official date for the completion of the internal market). After the implementation of TEU[220] and under the pressure of the action brought by the Parliament, the Commission proposed three new Directives dealing with the abolition of internal frontiers and the free travel for third country nationals within the Union. The controversy on the scope of Article 7a EC (8a EEC) and the mandate for these Directives were clarified by the Amsterdam Treaty, which incorporated the entire subject of free movement of persons and free travel into Community competence and set up a five year programme for the abolition of internal border controls on EU citizens and third country nationals. (*infra*).

2. The case for Community competence

A restrictive immigration policy ('fortress Europe') or a liberal policy ('open borders') can be similarly implemented by the Member States in their individual capacity, by acting together at intergovernmental level or by the Community on their behalf. What are the reasons then for preferring Community competence?

The choice of acting together, rather than at national level is dictated by reasons of effectiveness.[221] Co-operation is essential to ensure that the efforts of one State are not

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[219] Political Declaration by the Governments of the Member States on the Free Movement of Persons, annexed to the Single European Act.

[220] The new Article 3(c) EC, amended by TEU, includes among the objectives of the Community 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capitals.' The word 'persons' refers to the nationals of the Member States as well as third country nationals.

[221] The principle of subsidiarity establishes that 'in areas which do not fall within its exclusive competence, the Community shall take action ... only and in so far as the objectives of the proposed action cannot be

undermined by the ineffectiveness of its neighbour, in a situation where there are no internal frontiers. However, effective co-operation in the field of immigration could be achieved at Community as well as at intergovernmental level. If there was a consensus among the Member States on curbing third country immigration, the substance of such policy would not be altered by the legal and political process which was followed to implement it (communitarian or intergovernmental).

The reason why several Member States have opposed Community competence in the field of immigration, is that immigration affects issues of membership and therefore touches the core of national sovereignty. Like citizenship, immigration policy is concerned with the issue of membership of national societies, which Member States have not yet delegated to the European Union. Member States have favoured intergovernmental co-operation, because it allowed them to tackle immigration more effectively by acting together, but at the same time it did not compromise national sovereignty, by allowing a supranational authority to take decisions in vital matters of entry and residence of third country nationals (and eventually citizenship) in their territory.

2.1 Democracy and immigrants' rights

There is a fundamental reason of democracy why national or Community competence in the field of immigration should be preferred to intergovernmentalism. Both at national and Community level, anti-immigration measures find a limit in the respect of human rights and fundamental freedom, which are recognised to all individuals, regardless of nationality. These individual rights are expressed in international Conventions (including some specific to rights of migrants and refugees) to which the Member States are parties and in various national constitutions. They are also enforceable at Community level (but only against Community institutions and not against Member States), on the basis of Article F(2) - TEU (formerly the 'human rights jurisprudence' of the European Court of Justice), which includes human rights in the EC legal order through the indirect means of the 'general principles of Community law'.

In substance, if immigration policies were to be formulated at Community level,

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sufficiently achieved by the Member States and can therefore, by reason of scale or effects of the proposed action, be better achieved by the Community.

Community institutions would be subject to democratic controls similar to those, which fetter the powers of the executive in the Member States, namely parliamentary scrutiny and judicial review. Intergovernmental co-operation on the other hand escapes controls at Community level and is often beyond the reach of national democratic controls. This is particularly true for 'compensatory measures' which have been agreed at intergovernmental level, to deal with issues connected to the abolition of internal frontiers within the EU. Police co-operation, computerised exchange of information, stricter rules on asylum, external border controls, are all measures, which should be balanced against individual rights. If action is taken at European level (intergovernmental), national democratic controls might prove not enough.

The 'democratic deficit' in the field of immigration is not limited to the democratic accountability of actions, which have a potential for restricting individual rights and freedom. The whole approach to immigration is unbalanced towards issues of border controls, police co-operation and fight of cross-border crime. On the other hand there is little concern for other immigration-related issues, such as the rights of refugees and migrants, racism and xenophobia and the integration of immigrants in European societies. A democratic approach to immigration should make sure that fundamental rights of migrants are not violated, and that the emphasis of immigration policies is balanced between restrictive actions (if required) and positive actions to favour the integration of migrants.

EU immigration and asylum policies, before the Amsterdam Treaty, put a great emphasis on the negative aspects of immigration, by associating it with related issues of cross-border crime and policing. Article K.1 of the Treaty on European Union listed asylum and immigration policies as 'matters of common interests' together with the fight against illegal immigration, drug addiction, international fraud, judicial co-operation in criminal matters and police co-operation to counter drug trafficking and terrorism, among the other subjects. It was noted above that if on one hand this connection might have been due to the fact that all those issues come under the competence of national home affairs ministers, on the other hand it contributed to creating a negative image of immigration, asylum and third country nationals in general.

The negative image still associated with third country nationals contrasts with the positive image associated with the free movement of EC nationals, where the emphasis is on equality and rights of citizenship, rather than on crime and on drug trafficking. Although also the free movement of EC nationals causes concern with respect to cross border crime, and calls for

more police and judicial co-operation, these issues are not regarded as the main concerns of citizenship policy in the European Union. Like citizenship, asylum and immigration policy should receive attention in their 'positive aspects' (rights of the individual and non-discrimination), separately and with more emphasis than in their 'negative aspects' (illegal immigration, cross border crime, etc.).

A 'positive approach' to immigration would focus on integration of immigrants in European societies, as well as on border control and policing. A European integration policy of third country nationals into full citizenship (European or national) is potentially very controversial, as it affects issues of national membership and sovereignty. This is one of the principal reasons why Member States have been so reluctant in creating any Community competence in the field of immigration. Nevertheless, a policy of integration should not necessarily aim at full citizenship or nothing. Full citizenship represents an important goal for the integration of long term immigrants (see, Chapter III), but there are many other measures, which could guarantee a more democratic immigration policy and favour the integration of immigrants, without impinging directly on the issues of citizenship and sovereignty. The European Commission considers integration policies of third country nationals resident in the Community an important element of a 'comprehensive approach' to immigration policy.[222]

The Amsterdam Treaty has improved the 'democratic deficit' in the fields of immigration and asylum policies, by bringing such matters under Community competence. A new Title of the EC Treaty, called 'Free movement of persons, asylum and immigration' now deals with the abolition of internal borders and directly related flanking measures, such as immigration and asylum policies and the prevention of crime. Such flanking measures, unlike those provided for in TEU, are now balanced by a mandate for the Council to adopt other measures safeguarding the rights of third country nationals, including minimum standards for asylum seekers and rights of residence in other Member States for third country nationals who are legally resident in a Member State.

2.2 Policies against racism and xenophobia

It has been suggested that European immigration and integration policies should be flanked by

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[222] See, Communication from the Commission to the Council and then European Parliament on Immigration and Asylum Policies, COM (94), 23 final, 23 February 1994.

Community policies to counter racism and xenophobia and that it was a serious deficiency that no such policies were dealt with in the EC Treaty, which only banned discrimination on the grounds of nationality (of the Member States) - Article 6 EC - and of gender (equal pay for equal work) - Article 119 EC (O'Keeffe 1995).

A comprehensive European policy to counter racism and xenophobia would require action at two different levels to be effective: legislative and constitutional. The first level is concerned with the formulation of a common Union strategy leading to actions in different fields to eradicate discrimination and violence and to favour the integration into mainstream society of immigrants and of those citizens who could be the target of discrimination. 'Affirmative actions' with respect to integration should involve access to employment, housing, health and education, but also the teaching of cultural integration and the introduction of stricter measures against acts of intolerance and discrimination. These actions can normally be realised by means of ordinary legislation both at European and national levels.

The action of the ordinary legislator, however, must be supported by constitutional principles protecting the fundamental rights of the individuals, who are victims of discrimination. This introduces the need for a second level of action, which is concerned with a constitutional right to non-discrimination and constitutional protection of human rights in general. An EC-wide right to non-discrimination should aim at extending the existing provisions of the EC Treaty on non-discrimination on grounds of nationality and gender to other subjects and at protecting a larger number of individuals (not only EU citizens). A general prohibition would cover gender, race, religion, disabilities, and language among the possible subjects and it would protect EU citizens as well as third country nationals. Such a far reaching rule of non-discrimination would be most effective in the context of an EU charter of human rights, protecting all individuals regardless of nationality, parallel to the catalogue of citizenship's rights of Articles 8 to 8e EC. EU protection of human rights could be realised either by inserting a catalogue of rights in the EC Treaty next to the rights of citizenship or by means of accession of the EU to the European Convention on Fundamental Rights and Fundamental Freedoms (see, Chapter VI).

It was considered in Chapter VI that the Amsterdam Treaty failed to deliver an EC comprehensive charter on fundamental rights or to agree on the accession of the ECHR by the Community. It introduced, however, some important rules on non-discrimination and

fundamental rights. The new Article 6a EC deals with discrimination in general but it falls short of establishing a constitutional prohibition on non-discrimination. It gives to the Council the discretionary power to pass secondary legislation dealing with discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. As such Article 6a is not directly effective. It would be, however, extremely valuable if the Council agreed some effective rules against discrimination, albeit in the form of secondary legislation.

At both levels of legislative action (constitutional and ordinary) a policy against racism and xenophobia would protect from violence and discrimination all natural persons within EU jurisdiction (not only citizens and permanent residents), regardless of national belonging. It would contribute to the achievement of 'equal citizenship' (internally) as well as 'democratic immigration policy' (externally).

Inside citizenship, a prohibition of racial discrimination could help the material integration of all those individuals, who despite their formal status of citizens, still felt left out in terms of equal opportunities from 'mainstream European, white, middle class society.' Similarly policies to counter discrimination on the ground of religion, gender, language, disability, would help other materially disadvantaged groups of formal citizens to achieve equal opportunities. Although all Member States have national non-discrimination rules of the kind described above, it would be important that such rules were inserted in the EC Treaty, along with the provisions on non-discrimination on grounds of nationality and gender (at workplace), given the increase in the Community powers (and influence on the lives of European citizens) since the Treaty of Rome and in the light of the new political competences acquired in the field of Union citizenship.

A policy against racism and xenophobia would be even more important outside citizenship with respect to third country immigrants. It would not achieve their full and formal integration into society (citizenship), but it would protect them from discrimination and facilitate their material integration into society. In fact, immigrants settling in European States face a 'double barrier'. The first hurdle is the national exclusive citizenship laws, which prevent access to citizenship of permanently resident immigrants for generations. The second hurdle is represented by the issue of marginalisation of weak groups in modern capitalist societies. Once immigrants are allowed to access formal citizenship, they are faced with the same problems of material equality and substantial membership as other weak groups, who are already formal members (citizens) of the national community.

It has been argued that access to citizenship and formal equality could help countering phenomena such as racism and xenophobia (Hopkinson 1994). This seems particularly true in the case of Germany, where the long term exclusion of permanently resident foreigners from citizenship, might have contributed to the emergence of xenophobic and racist feeling against them. The inclusion into formal citizenship of immigrants, who have worked and resided in Germany for generations, would send a clear message to all potential racists, namely that the state regards such persons as equal members of the community. Specific policies to counter racism and xenophobia are nevertheless necessary, because if access to citizenship could act as a catalyst to bring about integration, material discrimination can still persist 'inside citizenship'. In this respect Britain has represented the opposite example of Germany. Easy access to British citizenship and political rights for permanently resident immigrants, have not solved the issue of marginalisation and discrimination of the immigrant population from mainstream society.

At European level it might be more appropriate to proceed first with 'material equality' by tackling issues such as racism, xenophobia, human, social and economic rights, rather than dealing immediately with access to full citizenship, which would impinge directly on the national sovereignty of the Member States. A question which could be asked is whether there is a need for a European policy to counter racism and xenophobia, when all Member States already have one at domestic level, through the means of their national ordinary and constitutional legislation, and membership of international Conventions. There are two main reasons which justify such policy. First, it would be important to support Union citizenship. As formal membership expands from national to European level, so policies to counter material inequalities should be dealt with at the same level. This is the case with social policies (which are already part of Community competence), but it should also involve more 'political' non-discrimination policies, dealing with racism and xenophobia, religious, linguistic, ethnic, cultural diversity, gender equality etc. Second, a European immigration policy, should be flanked by a policy to protect immigrants' rights. Ideally both immigration and anti-racist policies should come under Community competence, to allow for a more coherent and democratically accountable action with respect to third country nationals. It is considered below that immigration and asylum policies have been moved in the EC Treaty together with the new provisions dealing with immigrants and asylum seekers' rights. Such provisions, however, do not allow for Community action to counter racism and xenophobia,

which remains a matter for intergovernmental cooperation. Moreover, in the long term it would also be desirable to promote access to EU citizenship for third country nationals permanently resident.

The House of Lords in 1993 called for a revision of the Treaty on European Union to confer to the EU the power to combat racism and xenophobia.[223] It is not clear, whether such policy should be inserted in the EC Treaty, along with other fundamental human rights next to the stricter rights of citizenship, or whether it should remain a 'matter of common interest', for which action is taken at intergovernmental level. The European Commission in its 'Communication on Immigration and Asylum Policies' of 1994 called for an integrated and coherent programme in the field of immigration policies and action against racism and xenophobia. The Commission did not make any proposal and left the initiative to the Member States, which were free to pursue the matters in the context of intergovernmental co-operation.[224]

The European Councils of Corfu (June 1994), Florence (June 1996) and Amsterdam (October 1997) took actions against racism, xenophobia and discrimination at both legislative and constitutional level. The Corfu European Council (1994) adopted 'conclusions' on the implementation of a European policy to counter racism and xenophobia. The initiative proposed the constitution of a Consultative Commission to make recommendations on co-operation between governments and the development of a global strategy at the Union level to combat acts of racist and xenophobic violence. The European Council's conclusions achieved the result of balancing the new intergovernmental competences in the fields of justice and home affairs with a plan for intergovernmental action to combat acts of racism and xenophobia. *De facto* the conclusions included policies to combat racism and xenophobia among the 'matters of common interest' listed in Article K.1-TEU.

The Florence European Council (1996) and the Amsterdam Treaty (October 1997) made further progress in the fight against racism and xenophobia at European level. The Florence European Council agreed in principle to the establishment of a European Monitoring Centre on Racism and Xenophobia. The main task of such a centre would be to set up a European information network on racism and xenophobia in order to provide the Community and its

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[223] House of Lords, *Tenth Report of the select Committee on the European Communities, Community policy on Migration*, 1992-93, London, HMSO.

[224] See, Communication from the Commission to the Council and then European Parliament on Immigration and Asylum Policies, COM (94), 23 final, 23 February 1994.

Member States with objective, reliable and comparable data. The centre will focus on the following areas: free movement of persons and goods within the EU, employment, education, training and youth, information, television broadcasting and other media, social exclusion, and culture.

The Amsterdam Treaty brought immigration and asylum policies under Community competence (and therefore under the jurisdiction of the Court of Justice) and introduced a general provision on non-discrimination (Article 6a EC) on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 6a EC, unlike Article 6 EC, does not set a directly effective Treaty standard against discrimination (constitutional), but gives to the Council the power to adopt secondary legislation to this effect. As such it is weaker then the directly applicable Treaty provision against discrimination on grounds of nationality (of a Member State) of Article 6 EC.

