European Citizenship

An Institutional Challenge

Massimo La Torre

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European Citizenship

An Institutional Challenge

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European Citizenship

An Institutional Challenge

edited by

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PREFACE

Modern citizenship has an irremovable dynamic element. It necessarily implies, and indeed in some respects promotes, the possibility of *transforming* the specific situations in which it is manifested, and thus the social roles connected with it. But inasmuch as the modern notion of citizenship cuts the very roots that connect it to some sort of objective and to 'fatal' reality and is founded on a phenomenon that is elementary, individual and general at the same time (the equal subjectivity of citizens), it also embodies a tendency to go beyond the limits of the contingent political community and become a *universal* legal position. In the modern enlightened tradition, it has been said, the citizen of a state is already a 'world citizen' in embryo.

Nevertheless, as citizenship is the institutional implementation of membership in a political community, and is based mainly on conventional rules, whoever is not covered by those rules, and has no power of producing, altering or derogating from them, is excluded both by the community and by its membership. Paradoxically, only a notion of membership as sheer subjection to rules and political power would allow for an 'overinclusive' membership; but this would not be democratic. Citizenship thus seems to have an irreducible exclusionary import. Furthermore, once citizenship is formulated in terms of 'nationality' as membership of a 'nation' or national community, i.e., a 'community of fate' (since one cannot choose or change one's place of birth or one's ancestors), then this new status of 'national' will necessarily exclude all those who do not share the same ascriptive 'natural' properties defined through genealogy; the 'world-citizen' of the Enlightenment becomes a 'fellow countryman'. What is then the real content of modern citizenship, its expressing the status of an autonomous, self-legislating 'universal' subject or its rooting in a cultural and ethnic identity, the homogeneous destiny of a community?

These questions have been newly raised by the introduction of 'European citizenship' in the Maastricht Treaty (articles 8 - 8e). In particular there is controversy about what the definitional character of this new type of citizenship will be. Furthermore, the relationship between European citizenship and the body politic to which it expresses the status of membership remains unclear. Inasmuch as citizenship is only one side of a coin whose other face is sovereignty, it would seem that European citizenship heralds the emergence of a sovereign independent *European* political community. On the other hand, the fact that European citizenship is vested in the nationality of the Member States would exclude this possibility. But what remains then of citizenship in a strict sense?

Citizenship is a bond based on the idea of a general interest, so that citizens

are the holders and share-holders of a common good, which therefore prescribes some degree of solidarity among them. European citizenship might thus be conceived of as legitimating distributive justice within the borders of the Union. A policy of redistributing wealth, taking from the richer regions and giving to the poorer ones, would be sanctioned by the implementation of this new legal condition, that of *European citizen*. But are Member States prepared to cope with this strong implication of what was perhaps originally thought of as a mere institutional device and a tool to symbolically or only rhetorically overcome the lack of democracy in the European community political order?

These are some of the issues raised by the status of 'European citizenship' as it has been introduced by the Maastricht Treaty, issues which were discussed at a conference held at the European University Institute in Florence between 13 and 15 June 1996, in the framework of the European Forum on 'Citizenship' for the academic year 1995 - 1996. The chapters are mostly revised versions of papers read on that occasion. They are arranged according to the structure that was given to the conference itself, and are introduced by an opening essay from Professor Joseph Weiler, who identified the key points that were to be more closely examined during the opening lecture of the conference.

The first part of the book addresses 'Citizenship and Rights', and examines aspects of a more theoretical nature raised by the concept of citizenship, aspects relating to political philosophy, legal philosophy, the history of thought, and social theory. The second part is devoted to the controversial and thorny issue of the relation between citizenship and nationality, a pair of ideas that have been yoked only recently, since, as Professor Michel Troper shows, it arose towards the end of the French Revolution. Although for some time now, there has been a tendency to emphasise the concept of nationality at the expense of that of citizenship, in reality matters stand differently, at least from a historical point of view.

The third part of the book considers the special status of European citizenship. What kind of citizenship is it? Is it citizenship in a strict sense, or something rather different? A diversity of answers is given here, ranging from those who maintain that the new concept of citizenship is something never seen before, and perhaps superfluous, and others who consider that it still remains connected with a 'republican' ideal which prognosticates, or strongly implies, a more or less sovereign European political order.

The last part of the book reflects on the difficult problem of European democracy or of the possible democratic valency of the European Union. Citizenship, signifying the ownership of equal political rights, looks forward to the presence of a democratic order. If there is such a thing as European citizenship, there must be European democracy, but is this democracy a reality or is it an ideological distortion? Is it possible to speak of democracy in a context in which there is no 'people' as a culturally and linguistically homogeneous community? And how is the formation of public opinion possible, which is indispensable with a democratic system of government, where a common means of communication and single native tongue are lacking?

The answers given in the book are manifold but they all agree that the people of the democracy, the *demos,* is definitely not — *pace* the German constitutional court — an *ethnos.* This obviously does not mean however, that by adding a few articles of law on European citizenship, we can instantly build a European political identity, and overcome the lack of democracy that, without question, encumbers community institutions.

The book, as the conference from which its materials are drawn, and the European Forum itself, would not have been possible without the support of the entire European Institute, beginning with the President, Dr. Patrick Masterson, to whom I here wish to extend my heartfelt thanks. Professors Stephen Lukes and Klaus Eder, the other two scientific directors of the Forum on Citizenship, were always ready with encouragement and advice. Kathinka España and Catherine Divry, Executive Co-ordinator and Publications Officer respectively, of the European Forum, were fundamental for the success of the project. Patricia Bailey, a researcher in the law department who is now an associate at Cabinet Peitrinal et Associés in Paris, assisted me with the (not always very exciting and somehow impossible) task of editing the manuscripts. Rory O'Connell, also a researcher in the law department, helped with correcting the proofs. To all these individuals, I extend my sincerest thanks.

Massimo La Torre
Villa Schifanoia, Florence
July 1997

INTRODUCTION
EUROPEAN CITIZENSHIP — IDENTITY AND DIFFERENTITY

Joseph Weiler

I. PREFACE

The traditional, classical vocabulary of citizenship is the vocabulary of the State, the Nation and Peoplehood. It is hard to think of the term unconnected to those concepts. But this means that its very introduction into the discourse of European integration is problematic for it conflicts with one of Europe's articles of faith, encapsulated for decades in the preamble to the Treaty of Rome: That European Integration is about '... an Ever Closer Union among the Peoples of Europe'. Not the creation of one people, but the union of many. In that Europe was always different from the classical federal state which, whether in the USA, Germany, Switzerland, Australia and elsewhere, whilst purporting to preserve all manner of diversity, real and imaginary, always stipulated the existence of a single people at the federal level.

The introduction of Citizenship understood in its classical vocabulary could mean, then, a change in the very telos of European Integration from peoples of Europe to a people of Europe, even if in a federalist context. With the change of the telos, would commence a process which would eventually result in a change of European identity and the identity of citizens in Europe, who would become, not only formally, but in their consciousness European citizens.