The Amsterdam Treaty has also amended Article K.1 of TEU to include the prevention and the fight against racism and xenophobia among the objectives of common action by the Member States (at the intergovernmental level). In this respect the amended Article K.1 does not go much further than the Corfu Conclusions, which *de facto* included the prevention and the fight against racism and xenophobia among the matters of common interest, listed in the old Article K.1.

The principal limits of Community and Union policies on racism and xenophobia are the intergovernmental nature of most of the actions envisaged and the failure to consider the constitutional aspect of anti-discriminatory and human rights policies. The intergovernmental nature of the Corfu plan and of the new Article K.1 of TEU is exposed by the fact that - similarly to the other policies included under the third pillar of the Treaty on European Union (Justice and Home Affairs) - they define a rather limited role for the European Parliament and for the Court of Justice. Moreover, even where the Amsterdam Treaty creates some Community competence in the field of non-discrimination (Article 6a EC), it only addresses one of the two levels of action necessary to combat racism and xenophobia outlined above - action by the Council at the level of secondary legislation - leaving unsolved the questions of wider EC constitutional provisions on non-discrimination and protection of human rights.

The conclusions of the Corfu and Florence European Councils and the Amsterdam Treaty amendments represent steps in the right direction in the democratisation of European immigration policies. They achieve the purpose of balancing the new competences on

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3.1 Family re-unification

An important aspect of the integration of third country immigrants is concerned with the possibility of enjoying a family life in the state of residence. Family re-unification was the object of a Resolution of Immigration Ministers in Copenhagen in June 1993, which linked it to the right of family life, as recognised by the European Convention on Human Rights. The Resolution individuated the categories of family members entitled to the right of re-unification and the general criteria for admission. The Commission's Communication on Immigration and Asylum Policies emphasised the importance of family re-unification for the integration of third country immigrants in the Community and suggested the adoption of a legally binding instrument (Convention) to tackle the problem of legal certainty and to harmonise Member States' practices and standards in this field of immigration policy. The Amsterdam Treaty has partly addressed the concern of the Commission in the area of family re-unification. The new Title of the EC Treaty on free movement, asylum and immigration contains certain provisions, which require the Council to adopt, within five years, measures concerning 'conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion.'

Regarding the substance of family re-unification, in the Communication the Commission argued in favour of harmonisation and liberalisation of Member States' family re-unification policies. This position reinforced the case for a more 'human right oriented' immigration policy, although it could determine an 'unbalanced' immigration policy, given the very restrictive approach adopted towards economic migrants (workers and self-employed).

The human rights aspect of family re-unification should be weighted against the necessity of creating a system, which favours skills. It has been argued that family re-unification favours the admission of low-skilled immigrants who are either not allowed to work in the Member State of residence or if they are, they are likely to end up as an economic underclass, moving between low skilled and low paid jobs and long term unemployment (Chavez 1995). The creation of immigrants underclasses in Western European societies is often the consequence of a willingly unbalanced immigration policy, which, with the pretext of family re-unification, favours the access of low skilled immigrants to low paid and low skilled jobs, which Europeans are reluctant to take. In contrast, restrictive immigration policies towards

workers and self-employed, who would be targeting medium and high skilled jobs, conceal the willingness to maintain quotas for nationals in these sectors.

The risk that immigrant ethnic groups might become economic underclasses in European societies would diminish if family re-unification policies were balanced by admission of skilled immigrants and by a more liberal policy towards third country students, who wished to remain after their studies. This does not mean that restrictive immigration policies should be aimed at low-skilled immigrants, but that excessive emphasis on family re-unification coupled with a restrictive approach to economic migration (workers and self-employed) determines an unbalanced composition of immigrant groups, who enter the Member State, and runs the risk of creating and strengthening economic and ethnic underclasses of immigrants, by leaving skilled immigrants out.

A sort of 'meritocracy' for immigrants, rewarding individual efforts and skills more than family links, would favour a more varied composition of immigrant groups entering European societies.[225] The admission of a more varied range of immigrant workers, who would be competing for low-skilled as well as medium and high skilled jobs, might in turn result in their better integration within society.

Emphasis on skills would help preventing the relegation of immigrant ethnic and economic groups into underclasses of citizens (or just denizens and resident aliens). This of course would not solve the problem of economic underclasses in general, which remain an issue for citizenship in capitalist societies, but would have the merit of preventing the 'ethnicisation of exclusion', where new entrants are relegated to the bottom of the social and economic ladder, with little or no prospects of moving upwards. Interclass immigration favours integration, because it reduces economic differences vis-a-vis cultural and ethnic differences. In contrast, underclass relegation and economic exclusion reinforce cultural and ethnic differences and make integration of immigrants in the host society more difficult.

The difficulty with the integration of immigrant ethnic groups in the United States was not that there were too many Latinos or Asians *per se*, but that too many of the people admitted were low-skilled. Family re-unification was adopted in 1965 as the guiding principle of US immigration policy, with the expectation that it would have maintained the ethnic balance of the US population as it existed at the time. Instead it favoured the relegation of immigrant

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[225] The emphasis on skills should not affect human rights standards of family re-unification, in particular those regarding the spouse and dependent children of the immigrant.

ethnic groups to economic underclasses, allowing too many low-skilled immigrants in and leaving too many medium and high skilled immigrants out. For this reason it has been argued that family re-unification should not be kept as the guiding principle of immigration policy (as it has been the case in the United States since 1965) and that governments should not be deterred from changing it out of fear that such a move might be interpreted as racist or against human rights (Chavez 1995).

3.2 Integration of resident immigrants into citizenship

According to the Commission, integration requires efforts from the host society as well as from the immigrants. The first should provide immigrants with enough resources (knowledge of local language, housing, education, vocational training, etc.) to enable them to attain 'parity' with the national population. The second on the other hand should be ready to 'adapt to the lifestyle of the host society without losing their cultural identity and accept the fact that equality of rights entails equality of obligations.'[226]

The reference to the 'lifestyle of the host society' has been interpreted as controversial because in some cases certain aspects of the lifestyle of the host society could be unacceptable or even offensive to immigrants (O'Keeffe 1995:31). In this respect the Commission would be advocating cultural assimilation as well as political integration of third country immigrants. However, 'lifestyle of the host society' might be interpreted as political traditions and political identity rather than culture, as the Commission added: 'without losing their cultural identity'. The Commission's proposal would then fall in the field of 'democratic integration' rather than cultural assimilation.

Democratic integration rejects cultural assimilation, but requires both parties (host society and immigrants) to make reciprocal cultural concessions in the context of a pluralistic political community. The host society should respect immigrants' cultural and religious identities in so far as they were not in contrast with its fundamental principles of democracy, equality and respect of human rights, while the immigrants should accept the host society's constitutional framework and rules, even if this might require a 'cultural sacrifice' on their part (with respect to that part of cultural identity, which is linked to political institutions and practices).

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[226] See, Commission's Communication at p. 32.

Apart from integration policies within the Member States, the Commission envisaged three levels of integration of third country nationals with respect to Community law, involving the following sets of rights: (a) right to free travel; (b) right to free movement; and (c) access to EU citizenship.

The right to travel would allow third country nationals to travel freely within a free border Europe and is therefore linked to the abolition of Community's internal borders. This right is provided for in the Schengen Agreement (for the Shengen area), and, at Community level by Article 7a EC (introduced by SEA) and by the Amsterdam Treaty provisions setting up a five year timetable for the abolition of border controls on Union citizens and third country nationals. It entails the right to travel for a short period of time (normally 3 months) to another Member State without the need to obtain a visa (other than the one used to enter the Member State of first entry) or being subject to any control at the borders.

The right to free movement is wider than the right to travel, as it entails also rights of residence and access to employment (or establishment as a self-employed) in all Member States. In the Communication the Commission referred to the right of free movement as an important step for the integration of resident immigrants in the Community - especially in the light of the wider employment market, which would be available for third country nationals - but it recognised that, differently from the right to travel, free movement of third country nationals still fell under national competence, given the far reaching consequences in the fields of national membership and immigration policy.[227] The Amsterdam Treaty achieved significant progress in this area: the new Community competences on free movement, immigration and asylum include a provision, requiring the Council to adopt, within five years, 'measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.'

Access to citizenship's rights depends on Member States' citizenship and naturalisation policies. The Declaration on nationality of a Member State annexed to the Treaty on European Union, underlined how the 'question of whether one individual possesses the nationality of a Member State shall be settled solely by reference to the laws of the Member State concerned.'

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[227] The right to free travel is derived from Article 7a EC on the internal market. However, it has been noted above that a more extensive interpretation of Article 7a EC (relying on the *effect utile* of the internal market provision) would bring also freedom of movement for third country nationals under Community competence. This would be necessary in order to ensure the free movement of all factors of production within the internal market, regardless of nationality.

Although in principle the Commission's position with respect to integration of third country nationals in the Community called for the achievement of gradual equality of treatment with EC nationals as a 'fundamental objective of society', any possibility of access to EU citizenship for third country nationals is, for the time being, ruled out by Article 8 EC according to which 'any person holding the nationality of a Member State shall be a citizen of the Union.' Policies of integration of non-Community immigrants into citizenship remain squarely within the competence of the Member States, except for the rights of free travel and free movement and some areas of social integration (Articles 118 EC).

The Commission suggested two lines of action to favour the achievement of equality for third country nationals resident in the EU, taking into account Member States' exclusive competence in the field of access to citizenship. First, the Member States should review their legislation in order to remove conditions of nationality for the exercise of rights or the granting of benefits, which are no longer justified for objective reasons. Second, the Commission encouraged Member States to liberalise naturalisation and citizenship laws and favour access to national citizenship for resident immigrants and children born of resident immigrants.

In addition to the issue of formal equality (access to citizenship) the Commission recognised the importance of 'material equality' for immigrants and ethnic minorities resident in the Community. Whether immigrants are allowed access to national (and therefore European) citizenship or whether they remain denizens, they face problems of material integration in the host society, which is made worse by their status as 'new entrants' and by their different cultural and ethnic background. In this perspective it is necessary to create the right economic and socio-cultural conditions for successful integration.

Regarding the issue of social and economic integration, inequalities in the labour market result from absence of qualification, vulnerability of the industries in which immigrants have traditionally been employed, poor knowledge of the Member State of residence and discrimination at the recruitment stage. Some of these inequalities are shared with other weak groups of formal citizens such as non-immigrant ethnic and national minorities, women, gay, lesbian and disabled persons, etc. Also difficult housing and access to health services are not limited to immigrants. However, the Commission indicates that Community instruments and policies to combat unemployment and exclusion in general should pay particular attention to the position of immigrants, in particular by means of measures taken under the Social Fund.

A new important Community means to combat material exclusion of immigrants is the new Article 118 EC, which gives to the Council legislative powers in the field of employment of third-country nationals legally residing in the Community and therefore allows the Commission to table new proposals in this area. Article 118 EC, as amended by the Amsterdam Treaty, integrates the former Article 118 EC with Article 2 of the Agreement on Social Policy ('Social Chapter'), which following the accession of the United Kingdom was incorporated in the EC Treaty. The new Article 118 EC, however, goes beyond the Agreement on Social Policy and the former EC provisions, in so far as it not only requires the Council to pass legislation on 'conditions of employment for third-country nationals legally residing in Community territory,' but it also requires the Community to support and complement the activities of the Member States in the field of the integration of persons excluded from the labour market, regardless of whether they are EU citizens or third country nationals.

If the new Article 118 EC receives the same extensive interpretation made by the Court of Justice of the old Article 118 EC, the new legislative powers of the Community could be extended to cover all issues of social integration of immigrants.

4. Post SEA intergovernmentalism

In contrast with the democratic tradition of the Member States, but in accordance with the willingness to maintain national sovereignty in the field of immigration, before the Amsterdam Treaty European immigration policy has mostly developed along the lines of intergovernmentalism. The European Commission has accepted the resort to intergovernmental action, after the partial failure in expanding Community competence in the field of immigration by means of the 'social policy' provision of Article 118 EEC and of Article 8a EEC on the internal market without frontiers.

Several Conventions, dealing directly or indirectly with the issue of third country immigrants in the EU, are considered in this Chapter: the Schengen Convention, the Dublin Convention, the External Border Convention the Europol Convention and the Convention on the European Information System. It is important to note that although these Conventions were all agreed as intergovernmental instruments, they have been brought under Community competence, with the exception of the Europol Convention, by the Amsterdam Treaty. In practice this signifies that if the difficulties relating to the substance of the Conventions

remain in place, the difficulties relating to the non-democratic nature of the intergovernmental action have been overcome. The European institutions are now fully involved in actions undertaken under these Conventions and most importantly all actions are subject to the jurisdiction of the Court of Justice. The Europol Convention, which remains under the intergovernmental domain of the Treaty on European Union (third pillar), might also be subject to the jurisdiction of the Court for those Member States which agree to it.

4.1 The Schengen Agreement

The Schengen Agreement was signed on 19 June 1985 between Germany, France and the Benelux countries (Belgium, Luxembourg and the Netherlands). The object of the Agreement was the gradual abolition of the internal border controls between the signatory States. It gained momentum between the Single European Act and the Maastricht Treaty, when it appeared clear that the 'Community route' to the abolition of internal frontiers was not viable. Some Member States were never ready to accept the Commission's and Parliament's interpretation of Article 8a EEC (now 7a EC) on the internal market as an area without internal frontiers, where all internal border controls had to be abolished and free travel guaranteed for EC as well as third country nationals.

If the Commission refused to put forward any far reaching legislation implementing Article 8a EEC, some Member States decided to pursue the objective of the abolition of internal border controls and free travel at the intergovernmental level. On 19 June 1990 France Germany and the Benelux countries agreed the Schengen implementing Convention, dealing with the issue of compensatory measures for the abolition of internal border controls. The original five countries were later joined by Spain, Portugal, Greece, Italy, Austria, Denmark Finland and Sweden.

Full implementation of Schengen started on July 1 1995 between six of the Schengen Member States.[228] Italy, Greece and Austria benefited from longer time-delays to abolish the internal frontiers, in order to comply with the so called 'compensatory measures', such as the stricter enforcement of external borders and the technological difficulties related to the

[228] France, which should have abolished the internal frontiers at the same time as Germany, the Benelux, Spain and Portugal immediately invoked a temporary 'safeguard clause' for reasons of internal security, to deal with the last wave of Algerian Islamic terrorism.

'Schengen Information System' (a computerised system, which allows the exchange of information between police forces). The Commission estimates that these three Member States should be able to join the area without internal frontiers before the end of 1997. Denmark, Finland and Sweden were the last Member States to sign the Schengen Agreement on 16 December 1996, bringing the Schengen group to thirteen members. The accession of these three new members was complemented by the signature of a cooperation agreement with Norway and Iceland aimed at maintaining in force the Nordic Union's arrangements on passports and free travel. The United Kingdom and Ireland are not part of the Schengen process.

The importance of the 'Schengen implementing Convention' (1990) with respect to the original 'Schengen Agreement' (1985) lies in the fact that while the second one sets the goal of the gradual abolition of all internal frontiers and controls, the first one makes it possible by providing for a series of necessary 'compensatory measures'.

The abolition of borders controls is provided by Schengen for EC as well as third country nationals. The latter therefore acquire a new right to free travel within the territory of the Schengen countries, whether they already reside in one of those countries or whether they have legally entered 'Schengenland' from one of the external borders. The right of free travel for third country nationals is nonetheless heavily counterbalanced by a series of important compensatory measures, which are cause of great concern for the individual rights and liberties of non EC immigrants.

The compensatory measures included in the Schengen implementation Convention cover: (1) stricter external border controls; (2) common visa policy; (3) carrier sanctions; (4) internal (non-border) controls; (5) asylum rules; (6) Schengen Information System; (7) police co-operation. All those measures are now the object of separate Conventions which are considered in more details in separate Sections.

It has been argued that the main consequences of Schengen would be: i) no more systematic internal border controls (with the risk of more arbitrary ones); ii) stricter external border controls ('fortress Europe'); iii) more controls on EU citizens and third country nationals in the Member State of residence (Leuprecht 1990). It could be added that the increase in internal (non-border) controls in the Member States, would create the necessity for the adoption of a system of identity cards in those countries which do not have it. Overall Schengen is a net loss in terms of individual rights and freedom of EU citizens and third

country nationals. It has been argued that with the 'excuse' of the abolition of internal border controls, the Schengen Convention aims at curbing all non-EC immigration coming from outside the Schengen area, including a large proportion of asylum seekers (Foblets 1994). All the compensatory measures for the implementation of the free travel area, are not balanced by a coherent policy to protect individual rights of third country nationals, who are on the receiving end of policies aimed at reducing and controlling immigration to Schengenland.

The 'Schengen Information System' aims at making more efficient the fight against drug trafficking, terrorism and cross-border crime in general. It allows national police forces to access and exchange information on individuals across Europe by means of a computerised data system. This is likely to increase the effectiveness of police action against national and cross-border crime, but on the other hand it alters the balance between defence and prosecution, by not compensating the increased efficiency of police and law enforcement agencies, with a correspondent cross border protection of individual rights and fundamental freedoms (O'Keeffe 1991). The issues of police co-operation and the setting up of a European police force is now the object of a separate Convention (Europol Convention).

The 'external borders' aspect of Schengen is concerned with the implementation of a restrictive ('fortress Europe') immigration policy. The crackdown on immigration from third countries, however, is not supported by a policy of protection of the individual rights of immigrants entering Schengenland. With respect to immigration controls Schengen is complemented by the Dublin Convention on Asylum and by the Draft External Borders Convention. These two Conventions are considered separately in the following Sections.

The Schengen Agreements also provide for carrier sanctions to be inflicted on those companies, which transport to the Schengen area passengers, who do not have the required travel documents or visa. These measures have been strongly criticised for two main reasons. First, carrier companies (airlines in particular) have complained that they should not be asked to do custom police work to make sure that they do not transport passengers, who do not possess a legal travel document or a visa. As a consequence, airlines companies have started regular checks (also within Schengen) on travel documents of passengers, so that, before Schengen is fully implemented, border checks within the Union have actually increased, and are carried out by national custom police as well as transport companies, which want to avoid incurring sanctions. Second, carrier sanctions might prevent many asylum seekers, who often would not be granted a travel document or who do not have the time to obtain a visa, to leave

their country of residence in the first place (Foblets 1994).

Before moving to the analysis of the other Conventions, which deal more directly with the issue of compensatory anti-immigration measures for the creation of a borders-free zone, it is important to note the different attitudes that some Member States have demonstrated towards the abolition of the internal frontiers on the one hand and towards the compensatory measures on the other hand. The United Kingdom and Denmark have opposed since the Single European Act the abolition of all internal border controls and the right to free travel for third country nationals. It should be remembered how on the occasion of the Single European Act and with respect to Article 7a EC (formerly 8a EEC) it was the government of the United Kingdom in the person of its former Prime Minister, Ms. Margaret Thatcher, who pre-empted any literal interpretation of the Article by the European institutions by requesting and obtaining a Declaration which reaffirmed the Member States' exclusive competence in the field of immigration of non-EC nationals. Denmark, however, recently signed up to the Schengen Agreement and Convention together with its Nordic neighbours (Sweden and Finland).

At Amsterdam, where the whole subject of border controls, immigration and asylum was communitarized, the United Kingdom, Ireland[229] and Denmark[230] secured an 'opt-out', which allows them to maintain their Community borders and to avoid the jurisdiction of the European Court of Justice, still remaining party to those intergovernmental Conventions dealing with compensatory measures. The British and Irish opt-outs from the Community free travel area were reinforced by a formal derogation from Article 7a EC, concerning keeping their border controls, with a reciprocal right for the other Member States in respect of the United Kingdom and Ireland.

Although hostile to the abolition of internal borders, and to the surrender of powers in the field of third country immigration to the Community (as means of preserving national sovereignty), the United Kingdom has demonstrated great interest in compensatory measures, such as stricter external borders controls, asylum rules, police co-operation and the Schengen information system. This should cause even greater concerns for democracy and individual

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[229] Ireland reluctantly opted out of the new Community competences in the fields of border controls, immigration and asylum, in order to maintain the common travel area with the United Kingdom.

[230] Denmark, despite its opting out of the Community free travel area, remains part of the Schengen Agreement and therefore committed to abolishing the Community internal border controls at the intergovernmental level.

rights than in other European countries, where restrictive measures could be presented as necessary compensation for the granting of a new right, i.e. the free travel across Europe for all persons regardless of nationality.[231] On the other hand in the UK the loss in terms of individual rights due to increased internal controls, stricter external border controls, police co-operation and exchange of information about individuals, would not be justified by the granting of any new right.

Such democratic unbalance is of particular concern in the United Kingdom, where, differently than in other Members of the European Union, there is not a written Constitution. The imbalance between the rights of the defence and of the prosecution resulting from the Schengen and the Dublin Agreements finds no correction in the UK constitutional system. European legislation is therefore lowering individual rights standards in a country, where there is no rigid constitution to limit government action. Besides, police co-operation and the enforcement of stricter internal controls on EC and third country nationals, would require the United Kingdom to adopt a system of compulsory identity cards. This would not necessarily imply the lowering of individual rights standards - all other European countries have a system of compulsory identity cards - but it is difficult to accept even such a small reduction of individual liberty in exchange for nothing. It would be different if the adoption of a system of compulsory identity cards was a necessary measure to allow for the abolition of the Community internal borders.

The UK government recently blocked the implementation of the External Borders Convention and of the Europol Convention, on the grounds that it was not ready to accept the judicial supervision of the Court of Justice. Those two Conventions were stipulated under the authority of the Treaty On European Union, and according to Article K.3(2)(c) jurisdiction was conferred on the Court of Justice 'to interpret their provisions and to rule on any disputes regarding their application.' The reason for giving jurisdiction to the Court of Justice was that, despite their quasi-intergovernmental nature, both Conventions affected the rights of individuals to such an extent that it was necessary to provide for independent judicial supervision. In line with a coherent application of the principle of subsidiarity the 'efficiencies' derived from police co-operation (in the case of Europol a new European police

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[231] In the case of EU citizens the right of free travel would consist in the actual abolition of identity checks at the borders, as they already enjoy the right of free movement, albeit conditional to the production of a valid identity document.

force) and stricter external border controls were balanced by similar efficiencies in the enforcement of individual rights through the means of the European Court of Justice.

By accepting of the substance of the Conventions, and rejecting the jurisdiction of the Court of Justice the UK government has deviated from the principle of democracy. The willingness to accept certain aspects of the single market (including free trade and co-operation in the fight against illegal immigration, organised crime and drug trafficking) but the permanent rejection of the necessary supranational protections for citizens as well as third country nationals (citizenship's rights and fundamental human rights) is understandable in terms of defence of national sovereignty but it is not acceptable in terms of democracy.

Some erosion of national sovereignty is inherent in the democratic, 'Community' handling of home affairs and immigration issues. National sovereignty and national competence with respect to the rights of third country nationals are guarantees of democracy, when the measures to counter and control immigration are taken at national level. More in general all national measures in the field of justice and home affairs (involving also the rights of EU citizens) are subject to domestic democratic check and balances. However, when measures restrictive of immigration and of individual liberties are taken at intergovernmental or Community level, they should be paralleled by supranational powers in the field of judicial protection of individual rights, regardless of the fact that those powers might erode national sovereignty. It would be preferable, for the sake of democracy, that all these matters (immigration, justice and home affairs) continue to be dealt with exclusively at the national level (where the necessary democratic guarantees are available), rather than at intergovernmental level, where only those aspects which are detrimental to individual liberties are the object of (non-accountable) co-operation among the Member States.

4.2 The Dublin Convention

The Dublin Convention was concluded by the Member States of the European Community on 15 June 1990. Although some provisions to bring the discipline of asylum in line with the abolition of internal borders were already present in the Schengen Convention, the Dublin Convention extended the new common policy on asylum to those Member States, which were not part of Schengen, but which, in spite of the reluctance to abolish internal borders, were interested in the compensatory measures regarding immigration and asylum.

The Convention dealt with asylum applications and aimed at reducing the number of unfounded applications, which allowed a large number of 'economic immigrants' to enter the European Union, without substantial grounds for claiming the status of political refugee. The means adopted to achieve this purpose was the establishment of criteria for determining the Member State responsible for examining an application for asylum of third country nationals entering the European Union. Any application would be dealt with by only one Member State. The Member State responsible for the application would normally be the State of first entry, unless the applicant could demonstrate a close connection with another Member State of the Union, he subsequently entered. As there is no risk of 'refoulement' in any EU Member State (all Member States are part of the 1951 Geneva Convention on the rights of refugees), any Member State, which is not the state of first entry, would be entitled under the Dublin Convention to send the asylum seeker back to the 'country of first asylum'. The purpose of this rule was to abolish the phenomenon of 'asylum shopping', that is to say, the practice by asylum seekers of applying for refugee status in different Member States of the European Union.

The limitation of asylum applications to only one State of the Union is clearly functional to a restrictive immigration policy and to the establishment of a free travel area, but it raises concern with respect to the issue of human rights.[232] It has been argued that reducing from fifteen to one the number of states which a refugee can address for political asylum could be in violation of the Geneva Convention, which establishes that each Member State must make its own judgment about the recognition or refusal and eventually deportation of individual applicants for asylum (Foblets 1994:795).

In fact, the Dublin Convention does not directly violates the Geneva Convention, as it establishes that:

> 'each Member State shall have the right to examine an application for asylum submitted to it by an alien, even if such application is not its responsibility under the criteria defined in this Convention, provided that the applicant for asylum agrees thereto.'

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[232] In the case of the United Kingdom and Ireland the only rationale for adopting the new rules on asylum is the pursuance of a more restrictive immigration policy, as those countries are not part of Schengen and have not agreed to abolish internal borders controls. It was considered above how the United Kingdom and Ireland have also opted-out of the new Community competences on the abolition of external borders, immigration and asylum.

A Member State maintains the power to deal with an application for asylum under its national legislation, even if it is not the 'country of first entry'. Nonetheless, the 'country of first entry' principle represents a strong incentive for the Member States to send the asylum seeker back to the Member State of first entry. The right to examine an application for asylum according to the Geneva Convention is presented by the Dublin Convention as an 'exception' to the general rule of the 'country of first entry', which is also the rationale for the whole Convention.

The Dublin Convention presents serious problems of compatibility with previous international human rights instruments (namely the Geneva Convention), and it signals a dramatic reduction in the chances of asylum seekers (including genuine ones) to obtain the status of political refugees in Europe. It reduces the rights and freedoms enjoyed by third country nationals in the European Union, against the objective often declared by the European institutions and by the Member States of protecting universal human rights. It was noted above that the Dublin rules on asylum, and the other 'compensatory measures' for the abolition of the internal frontiers, have increased the 'democratic deficit' of the European Union, due to the lack of adequate protection of fundamental human rights against the new restrictive policies. This approach to immigration and asylum policy has also resulted in the lowering of the Member States' national human rights standards.

Under French law an asylum seeker who was denied the status of refugee had the right to make an appeal to the Office for the protection of refugees (OFPRA) before he was definitively deported. The *Conseil Constitutionel* found that this right of appeal applied also in those cases in which the status of refugee had been refused because another Member State was competent to decide on asylum under the Schengen or Dublin Conventions. However, as the right of appeal granted by the French Constitutional Court would have undermined the scope of the Schengen and Dublin Conventions - which aimed at abolishing the phenomenon of 'asylum shopping' by means of the 'country of first entry' rule - the French government proceeded to a partial revision of Article 53(1) of the Constitution, which now allows France, as a Member of the European Union, to conclude Conventions to determine the jurisdiction to examine applications for asylum (Gaiffe and Berrod 1993:178).

Similar problems existed in Germany, where the Basic Law (Constitution) required each application for asylum in Germany to be assessed by the German authorities, in contrast with the Dublin rule which assigned competence to the EU Member State of first entry. It was not

without internal controversy (on the issue of fundamental human rights), that the German Parliament amended the Basic Law, limiting the almost unrestricted right of asylum of Article 16, in order to comply with the abolition of asylum shopping introduced by the Dublin Convention (Butt Philip 1994:184).

The rationale of the Dublin rule on asylum jurisdiction (country of first entry) is the reciprocal confidence Member States have in each other's national human rights standards.[233] As a matter of fact all Member States are part of the 1951 Geneva Convention on the protection of refugees, and this should be enough to guarantee 'basic standards' of protection, in particular the right to appeal against a negative decision before deportation. None the less, Member States still distrust each other on the point of human rights, at least with respect to 'high standards' of protection. Germany modified its generous right of asylum to comply with Dublin, only after a heated internal debate on human rights. The 'country of first entry' rule created problems also for Denmark, which was not among the original signatories of the Dublin Convention. Denmark joined one year later, after it was satisfied with other Members' obligations under various international human rights Conventions.

Member States' trust in each other's standards of human rights protection (due to their common membership of international Conventions) does not justify the reduction of national 'high standards' of human rights, imposed by stricter European rules on asylum policy. A coherent approach to immigration, asylum and human rights, would require the Community to formulate its own 'high standards' of human rights, in order to balance more restrictive rules on immigration and asylum at European level, without the need to rely on the constitutional traditions of the Member States, the international Conventions and the general principles of Community law.[234] It is considered below how this issue was partly addressed by the Amsterdam Treaty, which has communitarized asylum and immigration policies.

In addition to the Dublin Convention, the EU Ministers responsible for immigration, meeting in London at intergovernmental level in November 1992, agreed common standards on immigration and asylum, including two Resolutions and one Conclusion for the

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[233] Such confidence has been reinforced by the Amsterdam Treaty, which includes a Protocol on Asylum. This Protocol establishes that all Member States 'shall be regarded as safe countries of origin in respect of each other for all legal and political purposes in relation to asylum matters.' On this basis it restricts the cases where asylum applications from other Member States' nationals are admissible and it creates a presumption that asylum applications from other Member States' nationals are inadmissible.

[234] See, Articles F and L - TEU, as amended by the Amsterdam Treaty.

harmonisation of the internal procedures dealing with applications for asylum.

The Ministers adopted a Conclusion on countries where there is generally no serious risk of persecution. The aim was to reduce the number of unfounded applications by relying on the actual risk of persecution in the countries of origin of refugees. Four elements were taken into account to determine whether a country should have been included in the 'white list' of countries from which asylum requests would not be entertained: 1) previous number of refugees and recognition rates; 2) observance of human rights; 3) democratic institutions; 4) stability of the situation in a third country (Pereira 1993:41).