European Citizenship, on this view (still quite prevalent) is to people, what EMU is to currencies. To some — both Europhiles and Euroskeptics — this is exactly what European Citizenship is about. It should not surprise us that both Europhiles and Euroskeptics can hold a similar view of what European Citizenship is about. We have long understood that often the debate between these two supposed extremes is not a debate of opposites but of equals – equals in their inability to understand political and social organization in non-Statal, national terms. In their political imagination, the closest intellectual allies of, say, the right wing of the British Tories, are the Eurofederalists. It was hugely fitting and exquisitely right that Margaret Thatcher launched her famous attack on Europe at the College of Europe in Bruges. She and her audience shared the very same vocabulary even if using it in opposite directions. (It is not surprising, too, that on this view, those opposed to a European currency are also opposed to European Citizenship.)

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 1-24.

There is an alternative to this view. The introduction of European Citizenship to the discourse of European Integration could, however, mean not that the telos of European integration has changed, but that our understanding of Citizenship has changed, is changing, or ought to change.

It would be changing because of a change in the understanding of the State and the nation, but also, perhaps, because of a change in our self-understanding and our understanding of the self and its identity.

Think of the linguistic trio — Identity, Identical, Identify. Surely no self is identical to another. It is trite to recall that identity in an age where for long Choice has replaced Fate as the foundation for self-understanding is, to a large extent, a political and social construct which privileges one (or one set) of characteristics over all other, calls on the self to identify with that, and is then posited as identity.

It is equally trite to recall that the modern self has considerable problems with the move from Identical to Identity to Identify. Would it not be more accurate, in relation to the Self today, to talk of *differentity*?

Do not, pray, confuse what I am talking about with Multiculturalism. Whether in the USA or Hungary the labeling of people as black, or Whitemale, or Jew et cetera as a basis for group political entitlement is the celebration of a bureaucratically sanctioned polity of 'multi-cultural' groups composed of mono-culturally identified individuals — the antithesis of individual differentity.

Likewise, the introduction of a European Citizenship could constitute an attempt to construct, reflect and take account of fragmented Sovereignty in the sense so impressively and lucidly developed by Neal McCormick. Equally it could mirror the porous State in that truly original sense developed by Christian Joerges: The State without a Market, to which we could add a State without a boundary and its own defense — i.e. a State which constitutionally cannot even pretend to have control over its most classical functions: Provision of material welfare and personal and collective security.

Constructing, then a new concept of Citizenship around the Fragmented Sovereignty of the porous State and the Fractured Self of the individuals who comprise those 'States' — Citizenship as a hallmark of Differentity could have been a fitting project for Union architects as we slouch towards the end of the decade (and the Century, and even the Millennium — though even counting that way is about a particular, Christian, identity.)

That would be the major challenge to the conceptualization of European Citizenship. It has not, alas, been part of the Post-Maastricht political debate.

II. EUROPEAN CITIZENSHIP AND THE POST-MAASTRICHT DEBATE

Both in the input of the political Institutions to the 1996 IGC and in the first output of the Conference — the Irish Presidency document of December 15, 1996 — European Citizenship is the first issue to be raised. How is the official debate constructed?

A first typical feature is the conflation of Citizenship with (human) rights. This has become so natural that it seems both right and inevitable. You find it in the input of the Institutions to the Reflection Group. You find it in the Reflection Group Document itself. You find it again in the Irish Presidency mid-term Statement on the Union. I consider this conflation as part of the problem. Almost uniformly in all these documents the same phraseology is employed when the issue of citizenship and rights is discussed: The problem is defined as alienation and disaffection towards the European construct by individuals. The medicine is European Citizenship. What is the content of this medicine? Human rights, more rights, better rights, all in the hope of bringing the Citizen '... closer to the Union'.

On what basis is the claim made, again and again, that rights will make people closer to the Union? Even if there is some truth to that, the picture is, at a minimum far more complex in the current European context.

I think rights do have that effect in transformative situations from, say, tyranny to emancipation. But that has long ceased to be the West European condition. Somewhat polemically let me make three points to illustrate that the nexus rights-closeness is not nearly as simple as the IGC literature suggests.

Reflect on the following:

1. Take, say, an Austrian or Italian national. Their human rights are protected by their constitution and by their constitutional court. As an additional safety net they are protected by the European Convention on Human Rights and the Strasbourg organs. In the Community, they receive judicial protection from the ECJ using as its sources the same Convention and the Constitutional Traditions common to the Member States. Many of the proposed European rights are similar to those which our citizen already enjoys in his or her national space. Even if we imagine that there is a lacuna of protection in the Community space, that would surely justify closing that lacuna — but why would anyone imagine in a culture of rights saturation, not rights deprivation, that this would make the citizen any closer to the Community? Make no mistake: I do think the European human rights patrimony, national and transnational, has contributed to a sense of shared identity. But I think one has reached the point of diminishing returns. Simply adding new rights to the list, or adding lists of new rights, has little effect. Rights are taken for granted; if you managed to penetrate the general indifference towards the European construct by waving some new Catalog or by broadcasting imminent Accession to the ECHR, the likely reaction would be to wonder why those new rights or Accession were not there in the first place.
2. For the most part rights set 'walls of liberty' around the individual against the exercise of power by public authority. The Rights culture, which I share, tends to

think of this as positive. But, at least in part, at least psychologically, it might have the opposite effect to making the individual closer to 'his' or 'her' Union. After all, every time you clamor for more rights, which in this context are typically opposable against Community authorities, you are claiming that those rights are needed, in other words that the Union or Community pose a threat. You might be crying 'Wolf' to score some political point, or you may be right. Either way, if you are signaling to the individual that he or she need the rights since they are threatened, it is not exactly the stuff which will make them closer to 'their' Union or Community.

3. Finally, there is very little discussion of the divisive nature of rights, their 'disintegration effect.' Deciding on rights is often deciding on some of the deepest values of society. Even though we blithely talk about the common constitutional traditions, there are sharp differences within that common tradition. Some of the rights highest on the Christmas list of, say, the European Parliament, noble and justified as they may be, could if adopted for the Community be celebrated by the political culture in some Member States and regarded with suspicion and worse in other Member States. Remembering the *Grogan* v *SPUC* abortion saga, which the ECJ inelegantly, but perhaps wisely ducked, will drive home this point.

Human rights have a place in the discourse of citizenship, even an important place to which I shall allude. But given how things stand, developing political means of control is more central to European Citizenship than piling on new human rights. As I see it, the major problem of European Citizenship is giving it meaning, actually developing a some measure of shared understanding what it can and should (and should not) mean. Citizenship is as much a state of consciousness and self-understanding and only a smallish part is translatable to positive law. What is needed is serious public discourse as a pre-condition to any operationalization.

European Citizenship touches on the profound issues of public authority and identity in and of the Union. It touches on very most sensitive political wires. For decades the subject was avoided. But in the TEU Pandora's Box was opened.

III. THE EUROPEAN CONSTITUTIONAL PARADOX: THE CHALLENGE OF CITIZENSHIP AND DEMOS

The European Union enjoys powers unparalleled by any other transnational entity. It has, *inter alia*, the capacity

- to enact norms which create rights and obligations both for its Member States and their nationals, norms which are often directly effective and which are constitutionally supreme.
- to take decisions with major impact on the social and economic orientation of public life within the Member States and within Europe as a whole.
- to engage the Community and, consequently the Member States by international agreements with Third countries and international organizations.
- to spend significant amounts of public funds.

Europe has exercised these capacities to a very considerable degree.

Whence the authority to do all this and what is the nature of a polity which has these powers?