The 'white list' approach accelerates decisions on asylum applications, and prevents genuine refugees from obtaining asylum because the country they are fleeing from does not normally generate refugees. It is possible to indicate at least three main factors, which undermine the validity of a white list approach to the issue of refugees:

(1) Rigidity. Standards of human rights and democracy can rapidly deteriorate even in a country which does not normally generate refugees. Genuine refugees from a white listed country can reach Europe before ministers had the time to agree and update the 'white list'.

(2) Diplomacy. The exclusion or the inclusion of a country from the 'white list' can create diplomatic tensions with the European Union and damage otherwise good international relations. This is particularly true for those countries which are on the white list because they have democratic institutions and do not normally generate a high number of refugees. Nevertheless, contingent internal political developments could still create potential for refugees. A 'white list' increases the risk that the right of asylum to the EU is measured on the basis of 'good relations with the Europe' of the country of origin, rather than 'effective persecution'.

(3) Individual cases. Countries satisfying the criteria to be included in the white list could still generate a small number of refugees. Although the human rights situation might satisfy the criteria to be white listed, internal political in-fighting might lead to the persecution of particular individuals, without necessarily generating a wave of refugees.

Two other important Resolutions in the field of asylum were adopted by the EU immigration Ministers in 1992. The first Resolution, on manifestly unfounded applications for asylum, established that applications should be regarded as manifestly unfounded when it was clear that: a) there was no substance to the claim of persecution; b) the claim was based on deliberate deception or was an abuse of asylum procedure. A decision on such applications

should be reached in general within one month and there would be a simplified appeal procedure (Pereira 1993).

The second Resolution concerned 'host third countries' considered 'safe'. A 'white list' of safe third countries would allow Member States to send asylum seekers back to a third state where they had already been granted protection or where they had the genuine opportunity to seek such protection. In substance this abolished the right to appeal prior to deportation of applicants coming via another 'safe' country (it was considered above that this already applied to refugees coming via another EU Member State). Similarly to the Dublin 'country of first origin' rule, the refusal to consider an application for asylum on the ground that the refugee came from a 'safe' third country might be in violation of the Geneva Convention, which obliges each State to make its own judgment on each application.

Furthermore, many third states, which do not provide the same 'high standards' of human rights as the EU, might well be listed as 'safe' for the purpose of entertaining applications for asylum. In this respect some EU countries (in particular Germany and Denmark) - which already had constitutional problems with Dublin - might have problems in sending refugees back to a third state with lower - albeit enough to be considered safe - human rights standards. In contrast, Member States with lower constitutional human rights standards (or with no 'constitutional' standards at all) could increase dramatically the level of deportation of asylum applicants, relying on the EU rules on safe third states.

5. From TEU to Amsterdam

Title VI of the Treaty on European Union dealt with intergovernmental co-operation in the fields of 'Justice and Home Affairs'(JHA). According to Article K.1 asylum policy, immigration policy and rules governing the crossing of external borders shall be regarded by Member States as matters of 'common interest'. Member States could adopt joint positions and take common actions in the matters referred to in Article K.1, only when the objectives of the Union could be attained better by common actions than by the Member States acting individually, due to the scale or the effects of the proposed action (subsidiarity). Joint positions and joint actions had to be agreed unanimously by the Council, however, once consensus was reached on a particular joint action, the measures implementing that joint action could be adopted by qualified majority.

It has been argued that TEU introduced a new type of intergovernmental competence with potential for 'creeping communitarization' (O'Keeffe 1995:25). Differently from pure intergovernmental action, TEU provided for a limited role of the EU institutions in the formulation of the new policies. The Commission was given a shared right of initiative together with the Member States and according to Article K.4(2) 'shall be fully associated with the work in the areas' referred to in Title VI (JHA). The Parliament must be regularly informed and consulted on the principal aspects of the activities in the areas covered by Article K.1 and was given a right to ask questions and make recommendations (Article K.6). As for the Court of Justice, although article L TEU excluded the Title on Justice and Home Affairs from its jurisdiction, according to Article K.3(2)(c) the Member States could stipulate Conventions in the areas covered by Article K.1 and confer jurisdiction on the Court of Justice to interpret the provisions and to rule on any disputes regarding the application of such Conventions. Last but not least Article K.9 allowed for the communitarization of the subjects listed in Article K.1, using the procedure of Article 100c EC. The decision to communitarize co-operation in the field of justice and home affairs would have to be taken unanimously by the Member States acting in the Council.

The quasi-intergovernmental nature of the TEU provisions on Justice and Home Affairs did not address the problem of democracy with respect to immigration and asylum policies. Common positions and actions were agreed by a Co-ordinating Committee of the Council, created by Article K.4 TEU and consisting of unaccountable 'senior officials'. The role of the Commission and of the Parliament was entirely marginal and the final decision on common actions rested with the Ministers meeting in the Council. The most serious 'democratic deficit' was the lack of general jurisdiction for the Court of Justice. Common actions under TEU were exempted from judicial review both at national and Community level, unless the Member States agreed to confer jurisdiction on the Court of Justice in one of the K.3(2)(c) Conventions.

The Treaty on European Union introduced means for the democratisation of immigration policies in two principal areas: Article K.3(2)(c) TEU, dealing with the drafting of Conventions subject to the jurisdiction of the Court of Justice and Article 100c EC, dealing with the common visa policy under 'communitarian' competence. The latter represented the model for the communitarization of the whole matter of immigration and asylum policies, which was agreed in the Amsterdam Treaty.

5.1 TEU Conventions

Three Conventions were proposed by the Commission under the authority of Article K.3 of TEU: the Convention on the Crossing of External Frontiers, the Europol Convention and the Convention on the European Information System. The three Conventions extended to the Community some of the 'compensatory measures' of the Schengen implementing Convention on the abolition of internal border controls (namely stricter external border controls, police co-operation and exchange of information).

The extension of the 'compensatory measures' to the rest of the Community was determined by the interest of some Member States, not part of Schengen, in more effective means to apply restrictive immigration policies, prevent illegal immigration and fight cross-border crime, without necessarily having to agree to the abolition of the internal frontiers. The Conventions, however, were also a signal that, even before the Amsterdam Treaty, the Commission intended to apply Article 7a EC to the whole Community and abolish the internal frontiers beyond Schengen. Now they should be read in the light of the five year programme for the abolition all internal borders controls within the Community set up by the Amsterdam Treaty (*infra*).

It has been argued that the Commission's initiative in proposing Conventions under the authority of Article K.3 of TEU was an attempt to communitarize the third pillar of the Treaty (JHA), using the means provided by TEU to circumvent intergovernmentalism (in particular the jurisdiction of the Court of Justice). In fact, the matters covered by the new Conventions were already the object of other pre-TEU intergovernmental agreements (O'Keeffe 1995:27).

According to Article K.3, the Commission proposed that under each Convention the jurisdiction be given to the European Court of Justice on the matters of interpretation and dispute resolution. This is particularly important for the Convention on the European Information System, which includes guarantees for the protection of individuals in the processing of personal data. Article 29 of the draft External Borders Convention confers jurisdiction on the European Court of Justice on preliminary ruling on the interpretation of the Convention, and on disputes concerning its implementation, on application by a Member State or by the Commission.

The External Borders Convention contains rules on the crossing of the external borders, and on the nature of border controls. It regulates the entry of third country nationals, who

propose to stay a maximum of three months in the Union, while entry and residence of third country nationals in one Member State for more than three months remain subject to national law and restricted to that Member State. There is a strong connection between this Convention and the Community-wide right of free travel for third country nationals, introduced by the Amsterdam Treaty.

The TEU External Border Convention was deadlocked, like its wholly intergovernmental predecessor, by a dispute between the United Kingdom and Spain over Gibraltar, which is one of the critical points of the Union external border (because of the immigration coming from North Africa). It was also deadlocked by the British government on the issue of the jurisdiction of the European Court of Justice. On this last point there was no difficulty with the previous intergovernmental draft, which did not give jurisdiction to the Court of Justice. The Europol Convention is not progressing for the same reason. The government of United Kingdom do not want the European Court of Justice to adjudicate disputes concerning the external borders or the operation of Europol on the grounds that 'home affairs' are exclusive competence of the Member States. It denies that the involvement of the Court of Justice would make the patrolling of the external borders and Europol more accountable or transparent.

There seems to be a 'democratic contradiction' in the position of the British government on the jurisdiction of the Court of Justice under Conventions stipulated according to Article K.3 TEU. The British government back increased co-operation on external border controls, cross border policing and on the relevant Conventions, but when it comes to guarantee the necessary 'communitarian' judicial supervision of intergovernmental actions which have a potential for undermining fundamental human rights, they argue that 'home affairs' must remain within the national domain.

The judicial review of the Court of Justice under Conventions dealing with K.1 matters would have determined the definitive communitarization of these matters, which some Member States (including the United Kingdom) struggled to maintain under national exclusive competence. The concerns of those Members were met by keeping K.1 matters, including asylum and immigration, out of the EC Treaty and inserting them in the third pillar. The intergovernmental nature of the competence on justice and home affairs (third pillar), nevertheless, was not established by the Treaty on European Union on a permanent basis, given the 'democratic contradictions' it could generate. The subjects listed under Article K.1

were too close to issues of fundamental rights and individual liberties to be left to the unaccountable action of the intergovernmental legislator on a permanent basis. It was for this reason that the Treaty provided for the jurisdiction of the Court on specific Conventions and eventually for the communitarization of K.1 subjects via the passerelle provision of Article K.9.

5.2 The Amsterdam Treaty

The Amsterdam Treaty obviated the need to use Article K.9 or to negotiate the jurisdiction of the Court of Justice under the Conventions by bringing most of the third pillar under Community competence.

A new Title called 'Free movement of persons, asylum and immigration' has been inserted in the EC Treaty, dealing with internal and external borders, policies on visas, asylum and immigration, and judicial cooperation in civil matters. Matters concerning criminal law and police cooperation remain the object of intergovernmental cooperation under the third pillar, which has been substantively restructured. As a result the matters covered by the Schengen, Dublin, External Borders and European Information System Conventions have been brought under Community competence and under the jurisdiction of the Court of Justice. The Europol Convention, affecting matters of police cooperation, remains in the intergovernmental domain.

The United Kingdom, Ireland and Denmark have secured 'opt-outs' from the new Community competences, which are defined in separate Protocols. This arrangement allows them to avoid the jurisdiction of the Court of Justice in matters relating to home affairs. Denmark, however, will go ahead with the abolition of internal border controls at the intergovernmental level as a Member of the Schengen Agreement, although the matter of internal and external border controls has been communitarized for all the other Schengen Members.

The new community competences in justice and home affairs will determine a fundamental change in the formulation of policies in this area, although the substance of such policies, including the matters dealt with in the various Conventions, is likely to remain unchanged. Directives and Regulations rather than Conventions will be used by the Community to implement the new policies and all matters will be subject to control by the Court of Justice.

The jurisdiction of the Court of Justice is the same as for other Community matters, although preliminary rulings are restricted to last instance courts (which are under the obligation to refer) and are excluded with respect to the abolition of internal border controls. The entire jurisdiction of the Court is excluded with respect to measures regarding the maintenance of law and order and the safeguarding of internal security. In addition to the Court's traditional jurisdiction, there is also a type of action 'in the interest of the law', which may be brought by the Council, the Commission or a Member State. The Commission acquires the sole right of initiative after a five year period of joint initiative with the Member States. The overall structure of the EC Treaty is greatly improved as all matters relating to free movement of persons are now within Community competence and the area of intergovernmental competence (third pillar) has been confined to criminal law and police cooperation.

The new EC Treaty Title on free movement of persons, asylum and immigration provides for the abolition of internal borders according to Article 7a EC within five years, in conjunction with directly related flanking measures dealing with external border controls, asylum and immigration. The abolition of internal borders includes 'the absence of any control on persons, be they citizens of the Union or nationals of third countries.' Before the Amsterdam Treaty, the Commission put forward proposals for two Directives implementing Article 7a EC.[235] The proposals, based on Article 100 EC, provided for the abolition of internal border controls among Member States and for a time-limited Community-wide right of free travel for third country nationals. It appears that following the five year programme established by the Amsterdam Treaty for the full implementation of Article 7a EC, such proposals might be repealed and substituted with analogous proposals based on the new EC Treaty Articles on free movement and border controls.

The five year programme corresponds to a *de facto* communitarization of the Schengen Agreement, although Schengen remains in place for those Members, who have already abolished or are going to abolish the Community borders, before the time frame set in the EC Treaty, and for Denmark, which has opted out of the new Community competences. Moreover, not all the Schengen Agreement has been communitarized. The Schengen provisions dealing with co-operation in criminal law and police matters will be dealt with at intergovernmental level under the restructured third pillar.

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[235] COM(95)346 Final and COM(95)347 Final.

The new EC Treaty provisions also give to the Council the power to pass measures dealing with asylum and immigration policies within five years of the entry into force of the Amsterdam Treaty. The substance of Community action in the fields of asylum and immigration policies is likely to remain of the same restrictive nature as it was agreed at the intergovernmental level, however, this action will be flanked by measures dealing with the rights of asylum seekers and immigrants. This is a significant step forward with respect to previously unaccountable intergovernmental policies in the same areas. Among the measures which the Council is called upon to adopt in the field of immigrants and refugees' rights there are: (a) minimum standards relating to the reception of asylum seekers, to their qualification as refugees and to the procedures for granting or withdrawing refugee status in the Member States; (b) measures concerning the conditions of entry and residence of long-term immigrants, including for the purpose of family re-unification; and (c) measures defining the rights and conditions under which the nationals of third countries resident in a Member State may reside in other Member States. These provisions together with the jurisdiction of the Court of Justice in Community matters, achieve the result of balancing potentially restrictive measures in the field of asylum and immigration with the protection of third country nationals' fundamental rights.

In all the matters transferred from the third pillar into the EC Treaty, decisions require unanimity in the Council, apart from visas, where qualified majority voting is possible. This is mitigated by the fact that after five years the Council is to decide (by unanimity, although without the need for national ratification), whether some or all of these areas should move to qualified majority voting and to the co-decision procedure. Also, if there was a stalemate between the 15, the 13 signatories to the Schengen Protocol could be brought into play.

The Amsterdam Treaty has also restructured and improved the 'third pillar', now dealing with criminal law and police cooperation. The legal instrument of the Conventions has been replaced by the 'Framework Decisions', which are similar to Directives, as they have to be transposed into national law, but, unlike Directives, have no direct effect. The right of initiative of the Commission has been extended to all matters covered under Title VI of TEU (third pillar) and remains shared with the Member States. The European Parliament is to be consulted.

If under the new EC rules on free of movement asylum and immigration the Court of Justice retains its traditional powers, albeit subject to some limitations, under the third pillar

the powers of the Court are specifically spelled out. The jurisdiction of the Court is subject to acceptance by each Member State, unlike in the new EC matters, where it is compulsory. Each Member State can opt-out of the jurisdiction of the Court on preliminary rulings in each specifc Convention or Framework Decision. As a result instruments such as the Europol Convention, which was deadlocked because of the British veto on the Court jurisdiction, should become easier to agree. Moreover, under the third pillar, preliminary rulings can be requested by all courts or tribunals, but there is no obligation for last instance courts to request a preliminary ruling, if a question of Community law is raised. This contrasts with the EC provisions on free movement, asylum and immigration, where only last instance courts are allowed to request preliminary rulings, but are they also under the obligation to do so if a question of Community law is raised. In addition to the special status of preliminary rulings, under the third pillar the Court has the power to: (a) review the legality of Framework Decisions and Decisions in actions brought only by the Member States or the Commission; and (b) rule on disputes between Member States or between the Member States and the Commission regarding the interpretation or application of acts adopted under the third pillar.