One place to look for the answer would be — international law: The High Contracting Powers — the Member States of the European Union — entered into an international Treaty based on international law which created an Organization with these wide capacities and established its Institutions empowered to exercise the various powers. What, then, of authority? On this view the transnational authority of the Union writ, so long as *Jus Cogens* was not violated (and it clearly was not), derives from international law. *Pacta Sunt Servanda*. The internal authority of the Union writ, so long as internal constitutional norms were not violated (and apparently they were not) derives from the constitutional authority which governments enjoy to engage their respective states, including the authority to undertake international obligations with internal ramifications in national law. And the nature of the polity? It is an international organization belonging to the States which created it.

For a long time the international view has been out of vogue. Despite its terse elegance it seemed to give a formalistic answer to the question of authority and identity. It is true that international law imposes no restrictions, other than *Jus Cogens*, on what states may contract among themselves. But, as the European Court of Justice explained in its so-called constitutionalizing decisions, given the special purposes of the European construct, given the unprecedented nature of the powers and capacities, given the unique institutional machinery, the European Community (and later Union) were to be conceived as a new legal order. In more recent cases the Court has even taken to calling the Treaties a Constitutional Charter. Partly because of what the Court said, largely because of what it — *and its national counterparts* — did, it has, indeed, in many ways, made little sense to think of the Union as a classical international organization based on a traditional understanding of international law. This, surely, is one of the great European orthodoxies — celebrated by Euroenthusiasts, lamented by Euroskeptics but accepted as fact.

Let us accept the theology of the New Legal Order and Constitutionalism. The question still remains — whence the authority?

A. Citizenship and Authority

In Western liberal democracies public authority requires legitimation through one principal source: The citizens of the polity. The principal hallmark of citizenship is not the enjoyment of human rights — though that may be part of the citizenship package. That is the hallmark of humans. We pride ourselves that we extend human rights to visitors, aliens and the like. The deepest, most clearly engraved hallmark of citizenship in our democracies is that in citizens vests the power, by majority, to create binding norms, to shape the socio-economic direction of the polity, in fact, all those powers and capacities which, I suggested, the

Union now has. More realistically, in citizens vests the power to enable and habilitate representative institutions which will exercise governance on behalf of, and for, the citizens. If we seek primary citizenship rights we should look for all the instruments and mechanisms which are there to ensure the mastery of citizens over the polity and its organs. The institutions and mechanisms of democracy are the repository of primary citizenship rights. Note too, that this huge privilege and power of citizenship has, traditionally, come with duties — not simply a duty to obey the norms (that falls on non-citizens too) but a duty of loyalty to the polity with well known classical manifestations. The republican spirit, note, did not rebel against Taxation. It rebelled against Taxation without Representation.

The first big question which citizenship gives rise to is to find the mechanisms to assert the linkages between citizens and the exercise of public authority. Absent those linkages, public authority loses its legitimacy. Thus, absent European citizens there is a serious problem of legitimate authority which the celebrated constitutionalization accentuates. Lawyers recite dutifully that the

> Community constitutes a new legal order ... for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. (*Van Gend en Loos*)

Habitually we celebrate the fact the obligations among States created by a Treaty confer rights on individuals which courts must protect, even against States. It is in this sense that calling individuals subjects of the Treaty alongside Member States may be justified. Subjects sounds awfully like citizens. Indeed, in Monarchies, the subjects of the Monarch are the citizens of the modern State.

But note: Individuals are subjects only in the *effect* of the law. In this sense alone is it a new legal order. Consider the following *reductio ad absurdum*: Imagine three states which still allow slavery. There is trade among these states, including trade in slaves. Imagine further that the three get together and conclude a Treaty which creates mutual obligations among them such as prohibiting a workday for slaves of more than 20 hours. They also create institutions which are henceforth empowered to regulate all matters concerning slavery. Imagine now that they do not wait for a judicial decision but include explicitly in their Treaty what the ECJ 'found' in *Van Gend en Loos*: That these obligations, are, independently of national legislation, intended to create rights for the slaves themselves, and that national courts would have to protect those rights. Another New legal order will have come into being. Does the fact that the obligations *created by the States, the High Contracting Parties* which bestow rights on our poor slaves make them subjects of the Treaty? Well, yes in the limited sense of deriving rights created by others. No, in the sense that they have no say in the making of those rights. Enjoying rights created by others does not make you a full subject

of the law. In times gone by Men, the full subjects of national polities, created many obligations among them, as employers for example, which conferred enforceable rights on women. This, alone, did not make women full political subjects of the legal order until emancipation. Thus, in *Van Gend en Loos*, to the extent that the High Contracting Parties retained the prerogatives to make the obligations, bestowing rights on individuals, there was, in this sense, little new in the legal order, except that it accentuated the problem of legitimacy. For if the Community and Union have the capacity to exercise law making power over individuals *independently of national legislation*, by whose authority does it enjoy that power? One could object to my absurd example and claim that in the Union context the States are composed of citizens, not slaves who enabled their States to create institutions which create obligations etc. That is true, but than one is back to legitimation through the mediation of the State, i.e. through public international law and one waves the 'new legal order' good bye.

One paradox, then, of European Constitutionalism has been that it created a new, non-international, constitutionally oriented legal order in the effect of its norms, but avoided a necessary component of legitimation in the creation of the norms — citizenship. It is not that one has to exclude all norm making authority and legitimating power to States as such. After all, in all federations, States or their equivalent, form part of the legitimation at the federal level. But there must, likewise, be direct legitimation by citizens — de jure or de facto — at the union level.

Establishing European Citizenship would, thus it seems, be one necessary step to resolving that legitimation deficit. Vesting that concept with attributes, mechanisms or instruments that manifest, in a manner not mediated through national, Statal institutions, the attributes of citizenship will be the other.

B. Demos and Identity

Citizenship is not only about the politics of public authority. It is also about the social reality of peoplehood and the identity of the polity.

Citizens constitute the demos of the polity — citizenship is frequently, though not necessarily, conflated with nationality. This, then, is the other, collective side, of the citizenship coin. Demos, provides another way of expressing the link between citizenship and democracy. Democracy does not exist in a vacuum. It is premised on the existence of a polity with members — the demos — by whom and for whom democratic discourse with its many variants takes place. The authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a demos. Simply put, if there is no demos, there can be no democracy.

But this, in turn, raises the other big dilemma of citizenship: Who are to be the citizens of the European polity? How are we to define the relationships among them? A demos, a people cannot, after all be a bunch of strangers. How should we understand, then, and define the peoplehood of the European demos

if we insist that the task remains the ... ever closer union among the peoples of Europe?

One way to reconcile is denial — by rejecting the notion of a European demos. The implications of this No Demos thesis, espoused, among others, by the German Constitutional Court, is to deny any meaningful democratization of the Union at the European level, to reassert the implicit underpinning of the Community legal order in international law, and if one is to be intellectually consistent, to negate likewise any meaningful content to European Citizenship. Space does not permit full elaboration but a few hints will suffice.