6. Conclusions

The progress of European integration and the creation of an internal market as an 'area without internal frontiers in which the free movement of goods, persons and capitals is ensured,' have generated the need for a common European immigration policy with respect to third country nationals. This necessity has become even more evident after the Treaty on European Union, which has transformed the Community right of free movement (Article 48 EC) into a right of citizenship (Article 8a EC) and which has inserted immigration and asylum policies within the scope of intergovernmental competence of the 'third pillar' (Justice and Home Affairs). The Amsterdam Treaty of October 1997 has finally brought all aspects of free movement, immigration and asylum policies under Community competence. In this Chapter two major criticism have been made of the emerging EU immigration policy: the first concerns its form, the second its substance.

On the point of form the choice of dealing with immigration and asylum policy at the intergovernmental level was criticisable because it removed government actions from parliamentary and judicial scrutiny. This scrutiny is of particular importance in subjects such

as immigration and asylum policy, which are likely to impinge on individual fundamental rights and freedoms. The creation of a European immigration policy should not be an excuse for taking action against immigration which are in violation of fundamental rights and escape controls at national and at Community level. For this reason if Member States decide to take common action on immigration and asylum, this should be done under Community competence, where the actions of the institutions are subject to the scrutiny of the European Parliament and of the European Court of Justice.

The Amsterdam Treaty has addressed the issue of democratic control by providing for a large transfer of competences to the Community on internal and external borders, policies on visas, asylum and immigration and judicial cooperation on civil matters. The new Community competences also include specific provisions dealing with the rights of asylum seekers and third country nationals. It is regrettable that cooperation on police and criminal law matters have been left under intergovernmental competence, although the 'democratic credentials' of the third pillars have been much improved by an increased role for the Community institutions, particularly the Court of Justice.

Regarding the substance of European immigration policy it appears that Member States are converging on an increasingly restrictive approach ('fortress Europe') aimed at protecting their domestic labour markets from competition of third country migrant workers. A fortress Europe immigration policy is not to be welcomed because it contrasts with the idea of European integration and citizenship which has been put forward in this Thesis. First, there is no economic evidence that curbing immigration would automatically improve the unemployment crisis that affects most EU Member States. The vast majority of third country immigrants target unskilled jobs that European citizens often refuse to take. Moreover, demographic trends indicate that the steady population growth in developing countries is paralleled by falling birth rates in Western Europe. This demographic pattern suggest that a certain level of economic immigration towards the European Union might become desirable in the medium and long term, in order to ensure that economic growth is supported by the necessary workforce.

Second, 'fortress Europe' undermines the construction of a European citizenship based on political identity and association, rather than on national identity and kinship. The principle of exclusion inherent in a 'fortress Europe' approach contrasts with the openness of political identity and citizenship, which are supposed to bring together people of different cultural,

religious and ethnic backgrounds on the basis of political association. National identity and national citizenship on the other hand are based on kinship and favour the exclusion of outsiders, who do not share common ancestry, culture or traditions with the members of the national community. It was discussed in Chapter III and IV that the European Union could not reproduce a model of citizenship and identity similar to the national one, due to the lack of 'kinship' among European citizens. A political model of citizenship and identity based on association and participation would favour the integration of European citizens with diverse cultural backgrounds, but would also leave the door open to all those non-Europeans, who in spite of their diverse backgrounds want to join the political community. If one rejects the idea of a common European culture, it becomes difficult to exclude 'outsiders' from a status of citizenship based on political association. A European political citizenship should aim at overcoming national and cultural differences among Europeans in the name of a 'neutral' political community, which would be naturally inclusive towards third country immigrants.

The Amsterdam Treaty of October 1997, which resulted from the intergovernmental conference (IGC) on the revision of the Maastricht Treaty, modified the current asset of European immigration policy. It appears, however, that all modifications affect the form rather than the substance of immigration policy. In spite of the tide of left-wing governments which have been elected in Europe in the past year or so (Italy, Great Britain and France) there is little chance that Member States might agree on a common immigration policy less restrictive than the one designed by their conservative predecessors.

In Italy the centre left administration elected in April 1996 moved in the direction of favouring the integration of third country immigrants by proposing to grant them the right to vote and stand as candidates at local elections under the same conditions as EU citizens. In Britain the new Labour government elected in May 1997 proposed to amend the controversial Asylum and Immigration legislation recently passed by the Conservative government. In particular the amended legislation would abolish the 'white list' of safe countries of origin from which applications for asylum should not be entertained and re-instate the grants that the UK government used to provide for asylum seekers. The new government also proposed to abolish the 'primary purpose' rule, which conditioned family re-unification to administrative discretion. According to this rule a third country spouse had to demonstrate before the immigration authorities that his or her 'primary purpose' in marrying a British citizen was not to obtain entry. In France it is expected that the new Socialist government elected in June

1997 will relax some of the most restrictive aspects of the immigration legislation passed by the late Gaullist government (*Loi Debrè*), in particular with respect to the provisions regarding the expulsion of illegal immigrants. The British Asylum and Immigration Act and the *Loi Debrè* implemented the restrictive immigration and asylum policies agreed at EU intergovernmental level.

In spite of these signs of relaxation of some of the most restrictive aspects of national immigration and asylum policies, it appears that at EU level Member States are unlikely to recede from the 'fortress Europe' approach. The text of the Presidency of the Council (Netherlands) for the IGC said that there was no question of opening the door to an expansive policy, but rather of taking action in some clearly defined areas where co-operation between Member States was necessary. In this context, as in many others, 'fortress Europe' is presented as a necessary compensation for the abolition of the internal borders, but in reality it is used by Members to alleviate internal social tensions due to the rise in unemployment. As long as the unemployment crisis continues to deepen, no matter how effective those policies are in reality, Member States are unlikely to recede from the 'fortress Europe' approach to immigration policy.

CHAPTER VIII

EUROPEAN CONSTITUTIONAL CITIZENSHIP

This Chapter has been divided in two main parts: the first one dealing with theoretical issues of citizenship, democracy and identity, the second one with practical issues of citizenship in the European Union. It attempts to provide some indications for a 'European constitutional citizenship' by applying the principles outlined in Part One to the existing framework of citizenship and democracy in the European Union as described in Part Two.

In particular it focuses on the relevance to the process of European integration (including common citizenship) of principles and categories of general 'citizenship theory' such as: liberty of the ancients and liberty of the moderns, national identity and political identity, kinship and association, exclusion and inclusion, entitlements of citizenship, multiple citizenship and identities, subsidiarity and local democracy, intermediate organisations. This list is not exhaustive, but it contains some crucial concepts, which have been discussed in Part One with the often declared purpose of providing theoretical foundations for the development of a European constitutional citizenship, more complete and coherent than the current status European Union citizenship.

In the present Chapter the analysis of the applicability of some of these principles to the European Union goes beyond the legal analysis of the existing provisions on Union citizenship and on other citizenship related matters (such as immigration), which was made in Part Two. It is suggested that European citizenship and democracy might develop on the basis of the model of post-national citizenship outlined in Part One. The result is a typical analysis of *iure condendo*, where policy considerations prevail over strictly legal issues of citizenship. More than in any other situation considered in previous Chapters, the practical realisation of the type of citizenship, which emerges from this analysis, will be a job for the European

legislator representing European citizens (the IGC or the European Parliament), rather than for the Court of Justice.

It has emerged from the analysis conducted so far that two aspects of political theory are crucial to citizenship: eligibility and entitlements (see, Chapter I). Eligibility for citizenship has already been discussed with respect to citizenship in the European Union (in particular in the Chapters on European identity and on European immigration policy). The analysis of eligibility has focused on existing patterns of exclusion/inclusion from national citizenship and therefore from Union citizenship, as well as on the possible evolution of European Union citizenship. In particular it has been considered how Union citizenship might evolve towards a highly exclusive status ('fortress Europe'), on the model of the citizenship in nation states, or alternatively towards an inclusive association between members of different national and cultural groups (Europeans and not).

Bearing in mind the reflections made on eligibility, this Chapter concentrates on the issue of entitlements, and in particular on how to apply some general categories of citizenship (as outlined in Part One) to the emerging status of common citizenship in the European Union.

The level and the quality of entitlements of citizenship is a function of the political model of citizenship that is adopted. In general terms 'democratic citizenship' corresponds to a high level of entitlements (especially political rights) and a consequent high internal solidarity, while liberal citizenship corresponds to a rather hollow and non-solidaristic conception of society, in so far as it tends to confine entitlements to the area of civil rights and basic individual liberties. In liberal models of citizenship the area of political and social rights is reduced, in order to avoid the danger that 'self-rule' by the citizens (and the increase of internal solidarity) might compromise individual civil rights.

Democratic citizenship emphasises 'positive liberties': individuals' right to self-rule by means of strong political and social entitlements, while liberal citizenship emphasises 'negative liberties': the concentration of entitlements in the area of basic liberties (negative in the sense that they are 'residual' with respect to the limited powers of the public authority), with the risk of compromising self-rule and alienating citizens from the exercise of public power. According to liberals too much emphasis on self-rule and political participation is dangerous because the consequent growth of society inevitably reduces the scope of individual freedom. On the opposite side democrats argue that a reduction of unrestricted individual freedom (not necessarily impinging on civil and basic liberties) is a price worth

paying for an increase in self-rule and solidarity.

It has been considered in previous Chapters how republican citizenship represents a compromise between liberal and democratic radical theories. Republicans recognise the liberal concern for individual freedoms, especially with respect to diverse individual and group identities within large political societies, however, at the same time they argue that there is space for a common political good among free and diverse individuals. Such common political good constitutes the basis for self-rule and substantial entitlements of citizenship. The republican position has been outlined in Chapter II, and widely discussed with respect to European identity in Chapter IV. The next Section considers a concrete application of republican principles in constitutional theory ('constitutional dualism'), while the following Section reflects on the applicability of republican principles and 'constitutional dualism' to European citizenship.

1. Constitutional democracy

The conflict between liberty of the ancients and liberty of the moderns has been translated in American and European constitutional politics in 'government of the people by the people' against 'government of the people by laws', where the first one refers to the citizens' aspiration to democratic self-rule and the second to the protection of individual liberties provided for by the courts against the exercise of public powers (especially in the case of supreme courts overseeing the action of the legislator). Judicial review represents for liberals the means to uphold negative liberties against intrusive actions of the public powers, but is seen by many democrats as a counter-majoritarian and therefore non-democratic factor in public life.

If on the one hand liberals feel that minorities should not be left at the mercy of a majority legislating in Parliament (and therefore that there should be a set of basic individual rights beyond the reach of the ordinary political process, which the courts should enforce even against the will of a legislative majority), on the other hand some democrats find that judicial review of legislation contradicts the principle of democratic self-rule. Bruce Ackerman (1991) suggests a solution to the counter-majoritarian dilemma based on a model of dualist democracy. Dualist democracy distingushes between two different levels of politics: normal politics and constitutional politics.

Normal politics consist of the ordinary process of democratic self-rule entrusted to the people's representatives in parliament (or in other sub-national, democratically elected assemblies), which result in the day to day management of public life by an elected majority. Normal politics present two major disadvantages: (1) by means of dialogue and deliberation it processes individuals' interests into a common political will, which, far from constituting the will of all the people, is the expression of a political majority; (2) given that (i) the size of modern societies makes direct democracy practically difficult and that (ii) most citizens do not have the time, nor the willingness to devote a great deal of their lives to politics, normal politics take place through political representation in parliament, thus reducing greatly the scope for citizens' participation and democratic self-rule.

The first problem highlights the risk of politics as an arena for the pursuit of mere self-interest, where agreement between a group of individuals, large enough to command a majority in parliament, might lead to the advancement of particular interests to the detriment of others, which remain minoritarian. Madison, one of the drafters of the American Constitution, warned against the risk that normal politics might degenerate into the 'mischief of faction' (Sunstein 1988). In this sense the rule of the majority, not only excludes minoritarian interests from the running of the public 'thing', but it also represents a threat to the private sphere (basic liberties) of those citizens who do not share the interests of the majority.

Normal politics are the only expression of citizens' participation in public life in a levellist conception of democracy. Levellists believe that there is no risk in entrusting all politics to parliamentary majorities, as the 'struggle between self-interested individuals' is the best means to achieve a democratic political outcome. In this conception there is no concern about the low degree of representation inherent in normal politics. Parliament fully represents the political will of the people, so that 51% against 49% is perfectly entitled to rule in the name of the people until the next general election. It follows that political decisions reached by one democratic assembly do not carry more weight than those reached by another assembly, with the result that judicial review of legislation by the courts on the basis of previous 'higher ranking' norms is, from the levellist point of view, not acceptable. In order to avoid the (counter-majoritarian) obliteration of democratically enacted legislation the courts should always follow the last legally enacted legislation (Ackerman 1991).

The risk of possible abuses of the majority over the minority are overcome by emptying

politics of much of its substance (especially with respect to positive liberties such as political and social rights), and by expanding the area of individuals' pre-political and unrestricted freedom (negative liberties). In this respect levellist democracy can be seen as a practical application of radical liberal theories, which define politics as a market medium for the maximisation of individual preferences (Michelman 1988). Basic liberties and pluralism are achieved by removing controversial issues from the political agenda, rather than by improving and valorising the political process, as is the case for republican dialogic politics (see, Chapter II).

As an alternative to the democratic drawbacks of the dominance of normal politics in the levellist model of democracy, Ackerman's model of dualist democracy provides for a second tier of politics: constitutional politics. The disadvantages of normal politics (factionality and low representation/participation) can be overcome by creating a separate and higher law making track and political arena, reserved for some fundamental principles, which are to remain beyond the reach of normal politics (majority rule), and which must be agreed by a number of people large enough to represent a consensus among the members of the political community.

According to Ackerman in times of constitutional politics, the legislator has the authority to speak in the name of 'We the People', that is to say in the name of all the citizens, rather than of a simple, albeit democratically elected, majority. Such authority is derived from the fact that on the very rare occasions when constitutional politics take place, citizens can afford and are willing to devote more time to politics than in 'normal times'. Therefore constitutional norms should not only be agreed by a 'qualified majority' near to consensus, but they should also be the outcome of a political process in which all citizens, including those who stay away from politics in normal times, take part.

Constitutional dualism puts into practice the republican compromise between liberty of the ancients and liberty of the moderns, self-rule and rule by the laws, by means of a 'strategy of differential sacrifice' (Ackerman 1984). Citizens are not required to make of politics the main activity of their lives (as it was in the ancient city-states), but at the same time they are not supposed to remain 'perfect privatists' (as in radical liberal theories), totally alienated from public life. If during normal times, politics is just another interest competing with several other activities individuals engage in (and hardly one for which they would sacrifice many aspects of their private lives), during constitutional times, by reason of the interests at stake,

private citizens should be ready to invest more of their lives into politics. A serious engagement in politics entails sacrificing some aspects of our private lives; in a dualist society this sacrifice is not required of the citizens on a permanent basis, that is to say during normal times, but only when the political community enters upon a process of redefinition of its constitutional foundations.

Another crucial point at which constitutional dualism puts into practice republican principles is the defence of pluralism. It has been considered in Chapter II how republicanism, differently from communitarianism and neo-conservative versions of active citizenship, accepts the liberal idea of pluralism, that is to say the right of individuals to maintain other allegiances (political, cultural and religious) in the context of their membership of the larger political community. However, while liberals ensure pluralism by emptying the political community of much of its content (strategy of 'conversational restraint' or 'method of avoidance') and propose to write off controversial issues from the political agenda, republicans on the other hand believe that dialogue, discussion and deliberation on certain substantial and potentially controversial issues can produce a common position, even among morally diverse individuals.

Constitutional dualism provides the right framework for the application of some aspects of republican theory (pluralism and common citizenship). The space of constitutional politics (high law-making track) is where the citizens, starting from morally diverse backgrounds, find those common grounds, which shall constitute the foundations of the political community. At the same time the supremacy of constitutional rules over the ordinary political process ensures that a political majority, which wants to impose its own interests to the detriment of the minority would found itself constrained by the previously agreed superior rules.

Republicans argue, however, that constitutional rules should not only be about fundamental liberties and freedoms (i.e. a bill of rights), but that they should also include some more controversial issues on which citizens can agree on the basis of dialogue and deliberation. Dualism ensure that controversial issues which are not 'avoided', are nevertheless removed from the risks of the ordinary political process (factionality and low participation), so that 'minorities' can go to the courts if a parliamentary majority attempts to impose its own views on those issues which have been agreed at constitutional level.

As for the 'counter-majoritarian' aspect of dualist democracy, Ackerman sees it as an 'intertemporal difficulty', rather than as a contradiction of the principle of democratic self-

rule. In a dualist system, courts are supposed to uphold the 'will of the People' against any decision reached by parliamentary majorities in times of normal politics, even if subsequent with respect to the constitutional norms. Therefore if judicial review can be considered 'counter-majoritarian' with respect to normal politics, it is democratically legitimate in so far as it ensures that the 'will of the People' always take precedence over the wills of political majorities.

With respect to American history Ackerman (1991) identifies three main moments of constitutional politics in which political institutions spoke in the name of 'We the People': (1) the Foundership itself, that is to say the Constitution and the Bill of Rights;[236] (2) the Amendments which followed the Civil War; and (3) the recognition of the constitutional legitimacy of the active welfare state ('New Deal') with respect to individual rights by the Supreme Court in 1937.

In the first case, at the Philadelphia Convention the Founding Fathers of the American Constitutions, calling themselves with the collective pseudonym of 'Publius' asserted their right to draft superior constitutional norms, in the name of 'We the People', on the strength of a popular consensus, which bypassed the wills of majorities in individual states. Ackerman underlines the significance of the constitutional role of the 'Convention' in American law and in the Anglo-Saxon constitutional tradition as opposed to an ordinary parliamentary assembly. According to Article V of the Constitution of the United States the Congress acting by a two thirds majority can propose constitutional Amendments, but the final approval, expressing the will of 'We the People' is left to a 'rival' institution, the constitutional Convention. In English constitutional history the name Convention was used for a legally imperfect body, such as the House of Commons meeting without the consent of the King. It was a Convention, which started the 'Glorious Revolution' in 1688 by deposing the King and calling another to the throne. Both in the American and in the English constitutional traditions, the term Convention is therefore used to describe a breach with the existing constitutional order, which cannot take place through the ordinary political process (parliamentary), but which needs a special constitutional institution to express the will of all the people. In Ackerman's words the Convention expresses a 'revolutionary possibility', a 'self-conscious breach with the pre-existing constitutional forms'.

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[236] The American Constitution starts with the words 'We the People of the United States ...'

The second and third moments of American history have seen the 'will of the people' expressed jointly by the action of the Supreme Court and of the Congress. The Civil War Amendments were passed without the establishment of a formal Convention under Article V of the Constitution, which should have been elected with the consent of the States. In that situation, however, as the constitutional change (and in particular the abolition of slavery and the binding of the States to the Bill of Rights) was taking place against the wills of several state legislatures, it would have been self-defeating to ask the States to bring about the new constitutional order, by electing a Convention. Ackerman (1984) argues that the 39th Congress, which was elected after the Civil War, can be considered a *de facto* Convention (realising a constitutional breach). Instead, a formal state-originated Convention could have not possibly passed the 14th Amendment, which stressed the difference between the unitarian idea of 'We the People' and a mere confederation of states, by imposing the respect of civil rights to individual states, and affirming the supremacy of the will of 'We the People' over ordinary majorities in state legislatures.

The legitimation of the New Deal active welfare state, which was at first opposed by the Supreme Court ('Old Court') in name of the individual liberties protected by the Constitution, took the form of an 'informal amendment' of the Constitution. By 1937 the Supreme Court stopped defending the concept of economic *laissez-faire*, based on the idea of individual rights as negative liberties, and supported the 'modification' of unconstrained individual liberties, inherent in a system of welfare state (see, Chapter II). Furthermore, the necessary legislative changes were not introduced overnight by a Democratic Administration, which could command a majority in Congress (in fact, when this was attempted it met the resistance of the Supreme Court), but rather they were the result of a continuous series of electoral victories, that taken together pointed at a change in the will of 'We the People' (and eventually overcame the resistance of the 'Old Court').

With the notion of 'informal Amendment' Ackerman stretches to its limits the concept of 'We the People', and with it the dualist system, based on the distinction between constitutional politics and normal politics. However, even when a constitutional change occurs by means of informal amendment, rather than through a formal and previously agreed 'constitutional procedure', there is still a fundamental difference between dualist and levellist democracy. Informal amendments can be passed by institutions of 'normal politics' such as parliaments and courts (although in general by the two acting together, by a continuous and

coherent series of acts, or by special majorities), but with a qualitative difference with respect to times of normal politics, that it to say with the support of the consensus of 'We the People'.

In Europe examples of dualist systems are Germany, Italy and France, where 'rigid constitutions' (which resulted from a consensus among the people, following a constitutional breach) are superior to previous and subsequent legislation, passed by parliamentary majorities. The British parliamentary system, on the other hand is based on a levellist conception of democracy, in which a government that controls a simple majority in parliament can modify the (unwritten) Constitution, according to the will of the majority, which has elected it.

The next Section looks closely at the constitutional structure of the European Union, and considers whether a dualist system could bring about the benefits (in terms of pluralism and solidarity of citizenship) associated with the republican constitutional model (as described in Chapter II) and favour the process of European integration as well as the development of a common status of European citizenship.

2. Constitutional democracy in the European Union

2.1 The European Constitution

In its Opinion on the EEA Agreement the European Court of Justice distinguished the then 'EEC Treaty' from other international treaties, on the basis of the competences, which had been transferred from the Member States to the Community and described the Treaty of Rome as the 'constitutional charter of a Community based on the rule of law.'[237] In spite of such clear and radical language from the Court of Justice, the question of whether the European Union has a constitution, comparable to the constitutions of its Member States, remains a matter for discussion. The main difficulty appears to be the fact that, albeit different from other international organisations, the European Union does not have enough competences to be considered a 'state' or even a 'federal or confederal state', and as a consequence its 'basic law' cannot be considered a constitution in the traditional meaning associated with this word.

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[237] Opinion 1/91 on the EEA Agreement, [1992] ECR I-6102, in which the Court of Justice affirmed that the 'EEC Treaty constitutes the constitutional charter of a Community based on the rule of law' and that that 'the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprises not only Member States but also their nationals.'

Ian Harden (1994) argues that, as there is not a necessary link between the political form of nation state and the concept of constitution, the existing Treaties together with the jurisprudence of the Court of Justice are *de facto* a European constitution. Similarly the existence of a European economic constitution (and in particular the common market and monetary union) does not requires the support of a European nation state, if one accepts that a transformation of the relationship between political power and economy has led to the constitutionalisation of part of the economy, that is to say its removal from ordinary politics in the Member States.

According to Harden the Internal Market and more recently the process of monetary union have undermined the basic assumptions of the Keynesian state; the separateness of national economies and the wide discretionary powers of the executives in economic matters. Key economic decisions have been taken away from the executives' discretion (normal politics) and have been inserted in the European economic constitution. The constitutionalisation of the economy is therefore an important aspect of the European constitution, in so far as economic competences are taken away from governments (and political majorities) in the Member States, not to entrust them to normal politics in a European super-state, but to transfer them in that area of constitutional politics, which is liable to be agreed or modified only with the consensus of 'We the People'.

Like for economic matters, 'dualism' can provide the right model also for a European political constitution. Unlimited government discretion, supported by a political majority in Parliament (levellist democracy), presupposes the independence of national economies as well as a certain degree of political and cultural homogeneity within the nation state. In an 'independent' and culturally homogeneous nation state crucial decisions taken by a political majority would neither affect nor be affected by neighbouring national economies, nor would they impinge on the fundamental rights of internal minorities. In contrast, 'levellist democracy' presents great potential for abuse in multicultural states (following the increase in global migration), as well as in increasingly interdependent nation states, where crucial economic and political decisions, reached by a parliamentary majority in one state, affect not only internal dissenting minorities, but also citizens of other states, who do not have any political input in the state where the decision has been taken.

In this respect the processes of constitutionalisation (the shifting of some fundamental matters, including part of the economy, from the ordinary political process to an higher level

of politics in a dualist system) and European integration are intertwined. Integration increases the need for constitutionalisation of the economy as well as of all those decisions, which are likely to affect vital interests of national groups and minorities, which are part of the new larger political community. In a supranational political community such as the European Union the vital 'constitutional area', to be subtracted to the action of ordinary politics, is bound to grow in order to reflect the increase of diverse interests, which are represented in the community.

The distinction between state and constitution (including 'constitutional economy') is used by Ian Harden (1996) to demonstrate that there can be a European political and economic constitution without the support of a European super-state. He reads the classic distinction between liberty of the ancients (positive liberty) and liberty of the moderns (negative liberty), as two aspects of the concept of democracy, 'affirmative' the first, 'critical' the second. Affirmative democracy is closely associated with the existence of a strong political community (*demos*), which in the nation state has been supported by national identities (*ethnos*). In contrast, some aspects of critical democracy can be developed in the absence of a consolidated state community.

Affirmative democracy emphasises popular sovereignty and self-determination, as the foundations of political identity and the source of legitimation for the exercise of public power. In the European Union more emphasis on affirmative democracy would be required in order to remedy the current democratic deficit, affecting the European institutions and their exercise of power. A radical step in the direction of affirmative democracy, and therefore of a federal Europe, could be the transfer of legislative powers from the Council to the European Parliament (the Council could retain a supervisory role, and also some veto powers) and the transformation of the Commission into an executive responsible before the Parliament. The President of the Commission would be either directly elected or elected by the Parliament, rather than appointed by the governments of the Member States. Such a set of democratic institutions would allow for the transfer of more competences to the Union (Harden 1996).

Harden, however, notes how in modern Europe, political community and political identity have been expressed through the means of the state, where affirmative democracy has relied on national identity parallel to political identity as the cement holding the community together. The same sort of combination would not be possible in the European Union, where the political community must coexist with different cultural and national identities. At the

moment there is nothing like a single national identity at European level, which might sustain a drive towards affirmative democracy and this is also reflected in the public opinion in the Member States, which is generally opposed to the creation of a full fledged European state.

Critical democracy 'questions, limits and constraints public power', rather than involving the citizens in its management. For this reason Harden argues that it might be better suited to European integration than affirmative democracy, which requires a substratum of identity, and which would trigger the consolidation of a European super-state. In the absence of a 'European *demos*' the development of a system of critical democracy might represent a compromise solution between an unrealistic federal Europe (the super-state) and the re-patriation of competences to nation states, in order to provide a solution to the current democratic deficit of the European institutions.[238]

Harden's concern that a European super-state is, at this time in history, neither a viable nor a desirable option is to be shared, if only for the fact that the European integration should be about the overcoming of the nation state form, rather than its expansion. However, the argument that there is not a necessary link between constitution and state could be brought

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[238] In practical terms according to Harden (1996) further European integration and a solution to the current democratic deficit by the means of critical democracy, would see the exclusion of a system based on popular sovereignty (affirmative) and the opting for 'flexible integration'. The European Union would be structured on two different tiers, a common base and a series of open partnerships. The common base would include the basic constitutional structure, fundamental rights and the common market and would be shared by all the Member States, like the existing *acquis communautaire*. The open partnerships, on the other hand, would include all those areas of competence (monetary union, foreign policy, defence policy, social policy, etc.), on which only some Members were ready to go ahead with further integration. Partnerships would remain open to other Members who wanted to join at a later stage, and, differently from the common base, would not be bound by the principle of the *acquis communautaire*, that is to say, it would be possible to re-patriate the relevant powers to the Member States, if the partnership did not work. In absence of a direct popular mandate as well as of a 'European *demos*', neither the common base, nor the partnerships would be 'sovereign', in a similar manner to the nation states, and therefore they would never be in the position to define their own competences vis-à-vis the Member States.

A mechanism for flexible integration of the type suggested by Harden has been introduced by the Amsterdam Treaty, which has inserted in the Common Provisions of the Treaty on European Union a new Title on 'Closer cooperation and flexibility.' The provisions of this Title apply to the first (EC Treaty) and to the third pillar (criminal law and police matters), while for the second pillar (common foreign and security policy) the possibility of resorting to 'constructive abstention' by Member States was thought to be adequate to meet the requirements of flexibility. Closer cooperation between Member States may not concern areas which fall within the exclusive competence of the Community or affect Community policies, actions or programmes. This would exclude the internal market, social policy and monetary union, among the other areas of Community competence. The Commission is to ensure compliance with these criteria, which are subject to review by the Court of Justice. Closer cooperation can only be initiated by a proposal from the Commission: when presented with a closer cooperation request, the Commission will not submit a proposal to the Council unless the criteria are fulfilled. The process is triggered by qualified majority voting in the Council, unless a Member State uses its veto on grounds of 'essential interests' in which case the matter is referred to the European Council for decision by unanimity. Closer cooperation arrangements are open to any Member State willing to participate.

even further, by saying that there can also be a *demos* without a state. In the history of the nation state, political community and political identity have been closely associated with national identity, but there have been pre-national examples of citizenship in which the political element has sustained the identity of the citizens, without the need to resort to the elements of kinship (such as ethnicity, culture or religion), which characterise national identity. In this respect 'citizenship' (the expression of political community and identity), as opposed to 'nationality', pre-dates the nation state (which is about two hundred years old), and constitutes an interesting model for political integration in a supranational community, such as the European Union, not leading to the creation of a 'state'. The creation of an independent European political community and identity (*demos*) does not necessarily imply the rise of a European state, analogous to the founding Member States.

A federal or confederal Europe could not be considered a 'state' on the same terms as its founding Members (where national identity sustains the political community), if identity and citizenship were based solely on principles of association and excluded the resort to kinship, in order to keep the community together. It would be closer to multination states, where the existence of different national and ethnic groups requires an high degree of neutrality on the part of the central political power as well decentralisation and self-government. Europe could become a unique form of political community, where 'critical' as well as 'affirmative' democracy at federal level (based on a *demos* and on a common political identity) are compatible with national identities and national affirmative democracies.