Under this view, the nation, which is the modern expression of demos, constitutes the basis for the modern democratic State: The nation and its members constitute the polity for the purposes of accepting the discipline of democratic, majoritarian governance. Both descriptively and prescriptively (how it is and how it ought to be) a minority will/should accept the legitimacy of a majority decision because both majority and minority are part of the same demos, belong to the nation. That is an integral part of what rule-by-the-people, democracy, means on this reading. Thus, nationality constitutes the state (hence nation-state) which in turn constitutes its political boundary. The significance of the political boundary is not only to the older notion of political independence and territorial integrity, but also to the very democratic nature of the polity. A parliament is, on this view, an institution of democracy not only because it provides a mechanism for representation and majority voting, but because it represents the nation, the demos from which derive the authority and legitimacy of its decisions. To drive this point home, imagine an *Anschluss* between — this time — Germany and Denmark. Try and tell the Danes that they should not worry since they will have full representation in the *Bundestag*. Their screams of grief will be shrill not simply because they will be condemned, as Danes, to permanent minorityship (that may be true for the German Greens too), but because the way nationality, in this way of thinking, enmeshes with democracy is that even majority rule is only legitimate within a demos, when Danes rule Danes.

Turning to Europe, it is argued as a matter of empirical observation that there is no European demos — not a people not a nation. Neither the subjective element (the sense of shared collective identity and loyalty) nor the objective conditions which could produce these (the kind of homogeneity of the organic national-cultural conditions on which peoplehood depend such as shared culture, a shared sense of history, a shared means of communication(!) exist. Long term peaceful relations with thickening economic and social intercourse should not be confused with the bonds of peoplehood and nationality forged by language, history, ethnicity and all the rest.

For some the problem is temporal. Although there is no demos now the possibility for the future is not precluded *a-priori*. For others, the very prospect of a European demos is undesirable. It is argued (correctly in my view) that integration is not about creating a European nation or people, but about the ever closer Union among the peoples of Europe.

The consequences of the No Demos thesis for the European construct are in-

teresting. The rigorous implication of this view would be that absent a demos, there cannot, by definition, be a democracy or democratization at the European level. This is not a semantic proposition. On this reading, European democracy (meaning a minimum binding majoritarian decision-making at the European level) without a demos is no different from the previously mentioned German-Danish *Anschluss* except on a larger scale. Giving the Danes a vote in the *Bundestag* is, as argued, ice cold comfort. Giving them a vote in the European Parliament or Council is, conceptually, no different. This would be true for each and every nation-state. European integration, on this view, may have involved a certain transfer of state functions to the Union but this has not been accompanied by a redrawing of political boundaries which can occur only if, and can be ascertained only when, a European people can be said to exist. Since this, it is claimed, has not occurred, the Union and its institutions can have neither the authority nor the legitimacy of a Demos-cratic State. Empowering the European Parliament is no solution and could — to the extent that it weakens the Council (the voice of the Member States) — actually exacerbate the legitimacy problem of the Community. On this view, a parliament without a demos is conceptually impossible, practically despotic. If the European Parliament is not the representative of a people, if the territorial boundaries of the EU do not correspond to its political boundaries, than the writ of such a parliament has only slightly more legitimacy than the writ of an emperor.

What, however, if the interests of the nation-state would be served by functional cooperation with other nation-states? The No Demos thesis has an implicit and traditional solution: Cooperation through international treaties, freely entered into by High Contracting Parties, preferably of a contractual nature (meaning no-open ended commitments) capable of denunciation, covering well-circumscribed subjects. Historically, such treaties were concluded by heads of state embodying the sovereignty of the nation-state. Under the more modern version, such treaties are concluded by a government answerable to a national parliament often requiring parliamentary approval and subject to the material conditions of the national democratic constitution. Democracy is safeguarded in that way.

And citizenship? Citizenship on this view must remain in the exclusive domain of the Member States through whose authority the Community and Union may function with legitimacy.

On any count this is a formidable challenge to the European construct.

How, then, could and should European Citizenship be constructed? What should be the political attributes which forge the linkages which must flow, at the European level, from citizen to public authority? How should European demos be understood? Does it exist? Can it exist? What are its implications for European identity?

It is with these fundamental questions that we turn to the TEU and the preparatory and early phases of the 96 IGC.

IV. CITIZENSHIP AND AUTHORITY IN THE TEU

There is a story about the genesis of Article 8 according to which the issue of citizenship was far from the mind of the drafters of the TEU until the very last minute when one Prime Minister (Felipe Gonzalez according to this legend), unhappy with the non-EMU parts of the Treaty, and conscious of the brewing legitimacy crisis, suggested that something be done about citizenship. A skeptical IGC quickly cobbled the Citizenship 'Chapter' in response.

Maybe the story is untrue, but it could be, to judge from the content of Article 8.

The treatment of European Citizenship both in the TEU itself and, subsequently, by the Institutions and the Member States of the Union, is an embarrassment. The seriousness of this notion — after all the cornerstone of our democratic polities — and its fundamental importance to the self-understanding and legitimacy of the Union are only matched by its trivialization at the hands of the powers-that-be. It is no surprise that, so far as we can tell, the introduction of Citizenship by the TEU, a development characterized by the Commission as *'... porteuse de potentialités'* has had negligible if any impact on its subject, the citizens of the Union. And if any notice were taken by the citizenry of the actual impoverished content of the single-articled citizenship 'Chapter' in the TEU, the reaction would be, or at least deserve to be, contempt: For those who drafted it, those who approved it and for the Union which can come up with so little to give to, *and ask of*, its citizens.

The benign view would, then, regard the Maastricht concept of Citizenship as the result of muddled and hasty drafting. Alternatively I invite you to consider the hypothesis which no State or Union official may openly espouse, that the Citizenship clause in the TEU is little more than a cynical exercise in public relations on the part of the High Contracting Parties noteworthy by what it does not do than what it does and which probably has backfired even as an exercise in public relations.

To judge from the prominence it receives at the beginning of each of the Reports submitted to the *Groupe de Réflexion* by Commission, Council and Parliament and from the rhetoric employed in its discussion it could appear that a lesson has been learnt and that citizenship is about to be tackled seriously. That would be an erroneous judgment.

In explaining the trivialization of the concept, I propose to proceed from the light to the heavy. This entails reversing the normal order of things and beginning with the record of implementation of the Maastricht Citizenship Chapter and only then turn to an analysis of the actual content given citizenship in that Chapter. For this audience a recapitulation of Article 8 seems unnecessary.

A. The Implementation of the Citizenship Clause

What is the record of implementation of Article 8?

> 8a The right to move and reside freely has not been accomplished because of difficulties in removing frontier controls and because of a failure to draft or implement fully the myriad of Directives in this area.
> 8b The right to vote in EP elections in other Member States. The law has been changed but its exercise, especially in those countries in which there is a high absolute number of non-national European Citizen Residents (such as Belgium, Germany, France and Britain) was negligible (less then 6%).
>
> As to voting in local elections, whereas the European framework legislation is in place implementation in the Member States is not complete.
> 8c The Right to Diplomatic Protection. The Council Report states that the Guidelines are still incomplete.
> 8d The right to Petition the European Parliament exists but it existed prior to Maastricht. The right to Apply to the Ombudsman has not been realized because there is no Ombudsman owing to 'procedural' problems within the European Parliament. The Council does not miss the opportunity to express its regret *'On ne peut que regretter ce retard'* an exquisite example, if ever there was one, of the kettle calling the pot black. The European Parliament, at the forefront of demanding more and more rights for the individual (and itself) is conveniently silent on this issue.

In conclusion, then, not one of the sub-clauses of Article 8 concerning European Citizenship has been implemented fully since the coming into force of the TEU.

B. The Attributes of Citizenship

This conclusion might give the impression that the principal problem with the way Citizenship has been dealt with concerns implementation. And that should IGC 96 resolve those problems, meaningful European Citizenship would come into being. That impression, too, would be erroneous.

Given the constraints of space I shall allude only briefly to the most telling evidence.

Consider first Article 8 itself.

> (1) Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.

Although the Citizenship Chapter and its Article 8 are part of the Community Pillar, the citizenship established is, supposedly, Union citizenship. It would be strange if Community nationals would be citizens of the Community but not of the Union. After all, it was the move from Community to Union which was to mark the TEU. But the prevailing view among Member States at least, is that the Union, as such, has no legal personality. How can one be a citizen of an entity which has no legal personality? This might seem a quibble with

no consequences. Consider, however, the following.

Article 8 continues:

> 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

In a system based on the Rule of Law rights and duties are, for the most part, backed by judicial enforcement. The High Contracting Parties of the TEU, however, excluded as far as they could the jurisdiction of the Court from Pillar 2 and, significantly, Pillar 3. On one view this means that no rights and duties are imposed on individuals outside the Community Pillar or, that whatever rights and duties were created, would not, in the intention of the States, be enforceable.

The impression of at least a measure of cynicism in this respect is suggested by the following. Article 8d provides a couple of the rights to be enjoyed by Union citizens.

> Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 138d. Every citizen of the Union may apply to the Ombudsman established in accordance with Article 138e.

We already noted that the right of petition pre-dated the TEU. So it was just a matter of reassigning a name. But when we turn to the text of Articles 138d and 138e, we find that in the first place, the rights, even of petition and a complaint against maladministration, are restricted to matters

> which comes within the Community's fields of activity

as if the citizen cannot be directly harmed by maladministration of, say, some aspects covered in Pillar 3, and, in the second place, that one could hardly qualify these two rights as specific citizens' right for, after all, appropriately, they belong not only to citizens, but, in the language of the provision itself, to

> any natural or legal person residing or having its registered office in a Member State of the Community.

It is not that fundamental human rights, even basic political rights, cannot be part of the legal patrimony enjoyed by citizens in their capacity as human beings, but why then spell them out here as if they introduce something new or something peculiar to citizenship, when it transpires that part of their attractiveness is the fact that they are considered universal. One cannot escape the feeling that the drafters were desperately looking for some relatively easy, and non-consequential 'ballast' for the ill defined and ill thought citizenship Chapter.

There is nothing easy or non consequential in another citizenship right the right to move freely within the Union. Article 8a provides in its first part that

> Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States.

This would be significant in that it could reflect and constitute a sense of that much vaunted belongingness which is so prominent in current official thinking. But, apparently, the High Contracting Parties appreciated this consequentialness and thus we find the notorious sequel:

> subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

The Treaty, at the time, limited that right to individuals not in their capacity as human being, let alone citizens, but in their capacity as factors of production, part of the four fundamental economic freedoms, important, but hardly the stuff of citizenship. We have already noted the terse and scathing judgment of the Commission as to the measures which were to give effect to this provision.

Much emphasis is placed, in both Commission and Council Reports on the evolutive nature of the concept as indicated in Article 8e. But here too one cannot avoid the uneasy feeling of a mealy mouthed commitment. Any such extension will require unanimity — increasingly difficult in a Community of fifteen, the European Parliament — on a matter of citizenship, note — will only be consulted, and to cap it, the decision — a mere recommendation — will require constitutional ratification by the Member States. The prospects for deepening the notion of European Citizenship could not be all that high.

The reason I favour the hypothesis of a cynical public relations exercise in construing the notion of Citizenship which the TEU supposedly established is that the alternative is even a worse hypothesis — an unbelievably impoverished view of the very meaning of citizenship and its principal components. Can one credit that the hodgepodge of relatively trivial civic artifacts in Article 8 was believed by any serious official or statesman or stateswoman to capture what European Citizenship should be about? A citizenship composed of — the right to complain to an ombudsman or petition the relatively impotent European Parliament (provided the complaint concerns a matter '... which affects him, her or it directly') and with no guarantee of outcome; the right to consular help in foreign countries in which your own Member State has no representation as if reciprocal arrangements are not already in place as any seasoned traveler will know; and the right of non-residents to vote for the European Parliament or local authorities? Does not Article 8 look awfully like one of those *Carnets* of 'free attractions' some tourist authorities distribute to visitors to make them feel welcome and which you accept in the knowledge that the coupons are free because the attractions are not attractive? Article 8a-8d are all important in their own little way but so marginal and remote from the core of citizenship. The only significant measure, free movement and the right to residence, a measure which could connote a double sense of belonging, turned out to be a chimera. And the promise of future developments, contingent on such procedural difficulties as to

make it illusory.

One has to believe that the High Contracting Parties understood the fundamental nature of citizenship in redefining the nature of the Union — and it is this understanding, rather than misunderstanding which lead them to the desultory Article 8.

But why, then, open Pandora's box at all?

It is the current Commission's input to the Reflection Group which gives us, inadvertently perhaps, the interpretative key. In the eyes of the Commission the two key values which make Union Citizenship most worthy and, thus, worth developing to the full are: a. that citizenship reinforces and renders more tangible the individual's sentiment of belonging to the Union; and b. that citizenship confers on the individual citizen rights which tie him to the Union. Something was going amiss in the public relations of the Union. Maybe citizenship would be an answer?

That the citizen belongs to the Union is, perhaps, a sentiment important to instill. But even accepting the dubious assumption of the desirability of grafting a national type citizenship ethos on to the Community, surely, even more important is to render tangible, through the concept of citizenship and its manifestations, that it is the Union that belongs to the citizen? But you will look in vain to Article 8 for meaningful instruments to render tangible or instill ownership over rather than belonging to. Likewise, rights are surely important, but in the classic discourse of citizenship surely duties, the things the polity asks of its members, are as critical as that which it gives them. The demands of loyalty (not blind, to be sure), of service even, yes, of sacrifice, are as fixed a hallmark of citizenship as are rights. But, although, Article 8 mentions duties these remain mysterious and none are listed. And whereas the Council, to an even greater degree the Commission and especially, Parliament, are lavish in their clamour for more and more rights, the language of duty and service let alone loyalty are muted at best — Parliament does suggest some European Peace Corps equivalent — and for the most part absent altogether.

What, then, is the culture, what is the ethos which underlie phrases such as this:

> *[L]'instauration du concept de citoyenneté ... vise à approfondir et rendre plus tangible le sentiment d'appartenance du citoyen européen à l'Union européenne, en lui conférant des droits qui lui soient liés* (Commission) or
>
> *Rapprocher l'Europe du citoyen' est a paru nécessaire, au fil des années et particulièrement lors du récent débat public sur la ratification du TUE, pour renforcer l'adhésion des citoyens à la construction européenne* (Council)

and others like them? What is the culture and ethos which explain a concept of citizenship which, for example, speaks of duties but lists none?

At best it represents a failure of the imagination. An inability to think of citizenship in any terms other than those resulting from the culture of the State and

the Nation. And thus we are treated to a dispiriting kind of Euro NewSpeak: Vehement denials by all and sundry of the Statal or nation-building character of the Union whilst, at the same time, appealing to Statal and/or national understandings of citizenship and expecting it to provide *emotional* and *psychological* attachments — belongingness — which are typical of those very constructs which are denied.