In a large political community, such as the European Union, affirmative democracy (or liberty of the ancients) presents serious problems regarding the determination of the common good. In fact, it might prove extremely difficult to find a common ground between people with different national and cultural allegiances. It was considered in Chapter II how democracy in 'large republics' encounters two major obstacles, namely (1) the size and (2) the heterogeneity of the population. In this respect Harden is right in suggesting that critical democracy should play a prominent role at the central level, as the means to control and limit the exercise of public power. However, if one accepts that further European integration might lead to the formation of a European *demos*, it is crucial to reserve a role, albeit more limited than in culturally homogeneous and centralised nation states, for affirmative democracy.

This could be achieved by increasing the areas where majority voting is required in the Council, and at the same time extending the powers of the European Parliament. At the end of

this process all legislative powers in areas of Community competence should rest with the European Parliament, the Council maintaining a role of control, or acting as 'Upper House' representing the Member States. The Commission should consolidate its role of executive, responsible before the European Parliament, although it is questionable whether, even in a 'federal Europe', it should be directly elected or elected by the Parliament. The current system, where the Member States appoint the Commission and its President, subject to the Parliament's approval, could be maintained with some important modifications. For instance the Council acting by qualified majority could appoint the Commission, subject to a real confidence vote in the Parliament, so that *de facto* the Commission would be responsible before both institutions, the first one representing the people of Europe (*demos*), the second the national governments. The role of the Council (representing the Member States) is important, as the Commission should not only be the expression of a political majority in Parliament, but also of the different national groups, which constitute the Union.

Affirmative democracy at the federal level, however, should be reduced to essential competences, to be determined according to the principle of subsidiarity, in order to take account of the size and of the cultural heterogeneity of the population. In contrast, affirmative democracy would have a more prominent role at national and sub-national level (regions, provinces, local authorities). The emphasis on affirmative democracy at sub-national level is important as the problems of 'size' and 'heterogeneity' affecting the federal process at European level are in all analogous to similar problems already affecting nation states in Europe.

On the basis of the considerations made above it appears that the process of European integration can lead to supranational citizenship and democracy if two major issues are tackled: (1) the democratic legitimacy of the institutions at federal level and (2) the development of an effective system of local democracy and participation. The next two Sections focus on these two issues, which might play a crucial role in the future development of the European Union.

2.2 Democratic legitimacy and division of competences

The German Federal Constitutional Court ('Federal Court') in its decision on the Maastricht Treaty ('Maastricht Decision') has recently cast some serious doubts on the democratic

legitimacy of European institutions and on the jurisdiction of the European Court of Justice. Among the various complaints which were brought before the Federal Court against the Maastricht Treaty for violation of the German Constitution, one argued that the Treaty, by transferring more powers to the European Union, violated the 'democratic principle' expressed in the German Basic Law (constitution), according to which all state authority must emanate from the People. In particular Article 38(1)(1) of the Basic Law grants German citizens the formal right to vote as well as a right to participate in the legitimation of the organs of government and to influence the implementation of state power (Wegen and Kuner 1995).

The European Union, it is argued, lacks some basic features of a democracy, in order to exercise public powers with respect to its citizens (and in the specific case in question, German citizens). The democratic deficit is evident in the fact that Union acts are only indirectly legitimated through the participation of national parliaments, before which the ministers who sit in the Council of the Union are responsible. The European Parliament on the other hand is confined to a merely supportive role (Boom 1995).

The Federal Court has come to the conclusion that, given the current level of competences, there is enough democracy at Union level to guarantee the constitutional rights of German citizens. However, it has stressed that any further transfer, which took place in absence of a democratisation of the European institutions, would contrast with the 'democratic principle' as expressed in the German Constitution. In particular the Federal Court stated that German organs can disregard Union acts, which are beyond Union competence (*ultra vires*) and that it will strike down those acts if a question of compatibility with the Constitution is raised. This stance clearly undermines the jurisdiction of the European Court of Justice ('Court of Justice'), which, since its creation, has struggled to affirm its ultimate authority with respect to Community law. The procedure of Article 177 EC ensures that every time a question involving the interpretation of Community law is raised in a national court of last instance, the matter must be referred to the European Court of Justice. Furthermore in the *Foto Frost*[239] decision the Court of Justice stated that it alone possesses the authority to declare a Union act invalid, thus pre-empting the question of who (the national courts or the European Court) is the final arbiter of disputes involving the division of competences between the Union and the

[239] See, case 314/85, *Firma Foto Frost v. Hauptzollamt Lübeck-Ost*, [1987] ECR 4199.

Member States. The national courts can only uphold the validity of Union acts, while if they intend to challenge their validity they have to address the European Court by means of a 'preliminary ruling' (177 EC).

In practice the Federal Court does not intend to question the Court of Justice's ultimate authority as interpreter of EC law, but it limits its stance to those extreme cases, where the action of European institutions is beyond the competences conferred by the Treaty, and therefore violates the principle of democratic legitimacy. In fact, such action would amount to an 'informal amendment' of the existing Treaties, without a necessary improvement of the democratic legitimacy of the institutions. The Federal Court regards the Maastricht Treaty as a sort of benchmark for Union authority; any further expansion of competences would require a radical reform of the European institutions, introducing 'direct democratic legitimacy'. The Amsterdam Treaty transfers significant new competences to the Community but it does not introduce a reform of the European institutions, which has been put off until at least one year before membership of the European Union exceeds twenty. In the light of the considerations made above, this might be considered an unsatisfactory outcome in terms of democratic legitimacy, by the German Federal Court.

It has been noted that, as a matter of fact, the Federal Court has called a halt to the Court of Justice's expansive interpretation of Union competences, as developed in the theories of '*effect utile*' and 'implied powers'. The carving of new competences by means of judicial activism, even if justified by the '*effect utile*' of the measure in question or by the 'implied powers' conferred upon the Union, would take place without the necessary democratisation of the institutions. The German Court is also concerned about the liberal interpretation of Article 235 EC by the Court of Justice. Article 235 is a very broad provision, which allows for action by the European institutions (the Council acting unanimously on a proposal by the Commission and in consultation with the Parliament), in order to attain one of the objectives of the Community, when the Treaty has not provided the necessary powers. The main concern of the Federal Court is that Article 235, by conferring a general legislative power, could be used to create new competences, rather than to give effect to competences which have been transferred, but for which the necessary powers have not been inserted in the Treaty. In the former case action under 235 would amount to an 'informal amendment' of the Treaty, which, according to the Federal Court, in absence of a reform of the institutions, would violate the principle of 'democratic legitimacy'.

The Federal Court, disregarding the Court of Justice's stance in *Foto Frost* has claimed the right to rule on the division of powers between the Union and the Member States, which in the history of the United States was won by the Supreme Court after a long dispute with the State courts and legislatures. The position of the Federal Court in the Maastricht decision has been compared to the rebellion of several American states (Virginia in particular) against the jurisdiction of the Supreme Court in the matter of competences. The debate on the limits of federal power in the United States was eventually won by the Supreme Court, who could sustain the need for uniformity of application and interpretation of federal law, by claiming the democratic legitimacy of the federal institutions, who derived their powers not from the states, but directly from the 'People of the United States' (Boom 1995). In contrast, the call for uniformity of interpretation and application of Community law by the European Court of Justice is undermined by the lack of 'democratic legitimacy' of the European institutions.

In this respect the position of the German Federal Court can be distinguished from that of the American states, as it concerns an issue of democracy, rather than a state rebellion against the consolidation of federal power. It is for this reason that in the Maastricht Decision the Federal Court ignores the problem of uniformity of Community law, which might arise if national courts and organs are allowed to disregard *ultravires* Community acts. For the Federal Court 'democracy' takes priority over 'uniformity'.

One might ask, however, why the German Court decided to take a stand against the 'informal' growth of community competences and in particular against the expansive interpretation of the Court of Justice, at this particular moment in time. In fact, since the Treaty of Rome came into force, the Court of Justice has constantly expanded Community competences by referring to the 'spirit of the provisions' rather than to their letter, in a process which has been referred to as 'constitutionalisation of the Treaty' (Mancini 1989). The doctrines of 'direct effect', '*effect utile*' and 'implied powers' are major examples of judicial interpretation, which have resulted in informal amendments of the Treaty. Those informal amendments, albeit controversial from a constitutional point of view, were acceptable to the Member States in the light of the fact that the Court of Justice, with their tacit consent, was struggling to create a vital space for Community competences, vis-à-vis the overwhelming sovereign powers of the Member States. It is evident how (even in presence of political will from the Member States) leaving such task to intergovernmental conferences, which in principle should be the only fora for Treaty amendments (according to Article 236 EEC and

now Article N TEU), would have proved much more controversial and politically charged, than letting the Court of Justice carve out new competences by means of informal amendments.

This state of things, however, appears to have changed after the Maastricht Treaty. First, there is no more agreement among the Member States about transferring more competences to the Union and the whole idea of subsidiarity seems to suggest the opposite. Second, the Union is no longer an embryonic supranational institution struggling to consolidate its competences and its independent legal order vis-à-vis the Member States. It is now on a more equal playing field with the Member States, so that the division of competences in a 'federal system' (as it was the case for the United States) has become a controversial issue. The need for the Union to exercise certain powers must be balanced against the willingness of the Member States to maintain certain competences. The key difficulty for the Union is that, even those powers, which it could claim according to the principle of subsidiarity (by reason of scale or effectiveness of the action in question), could be denied by the Member States on the basis of lack of direct democratic legitimacy (along the lines suggested by the German Court).

So far the Court of Justice has acted almost unilaterally in favour of the Community, in order to promote further integration. After the Maastricht Treaty, however, the time has come for the European Court of Justice to assume a more neutral stance between the Union and the Member States, considering two factors: (1) the relevant portion of competences allocated to the Community, and (2) the limited and indirect democratic legitimacy of the European institutions. A more balanced approach is necessary if the Court of Justice wants to claim a role of 'tribunal of competences', in charge of ensuring that the vertical division of powers in the federal system takes place according to the principle of subsidiarity. In the past, even in matters not directly related to the question of competences, the Court of Justice has been generally lenient with the European institutions and harsh with the Member States.

The jurisprudence regarding Articles 173 and 215 EC on the one hand and the application of Article 177 EC and the *Francovich*[240] case on the other hand are good examples of how the Court of Justice has so far protected the European institutions, even to the detriment of the rights of the individuals, while it has used Community law to expose the Member States to individual actions. Only directly and individually concerned individuals, who are not affected

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[240] Cases C-6, C-9/90, *Francovich and Others v Italy*, [1991] ECR I-5357.

as members of a particular category and can therefore be singled out, have *locus standi* to challenge acts of Community institutions under article 173 EC (or their failure to act under Article 175 EC). In a similarly restrictive fashion, Community institutions can only be sued for damages, caused by acts intended to have legal effect, in case of a 'sufficiently serious breach of a superior rule of law for the protection of the individual,' so that it is 'not enough for their conduct to be knowingly unlawful, but it must verge on the arbitrary and capricious' (Mancini and Keeling 1994).

The justification for such a limited right to damages is based on a comparison with national law, where legislative acts, as discretionary measures, are generally exempted from liability. It also true, however, that the exclusion of liability for legislative acts in the Member States is justified by the fact that legislation is subject to direct democratic control, as it emanates from parliament or from organs who are responsible before parliament (Hartley 1991). Finally it took another rebellion by the German and the Italian Constitutional Courts to convince the Court of Justice to review the acts of the Community institutions against fundamental human rights as protected in the constitutions of the Member States and in international Conventions.

In contrast with the treatment of favour reserved to the European institutions, the Court of Justice has applied strict standards for the acts of the Member States, which are subject to a constant control of compatibility with EC law by means of Article 177 EC. It has been noted how the Court has used Article 177 EC as a 'quasi-federal' instrument to review the compatibility of national law with Community law, allowing individuals to use the mechanism of 'preliminary ruling' especially against national law (Mancini and Keeling 1994). Regarding damages the Court has recently held that Member States are liable to pay damages to individuals, resulting from non-implementation or mis-implementation of Community law into national law (*Francovich* case). Such disparity of treatment, which was justified by the need of the Community to assert itself as an independent legal order, is, after the Maastricht Treaty, no longer well received in several Member States, given the wide range of competences, already transferred to the Community. In this light one should read the new rebellion of the German Federal Court in the Maastricht decision.

The principle of subsidiarity of Article 3b EC is the most evident sign of the willingness of the Member States to shift the balance of powers in the Community in their favour, after decades of 'one way integration'. In the 'Maastricht Decision' the Federal Court puts into practice the principle of subsidiarity by advocating in favour of the preservation of the spheres

of competence of the Member States. After the Maastricht Treaty, an excessively integrationist or Community biased stance by the Court of Justice might fail to aggregate any consensus in the Member States, at least as long as it is not supported by a more democratic set of institutions. Furthermore it might not be in line with the principle of subsidiarity, and might lead to further 'rebellions' of national supreme courts, as well as to a reduction of the role of the European Court.

It appears, however, that the Federal Court might recede from its bellicose intentions (which might result in defiance of Community legislation and of the Court of Justice's rulings by national courts and organs) if the Court of Justice was ready to assume a more neutral position with respect to the Union and the Member States, in accordance with the principle of subsidiarity.

2.3 Local democracy

Some Member States and the German Federal Court in its Maastricht decision, take a restrictive approach to the principle of subsidiarity, arguing in favour of the nation states in the dispute over the division of competences with the European Union. In its wider meaning, however, subsidiarity concerns not only the relationship between nation states and central federal power, but the whole concept of 'vertical division of powers'. In the allocation of competences priority should be given to the lowest levels of government, unless the scale and the effect of the action suggest otherwise. It is therefore a concept, which is intended to avoid excessive centralisation at the European level, but which also implies decentralisation of powers within the nation state.

Some Member States, who favour the application of the principle of subsidiarity to the division of competences between the European Union and the Member States, maintain a centralised internal power structure. In the United Kingdom, for instance, 'internal subsidiarity' is highly underdeveloped, very limited powers being allocated to local authorities. British local authorities not only do not have enough political and economic authority, as required by the principle of subsidiarity, but they are also too small with respect to some of their regional European counterparts. A system of regional government is a better means to deal with subsidiarity at the national as well as at the European level. Regions would be stronger vis-à-vis the national government and would also be in a better position to deal

directly with the European institutions, by-passing national governments.

More and more regions and local authorities have been opening offices of representation in Brussels to lobby the European institutions, in particular regarding the allocation of EU funds. Probably the better equipped are the German Länder (which enjoy a high degree of internal autonomy in Germany) that not only 'lobby' the institutions, but also attend meetings of the COREPER and of the Council, the main legislative fora in the Community (Cram and Richardson 1994). There is, however, a risk in the 'lobbying tide' which has brought several European local and regional authorities to Brussels, in order to make sure that their interests (as distinguished from the 'national interests') are represented in the European political decision making process. A 'non-regulated' system of lobbying risks transforming European politics into the 'mischief of factions', of which Madison warned when talking about American politics, where the stronger regional players are able to reap more benefits than the smaller, less organised sub-national authorities.