There is a worse, even more dispiriting interpretation to the Citizenship discourse in Maastricht and in the run up to IGC 96. What is the political culture which underlies the discourse of belongingness so much sought after? Is it the discourse of civic responsibility and consequent political attachment at all? Or is it not closer to a market culture and the ethos of consumerism? Is it an unacceptable caricature to think of this discourse as giving expression to an ethos according to which the Union has become a product for which the managers, alarmed by customer dissatisfaction, are engaged in brand development. Citizenship and the rights associated with it are meant to give the product a new image (since it adds very little in substance) and make the product ever more attractive to its consumers, to reestablish their attachment to their favourite brand. Mine is not an anti-market view, the importance of which to European prosperity is acknowledged. But it is a view which is concerned with the degradation of the political process, of image trumping substance, of deliberative governance being replaced by a commodification of the political process, of consumer replacing the citizen, of a *Saatchi & Saatchi* or *Forza Europa* Europe.

What, then, should or could be done?

I shall make some suggestions about citizenship empowerment at the end of this paper.

V. DEMOS AS IDENTITY IN THE TEU - RETHINKING CITIZENSHIP

Despite its centrality to the notion of democracy and political legitimacy, there is something inherently troubling in the introduction of citizenship to the Union lexicon. We have already seen that in substance Article 8 was an empty gesture. On this reading, its significance must be seen at the symbolic level. For some, it could be the symbolism of accountability and democracy. But then, why so empty? There is another possibility. In its rhetoric Maastricht appropriated the deepest symbols of statehood: citizenship, defense, foreign policy — the rhetoric of a superstate. We all know that all three are the emptiest and weakest provisions of the Treaty, but at the symbolic level do they undermine the ethics of supranationalism? Supranationalism is a move away from statism to a new uneasy relationship between Community and Member States. Indeed, Community was a fine word to capture that value. Now the operational rhetoric is Union, not Community. We have come full circle. The deep irony is that the full circle has come on the ideological level alone. In the way it related to individuals, supranationalism was about the diminution of nationality as a referent for transnational intercourse. But, on this reading, under the rhetoric of the TEU, the Us is no

longer Germans or French or Italians and the Them is no longer British, or Dutch or Irish. The Us has become European and the Them, non-European. If Europe embraces so earnestly at the symbolic level European Citizenship, simply defining a new other, on what moral ground can one turn against French National Fronts, German Republicans and their brethren elsewhere who embrace Member State nationalism? On the ground that they chose the wrong nationalism which to embrace?

This unease would be particularly justified if the understanding of European Citizenship were to embrace that strand in European political thought and praxis which a: understands nationality in the organic terms of culture and language and religion (and ethnicity); and b. conflates nationality and citizenship so that nationality is a condition for citizenship and citizenship means nationality. Why, then, not advocate, realistically or otherwise, the elimination of the concept of European Citizenship? It is, I think, because in European Citizenship, understood as vehicle for identity, there is, strangely, immense promise.

How so?

Is it mandated, we should ask, that demos in general and the European demos in particular be understood exclusively in organic cultural homogeneous terms? Can we not break away from that tradition and define membership of a polity in civic, non-organic-cultural terms? Can we not imagine a polity whose demos is defined, understood and accepted in civic, non-organic-cultural terms, and would have legitimate rule-making democratic authority on that basis? A demos understood in non-organic civic terms, a coming together on the basis not of shared ethnos and/or organic culture, but a coming together on the basis of shared values, a shared understanding of rights and societal duties and shared rational, intellectual culture which transcend organic-national differences. Consider in this light again Article 8 and see its latent promise.

> Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union [...]

As mentioned, the introduction of citizenship to the conceptual world of the Union could be seen as just another step in the drive towards a Statal, unity vision of Europe, especially if citizenship is understood as being premised on statehood. But there is another more tantalizing and radical way of understanding the provision, namely as the very conceptual decoupling of nationality from citizenship and as the conception of a polity the demos of which, its membership, is understood in the first place in civic and political rather than ethno-cultural terms. On this view, the Union belongs to, is composed of, citizens who *by definition* do not share the same nationality. The substance of membership (and thus of the demos) is in a commitment to the shared values of the Union as expressed in its constituent documents, a commitment, *inter alia*, to the duties and rights of a civic society covering discrete areas of public life, a commitment to membership in a polity which privileges exactly the opposites of nationalism — those human features which transcend the differences of organic ethno-culturalism. On

this reading, the conceptualization of a European demos should not be based on real or imaginary trans-European cultural affinities or shared histories nor on the construction of a European 'national' myth of the type which constitutes the identity of the organic nation. European Citizenship should not be thought of either as intended to create the type of emotional attachments associated with nationality based citizenship. The decoupling of nationality and citizenship opens the possibility, instead, of thinking of co-existing multiple demoi.

One view of multiple demoi may consist in what may be called the 'concentric circles' approach. On this approach one feels simultaneously as belonging to, and being part of, say, Germany and Europe; or, even, Scotland, Britain and Europe. What characterizes this view is that the sense of identity and identification derives from the same sources of human attachment albeit at different levels of intensity. Presumably the most intense (which the nation, and State, always claims to be) would and should trump in normative conflict.

The view of multiple demoi which I am suggesting, one of truly variable geometry, invites individuals to see themselves as belonging simultaneously to two demoi, based, critically, on different subjective factors of identification. I may be a German national in the in-reaching strong sense of organic-cultural identification and sense of belongingness. I am simultaneously a European citizen in terms of my European transnational affinities to shared values which transcend the ethno-national diversity. So much so, that in the a range of areas of public life, I am willing to accept the legitimacy and authority of decisions adopted by my fellow European citizens in the realization that in these areas I have given preference to choices made by my outreaching demos, rather than by my inreaching demos.

On this view, the Union demos turns away from its antecedents and understanding in the European nation-state. But equally, it should be noted that I am suggesting here something that is different than simple American Republicanism transferred to Europe. First, the values one is discussing may be seen to have a special European specificity, a specificity I have explored elsewhere but one dimension of which, by simple way of example, could most certainly be that strand of mutual social responsibility embodied in the ethos of the Welfare State adopted by all European societies and by all political forces. But the difference from American Republicanism goes further than merely having a different menu of civic values and here it also differs from Habermasian Constitutional Patriotism. Americanism was too, after all, about nation building albeit on different premises. Its end state, its myth, as expressed in the famous Pledge of Allegiance to the America Flag — One Nation, Indivisible, Under God — is not what Europe is about at all: Europe is precisely not about One Nation, not about a Melting Pot and all the rest, for despite the unfortunate rhetoric of Unity, Europe remains (or ought to remain) committed to '... an ever closer union among the peoples of Europe.' Likewise, it is not about indivisibility nor, blessedly, about God.

The Treaties on this reading would have to be seen not only as an agreement among states (a Union of States) but as a 'social contract' among the nationals of

those states — ratified in accordance with the constitutional requirements in all Member States — that they will in the areas covered by the Treaty regard themselves as associating as citizens in this civic society. We can go even further. In this polity, and to this demos, one cardinal value is precisely that there will not be a drive towards, or an acceptance of, an over-arching organic-cultural national identity displacing those of the Member States. Nationals of the Member States are European Citizens, not the other way around. Europe is 'not yet' a demos in the organic national-cultural sense and should never become one.

One should not get carried away with this construct. Note first that the Maastricht formula does not imply a full decoupling: Member States are free to define their own conditions of membership and these may continue to be defined in national terms. But that, in my view, is the greatest promise of introducing supranational citizenship into a construct the major components of which continue to be States and nations. The National and the Supranational encapsulate on this reading two of the most elemental, alluring and frightening social and psychological poles of our cultural heritage. The national is Eros: Reaching back to the pre-modern, appealing to the heart with a grasp on our emotions, and evocative of the romantic vision of creative social organization. But we know that darkness lurks too. The Supranational is Civilization: Confidently modernist, appealing to the rational within us and to Enlightenment neo-classical humanism. Here, too, we are aware of the frozen and freezing aspect this humanism might take. Martin Heidegger is an unwitting ironic metaphor for the difficulty of negotiating between these poles earlier in this Century. His rational, impersonal critique of totalistic rationality and of modernity remain a powerful lesson to this day; but equally powerful is the lesson from his fall: An irrational, personal embracing of an irrational, romantic pre-modern nationalism run amok.

On this reading, all too briefly elaborated here, supranational citizenship is the context in which nationality and statism may thrive, their daemonic aspects under civilizatory constraints.

VI. POST-SCRIPT — SOME IMMODEST PROPOSALS

The question remains what, if anything, can be done to operationalize and particularly empower individuals in Europe in their capacity as citizens.

As expected European Citizenship features high in the rhetoric of the IGC. On the one hand the mid-IGC document released by the Irish Presidency — *The European Union Today and Tomorrow* — suggests modifying Article 8 to emphasise that European Union citizenship is complementary and is not designed to replace Member State citizenship. At the same time, the very opening phrase of the document reads: *The European Union belongs to its Citizens.*

But don't hold your breath when it comes to the actual proposals. They are very modest. The second phrase of the new text reads: 'The Treaties establishing the Union should address their most direct concerns.' There is much rhetoric on

a commitment to employment, there are a few significant proposals on free movement, elimination of gender discrimination and other rights. There are some meaningful proposals to increase the powers of the European Parliament and even to integrate formally, even if in limited fashion, national legislatures into the Community process. But overall, the net gainers are, again, the governments. As we saw at the outset, this is, at best, the ethos of benign paternalism. At worst the proposals represent another symptom of the above mentioned degradation of civic culture whereby the citizen is conceived as a consumer or at best as a share holder who must be placated by a larger dividend. It is End-of-Millennium Bread and Circus governance.

The powers that be are concerned by political alienation.

The reasons for this are many but clearly, on any reading, as the Community has grown in size, in scope, in reach and despite a high rhetoric including the very creation of 'European Citizenship', there has been a distinct disempowerment of the individual European citizen, the specific gravity of whom continues to decline as the Union grows.

This roots of disempowerment are many but three stand out.

First is the classic so-called Democracy Deficit: The inability of the Community and Union to develop structures and processes which would adequately replicate at the Community level the habits of governmental control, parliamentary accountability and administrative responsibility which are practiced with different modalities in the various Member States. Further, as more and more functions move to Brussels, the democratic balances within the Member States have been disrupted by a strengthening of the Ministerial and Executive branches of government. The value of each individual in the political process has inevitably declined including the ability to play a meaningful civic role in European governance.

The second root goes even deeper and concerns the ever increasing remoteness, opaqueness, and inaccessibility of European governance. An apocryphal statement usually attributed to Jacques Delors predicts that by the end of the decade eighty percent of social regulation will issue from Brussels. We are on target. The drama lies in the fact that no accountable public authority has a handle on these regulatory processes. Not the European Parliament, not the Commission, not even the Governments. The press and other media, a vital Estate in our democracies are equally hampered. Consider that it is even impossible to get from any of the Community Institutions an authoritative and mutually agreed statement of the mere number of committees which inhabit that world of Comitology. Once there were those who worried about the supranational features of European integration. It is time to worry about infranationalism — a complex network of middle level national administrators, Community administrators and an array of private bodies with unequal and unfair access to a process with huge social and economic consequences to everyday life — in matters of public safety, health, and all other dimensions of socio-economic regulation. Transparency and access to documents are often invoked as a possible remedy to this issue. But if you do not know what is going on, which documents will you ask to see? Nei-

ther strengthening the European Parliament nor national Parliaments will do much to address this problem of post-modern governance which itself is but one manifestation of a general sense of political alienation in most Western democracies. The final issue relates to the competences of the Union and Community. In one of its most celebrated cases in the early 60s the European Court of Justice described the Community as a '.. new legal order for the benefit of which the States have limited their sovereign rights, albeit in limited fields'. There is a widespread anxiety that these fields are limited no more. Indeed, not long ago a prominent European scholar and judge has written that there '... simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community.'

We should not, thus, be surprised by a continuing sense of alienation from the Union and its Institutions.

What can be done? Here is a package of three proposals plucked from a recent study commissioned by the European Parliament which my collaborators and I believe can make a concrete and symbolic difference.

A. Proposal 1: The European Legislative Ballot

The democratic tradition in most Member States is one of Representative Democracy. Our elected representatives legislate and govern in our name. If we are dissatisfied we can replace them at election time. Recourse to forms of Direct Democracy — such as referenda — are exceptional. Given the size of the Union referenda are considered particularly inappropriate.

However, the basic condition of Representative Democracy is, indeed, that at election time the '... citizens can throw the scoundrels out' — that is replace the Government. This basic feature of Representative Democracy does not exist in the Community and Union. The form of European Governance is — and will remain for considerable time — such that there is no 'Government' to throw out. Even dismissing the Commission by Parliament (or approving the appointment of the Commission President) is not the equivalent of throwing the Government out. There is no civic act of the European citizen where he or she can influence directly the outcome of any policy choice facing the Community and Union as citizens can when choosing between parties which offer sharply distinct programmes. Neither elections to the European Parliament nor elections to national Parliaments fulfill this function in Europe. This is among the reasons why turnout to European Parliamentary elections has been traditionally low and why these elections are most commonly seen as a mid-term judgment of the Member State governments rather than a choice on European governance.

The proposal is to introduce some form of direct democracy at least until such time as one could speak of meaningful representative democracy at the European level. Our proposal is for a form of a Legislative Ballot Initiative coinciding with elections to the European Parliament. Our proposal is to allow the possibility, when enough signatures are collected in, say, more than five Member

States to introduce legislative initiatives to be voted on by citizens when European Elections take place (and, after a period of experimentation possibly at other intervals too.) In addition to voting for their MEPs, the electorate will be able to vote on these legislative initiatives. Results would be binding on the Community Institutions and on Member States. Initiatives would be, naturally, confined to the sphere of application of Community law — i.e. in areas where the Community Institutions could have legislated themselves. Such legislation could be overturned by a similar procedure or by a particularly onerous legislative Community process. The Commission, Council, Parliament or a National Parliament could refer a proposed initiative to the European Court of Justice to determine - in an expedited procedure — whether the proposed Ballot initiative is within the Competences of the Community or is in any other way contrary to the Treaty. In areas where the Treaty provides for majority voting the Ballot initiative will be considered as adopted when it wins a majority of votes in the Union as a whole as well as within a majority of Member States. (Other formulae could be explored). Where the Treaty provides for unanimity a Majority of voters in the Union would be required as well as winning in all Member States.