In the current situation, the strong interest of sub-national authority into European politics results in an intense, but fragmented activity of lobbying, where representatives in Brussels argue the case in favour of their region/local authorities before the institution, which has the power of taking a specific decision, affecting, among the others, that particular region/local authority. In order to avoid the risks of factionality, sub-national participation in the European political process should be officialized and channelled through effective institutional means. The Committee of the Regions, established by the Treaty on European Union, fails to achieve this objective, as it has a mere consultative role on certain matters which might affect regions. Instead, regions and local authorities should have a substantial input in the European decision-making process, as it might result from a second chamber, elected on the basis of national and regional representation. The representatives of nations and regions should have effective legislative and veto powers, shared with the European Parliament, which would continue to represent the people of Europe directly. This second chamber, with powers parallel to those of the European Parliament, might bring together sub-national authorities and national governments, if the Council is to surrender gradually powers to directly legitimated institutions, such as the Parliament and the proposed second chamber.

The involvement at European level, however, can be effective only if local and regional authorities are devolved real powers from the nation states. In this perspective subsidiarity calls for constitutional reforms in those Member States, which still maintain centralised state

systems. In the past decade the process of European integration has been paralleled by a growing debate on federalism and regionalism in Member States, with a centralised internal state structure (in particular Belgium, Italy and the United Kingdom). In Belgium this has resulted in the adoption of a federal constitution. In Italy the current government is committed together with the right-wing opposition to a federal reform of the state, in order to deal with the strong need for autonomy coming from different regions and with pseudo-separatist movements in the north of the country. In the United Kingdom the newly elected Labour administration has included in its legislative programme (Queen's speech) a major constitutional reform leading to the election of a separate parliament for Scotland and an assembly for Wales (devolution). There is also a debate on whether England should be regionalised, so that regional entities could perform a mediating political role between the local authoritites and the central government. Regions could also represent better sub-national interests in Europe than local authorities. At the moment only the largest local authorities have the means to attempt to influence the European political decision making process.

The local dimension is an important element to solve the problem of democracy in the European Union. Ian Harden (1996) is right to say that 'critical democracy' (questioning, limiting and controlling public power) should play a prominent role at the European central level. It is also possible to maintain that certain elements of 'affirmative democracy' (exercise of public power) should be realised at European level, compatibly with the formation of a European *demos* (common political identity and citizenship). It is preferable, however, that, in accordance with the principle of subsidiarity, the main focus of 'affirmative democracy' remains as close as possible to the citizens, to ensure a maximum of direct political participation.

Local democracy is concerned with the political as well as the fundamental rights of the individual, in so far as it gives them the chance of influencing directly decisions affecting their every day life. The Council of Europe has dealt with local democracy as a matter of fundamental rights in two different instruments: the 'European Charter of local self-government' and the 'Convention on Participation of Foreigners in Public Life'. The purpose of the 'Charter' is to protect the rights of the local authorities as the political institutions which are closest to the individuals and give them the opportunity of participating effectively in the making of decisions affecting their everyday environment. Article 43 of the Charter contains a provision substantially similar to the principle of subsidiarity of Article 3b EC,

where it states that 'public functions should be carried out, as far as possible, by the level of government, which enjoys the closest proximity to the citizens.' The 'Convention on Participation of Foreigners in Public Life' looks at the fundamental rights aspects of local democracy by calling for political rights (starting from electoral rights) at the local level for all residents, regardless of whether they are citizens or not. In contrast with the great emphasis that Member States put on the application of the principle of subsidiarity to their relationships with the European Union, not all the Member States are parties to these Conventions, whose application would realise at the domestic level some of the basic features of subsidiarity.

The element of proximity, characteristic of local democracy, favours direct political participation by the citizens (or all the residents, where non-citizens are granted political rights), as well as the formation of local political identities. It has been noted how there is a link between the place people live in and their identity as members of a particular local community. Socio-spatial structures (ranging from the household to the neighbourhood and the local community) are the means by which people interact with each other and generate shared interest and values, which are the basis for collective projects and self-governance at local level. It is therefore crucial for local governance that individuals acquire a 'sense of the place', which allows them to associate with a particular place and identify themselves as residents. The 'sense of place' in turn generates 'residential solidarity', which provide the necessary support for local self-governance (Kearns 1995).

Local identities ('vertical') based on the 'sense of place', similarly to cultural, religious and ethnic identities ('horizontal'), need not be incompatible with national and European political identities, if one accepts the premise that common identity and citizenship in large communities (such as the nation states or the European Union) should be multiple and equidistant from alternative conceptions of the good. In fact, European citizenship and identity would bring together individuals who maintain diverse allegiances at the 'vertical' (national and sub-national) as well as the 'horizontal'(cultural, religious, ethnic) level.

CONCLUSIONS

A republican model of citizenship has been identified in Part One, with respect to entitlements (Chapter II), eligibility (Chapter III) and identity (Chapter IV), as the most appropriate framework for membership in a diverse post-national community. Republican entitlements realise a compromise between the liberal hollow model of citizenship, characterised by a lack of solidarity and the communitarian substantive community, where an excess of solidarity undermines basic liberties. Eligibility for republican citizenship is based on political association and self-determination and therefore is open to newcomers with diverse ethnic and cultural background. It has been argued that it could not be otherwise in a post-national community, which is already as diverse as the European Union. Finally republican identity is closely related to the first two. The political nature of entitlements and the openness of the community result in a form of identity that is multiple in so far as it combines allegiances to a unified political community with allegiances to local political communities and allegiances to other 'non-political' communities and groups (cultural, religious, social, etc.).

Union citizenship clearly does not realise the ideal model of European post-national citizenship outlined in Part One. It could not be expected that Member States, who still regard national sovereignty as the foundation of political power in Europe, would move to political union and common citizenship by means of one intergovernmental conference (Maastricht). Similarly the Amsterdam Treaty of 2 October 1997, which concluded the intergovernmental conference on the review of the Maastricht Treaty, did not achieve much more in terms of a more complete and possibly more inclusive post-national citizenship.

Union citizenship represents the maximum of political integration in the field of entitlements and membership, which the Member States of the European Union could reasonably be expected to accomplish at this stage of European integration. It extends the areas of political equality among Union citizens regardless of nationality and opens the way for a more complete status of European citizenship, with no discriminations, and no distinctions among European citizens with respect to entitlements in the Member State of residence.

If on the one hand it is important to recognise that Union citizenship, with all its limits, is the best result which could be obtained in terms of post-national citizenship from the Member States, on the other hand the process of European integration and the decline of the nation state as the exclusive place of expression of political identity, require a model of membership different from the national one and more far reaching than Union citizenship. Hence the importance of the ideal type of post-national European citizenship outlined in Part One.

The issue that should be addressed at the end of this analysis is whether Union citizenship, albeit limited in nature, represents a step in the direction of European post-national citizenship, rather than the re-formulation, at European level, of national citizenship. Three factors crucial to the development of Union citizenship are considered: (1) completeness; (2) inclusiveness; (3) identity.

(1) Completeness

There is a need to make Union citizenship a more complete status, by extending the application of the principle of equality among EU citizens and phasing out all the remaining discrimination and distinctions based on Member States' nationality. This can be achieved by granting equal access for EU citizens to all national entitlements and by increasing European entitlements (civil, social and political rights).

Completeness, however, does not imply inclusiveness. A complete Union citizenship, granting equal rights to Union citizens, regardless of nationality, could still be based on a principle of exclusion and discrimination of all non-European outsiders. Union citizenship would then evolve as the European correspondent of Member States' national citizenship, where citizens have equal access to entitlements, but non-national outsiders are excluded.

It has been argued argued in Part One how this would hardly be possible, given the difficulty of creating a common European cultural identity, as the premise for the exclusion of outsiders. European post-national citizenship and identity will have to be entirely political to accommodate the different cultural and national groups which make the 'peoples of Europe'. It will not be possible to keep out from European political citizenship members of other collectivities on a national or cultural basis. Hence the necessary inclusiveness of European post-national citizenship.

2) Inclusiveness

Union citizenship has, so far, maintained the exclusiveness of national citizenship. This is due to the fact that it is a derivative status of nationality of a Member State. According to Article 8 EC 'every person holding the nationality of a Member State shall be a citizen of the Union.' A major step forward towards inclusiveness would be the conferral of Union citizenship upon all third country national who are lawfully resident in the European Union on a long term basis.

If the link between Union citizenship and Member States' nationality is severed, national identity and membership will cease to be the determining factor to access Union citizenship. Assuming that an independent European citizenship can only be sustained by a common political identity, it would be difficult to justify exclusion of non-European outsiders in absence of national and cultural elements of identity. A more complete Union citizenship in terms of entitlements is compatible with a derivative status, which makes it dependent on national identity and membership, but a more inclusive one implies the overcoming of national identity as the exclusive reference for belonging and the building of a European political identity to sustain an independent status of citizenship.

Union citizenship represents an important progress towards a more complete European citizenship, with respect to the scattered individual rights granted by the EEC Treaty and by the jurisprudence of the European Court of Justice. However, such a move towards completeness is not paralleled by a correspondent progress with respect to inclusiveness, due to the link with Member States' nationality. This is a direct consequence of the fact that Union citizenship only addresses half of the problem of citizenship, namely entitlements, but it is not yet concerned with the issue of common identity.

As far as completeness is concerned two main legal means of expanding Union citizenship have been explored in Chapter VI. The first is concerned with the expansion of citizenship *strictu sensu* to include more political and social rights as well as fundamental human rights. The second with the acquisition by the Union of the competence to define the nationals of the Member States and as a consequence its own citizens (EU citizens). This last hypothesis would lead to the creation of a Union nationality (external membership with respect to third countries) parallel to Union citizenship (rights and obligations of internal membership).

On a procedural point doubts have been expressed about the feasibility and the desirability that Union citizenship be expanded by the 'constitutional' interpretation of the European

Court of Justice, on the basis of the existing Treaty provisions. It would desirable that further developments in the field of citizenship, human rights and nationality be sanctioned by the European legislator acting under Article 8e EC or in the form of intergovernmental conference (IGC).

Regarding the substance of the expansion of Union citizenship, if the widening of its scope in the fields of political, social and human rights is highly desirable, doubts have been expressed with respect to whether a Union nationality on the model of Member States' nationality is at all desirable. Union nationality would reproduce the pattern of exclusion of Member States' nationality and would contradict the principle of inclusion which should characterise a common European citizenship and collective political identity.

The 'legal approach' to European citizenship (finding out ways Union citizenship might develop in a more substantial status) is an empty exercise if the wider scope which is sought for Union citizenship is not supported by a collective identity of the citizens. If this identity is not based on kinship, but on political association it is difficult to imagine the development of a European nationality in which exclusion of third country nationals is based on kinship among the members of the community.

With respect to inclusion, the European Union seems to be moving in the opposite direction of an open and association based citizenship. It was considered in Chapter VII that the emerging European immigration policy could be criticised in its form and in its substance. Regarding the form, the lack of democracy and accountability which characterised the intergovernmental approach to immigration and asylum policies after the Treaty on European Union was remedied by the Amsterdam Treaty, which transferred the whole matter into the EC Treaty, under Community competence. On the point of substance, however, it has been noted in Chapter VII that Member States' governments have no intention of receding from a restrictive ('fortress Europe') approach to immigration policy, at least for the time being. They consider 'fortress Europe' a necessary instrument to alleviate the social tensions caused by the deepening of the unemployment crisis in Europe.

3) Identity

Three main patterns of collective identity could sustain Union citizenship: (a) common national and cultural identity (exclusive); (b) separate national identities (exclusive); or (c) common political identity (inclusive).

The non viability of a common European national identity (a) does not automatically imply the choice of a common political identity (c) and the consequent inclusiveness. In fact, progress with respect to entitlements could be paralleled by the maintenance of the existing link with Member States' nationality and exclusive national identities as the permanent support for Union citizenship (b). Such a unique type of post-national citizenship - common entitlements, but separate exclusive national identities - appears viable as temporary arrangement (Union citizenship), leading to a more complete status of post-national and inclusive citizenship, but not as a durable type of post-national citizenship in itself. The sharing of common entitlements (in particular political rights) at European level contributes to the building of a common identity of the citizens based on political participation and self-determination and to the overcoming of national identity as the exclusive source of belonging. National identities would remain the fundamental means of cultural differentiation among the peoples of Europe, but would lose their role of selective and exclusive criteria to access the wider (European) political community.

A more complete Union citizenship in terms of entitlements could in the short term be compatible with several national identities, however, in the long term it is likely to lead to a more inclusive one, as entitlements take the place of national and cultural belonging as the founding elements of European political identity.

It has been argued that the most important features of the newly established citizenship of the Union are not the individual rights granted under the catalogue, which introduce little substantial innovation, but rather the mere presence of a catalogue of rights of citizenship in the EC Treaty and its dynamic character stated in Article 8e EC (O'Keeffe 1994). The insertion of a whole Section on citizenship in the Treaty, although failing to realise an independent and full status of citizenship, provides new grounds for the expansion of the principle of equality among the nationals of the Member States of Article 6 EC. The provisions of Article 8 to 8e EC should be read in conjunction with Article 6 EC in so far as they represent an extension of the principle of equality in the political field. By bringing the broadly defined 'political field' into the Treaty, the provisions on citizenship of the Union not only materially enlarge the scope of application of Article 6 EC, but probably also allow the Court of Justice to apply the principle of equality to matters not expressly covered by the

catalogue, which before TEU would have been found to be outside the scope of application of the Treaty.[241]

A possible enlargement of the catalogue of Union citizenship rights by means of the special procedure of Article 8e could prove very controversial. It has been considered in Chapter V how an expansion in the field of political rights, which is necessary to achieve full equality among EU citizens, at the same time might contrast with the protection of national identity and sovereignty by some Member States. The same could be said for what concerns a generalisation of the rights of free movement and residence to include all non-economic actors and eventually third country nationals. The accessibility of Union citizenship for third country nationals would represent the overcoming of the principle of exclusion, which has characterised national citizenship, and it would make of Union citizenship the forerunner of a global civil society and citizenship, rather than the reproduction of national exclusion at the European level. Equality in such a context would no longer concern only the nationals of the Member States (as it is now for Union citizenship), but would apply to all persons resident in the Union, regardless of nationality. The issue of inclusiveness is dependent on the existence of a common European political identity to sustain an independent Union citizenship. Inclusiveness as the result of a European political identity and citizenship open to national and cultural outsiders, is, for the time being, precluded by the link between Union citizenship and Member States' exclusive nationality and national identities.

If confronted with the ideal type of European citizenship oulined in Part One, Union citizenship (Part Two) appears like an extremely limited and narrow status. However, it has the merit of introducing an important democratic element in the debate on political integration. In this perspective it should be considered as a first step in the direction of a more complete (in terms of entitlements) and a more inclusive (in terms of identity) European post-national citizenship. The combination of a 'multiple' Union citizenship and the principle of subsidiarity could provide the right formula for the development of democracy in a supranational and multicultural European context, where allegiances and loyalties would be divided among a broad set of local, national and supranational institutions. The importance of EU citizenship lies also in the fact that the focus of European integration is now citizenship,

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[241] See, the Commission's First Report on Citizenship of the Union of 21 December 1993, which stresses the importance of the fact that the provisions on citizenship have been inserted in the EC Treaty, immediately after the principle of equality of Article 6 EC, and that the status of other Treaty rights related to citizenship has been 'fundamentally altered' by the new provisions on citizenship of the Union.

rather than the free movement of factors of production, so that it will be increasingly more difficult to ignore the issue of full equality of the citizens.

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