Apart from enhancing symbolically and tangibly the voice of individuals qua citizens, this proposal would encourage the formation of true European Parties as well as transnational mobilization of political forces. It would give a much higher European political significance to Elections to the European Parliament. It would represent a first important step, practical and symbolic, to the notion of European Citizenship and Civic Responsibility.

B. PROPOSAL 2: *LEXCALIBUR* — THE EUROPEAN PUBLIC SQUARE

This would be the single most important and far reaching proposal which would have the most dramatic impact on European governance. It does not require a Treaty amendment and can be adopted by an Inter-Institutional Agreement among Commission, Council and Parliament. It could be put in place in phases after a short period of study and experimentation and be fully operational within, we estimate, two to three years. We believe that if adopted and implemented it will, in the medium and long term, have a greater impact on the democratization and transparency of European governance than any other single proposal currently under consideration by the IGC.

Even if it does not require a Treaty amendment we recommend that it be part of the eventual IGC package as a central feature of those aspects designed to empower the individual citizen.

We are proposing that — with few exceptions — the entire decision-making process of the Community, especially but not only Comitology — be placed on the Internet.

For convenience we have baptized the proposal: *Lexcalibur* — The European Public Square.

> We should immediately emphasize that what we have in mind is a lot more than simply making certain laws or documents such as the *Official Journal* more accessible through electronic data bases.
>
> We should equally emphasize that this proposal is without prejudice to the question of confidentiality of process and secrecy of documents. As shall transpire, under our proposal documents or deliberations which are considered too sensitive to be made public at any given time could be shielded behind fire-walls and made inaccessible to the general public. Whatever policy of access to documentation is adopted could be implemented on *Lexcalibur*.

The key organizational principle would be that each Community decision making project intended to result in the eventual adoption of a Community norm would have a 'decisional web site' on the Internet within the general *Lexcalibur* Home-Page which would identify the scope and purpose of the legislative or regulatory measure(s); the Community and Member States persons or administrative departments or divisions responsible for the process; the proposed and actual time table of the decisional process so that one would know at any given moment the progress of the process; access and view all non-confidential documents which are part of the process; under carefully designed procedures directly submit input into the specific decisional process. But it is important to emphasize that our vision is *not* one of 'Virtual Government' which will henceforth proceed electronically. The *primary* locus and mode of governance would and should remain intact: Political Institutions, meetings of elected representative and officials, Parliamentary debates, media reporting as vigorous and active a Public Square as it is possible to maintain, and a European Civic Society of real human beings. The huge potential importance of *Lexcalibur* would be in its *Secondary Effect*: It would enhance the potential of all actors to play a much more informed, critical and involved role in the Primary Public Square. The most immediate direct beneficiaries of Euro Governance on the Internet would in fact be the media, interested pressure groups, NGO's and the like. Of course also *ordinary citizens* would have a much more direct mode to interact with their process of government. Providing a greatly improved system of information would, however, only be a first step of a larger project. It would serve as the basis for a system that allows widespread participation in policy-making processes so that European democracy becomes an altogether through the posting of comments and the opening of a dialogue between the Community institutions and interested private actors. The Commission already now sometimes invites e-mail comments on its initiatives. Such a system obviously needs a clear structure in order to allow a meaningful and effective processing of incoming information for Community institutions. Conceivable would be, for example, a two-tier system, consisting of a forum with limited access for an interactive exchange between Community Institutions and certain private actors and an open forum where all interested actors can participate and discuss Community policies with each other. This would open the unique opportunity for deliberations of citizens and interest groups beyond the traditional frontiers of the nation state, without the bur-

den of high entry costs for the individual actor.

Hugely important, in our view, will be the medium and long term impact on the young generation, our children. For this generation, the Internet will be — in many cases already is — as natural a medium as to older generations were radio, television and the press. European Governance on the Net will enable them to experience government at school and at home in ways which are barely imaginable to an older generation for whom this New Age 'stuff' is often threatening or, in itself, alien.

The idea of using the Internet for improving the legitimacy of the European Union may seem to some revolutionary and in some respects it is. Therefore its introduction should be organic through a piecemeal process of experiment and re-evaluation but within an overall commitment towards more open and accessible government.

There are dimensions of the new Information Age which have all the scary aspects of a 'Brave New World' in which individual and group autonomy and privacy are lost, in which humanity is replaced by `machinaty' and in which government seems ever more remote and beyond comprehension and grasp — the perfect setting for alienation captured most visibly by atomized individuals sitting in front of their screens and 'surfing the net'.

Ours is a vision which tries to enhance human sovereignty, demystify technology and place it firmly as servant and not master. The Internet in our vision is to serve as the true starting point for the emergence of a functioning deliberative political community, in other words a European polity cum civic society.

For those who wish to see what this might look like we have prepared a simulation of Excalibur: http://www.iue.it/AEL/EP/Lex/index.html

C. Proposal 3: The European Constitutional Council

The Problem of Competences is, in our view, mostly one of perception. The perception has set in that the boundaries which were meant to circumscribe the areas in which the Community could operate have been irretrievably breached. Few perceptions have been more detrimental to the legitimacy of the Community in the eyes of its citizens. And not only its citizens. Governments and even Courts, for example the German Constitutional Court, have rebelled against the Community constitutional order because, in part, of a profound dissatisfaction on this very issue. One cannot afford to sweep this issue under the carpet. The crisis is already there. The main problem, then, is not one of moving the boundary lines but of restoring faith in the inviolability of the boundaries between Community and Member State competences.

Any proposal which envisages the creation of a new Institution is doomed in the eyes of some. And yet we propose the creation of a Constitutional Council for the Community, modeled in some ways on its French namesake. The Constitutional Council would have jurisdiction only over issues of competences (including subsidiarity) and would, like its French cousin, decide cases submitted to

it after a law was adopted but before coming into force. It could be seized by any Commission, Council, any Member State or by the European Parliament acting by a Majority of its Members. We think that serious consideration should be given to allowing Member State Parliaments to bring cases before the Constitutional Council.

The composition of the Council is the key to its legitimacy. Its President would be the President of the European Court of Justice and its Members would be sitting members of the constitutional courts or their equivalents in the Member States. Within the European Constitutional Council no single Member State would have a veto power. All its decisions would be by majority.

The composition of the European Constitutional Council would, we believe, help restore confidence in the ability to have effective policing of the boundaries as well as underscore that the question of competences is fundamentally also one of national constitutional norms but still subject to a binding and uniform solution by a Union Institution.

We know that this proposal might be taken as an assault on the integrity of the European Court of Justice. That attitude would, in our view, be mistaken. The question of competences has become so politicized that the European Court of Justice should welcome having this hot potato removed from its plate by an *ex-ante* decision of that other body with a jurisdiction limited to that preliminary issue. Yes, there is potential for conflict of jurisprudence and all the rest, nothing that competent drafting cannot deal with.

The IGC has proclaimed that the European Union belongs to its citizens. The proof of the pudding will be in the eating.

PART I

Citizenship and Rights

CHAPTER I
THE CONCEPT OF CITIZENSHIP IN THE PERIOD OF THE FRENCH REVOLUTION

Michel Troper

I. INTRODUCTION

Any theory of law based on positivist tenets has relatively little to say about the content of norms, and what there is to say is essentially this: if the content of a norm is in conformity with the content of a superior norm, then it is valid. Everything else follows from this. In so far as there are various possible contents which are not incompatible with the superior norm, the author of the norm has discretionary power to make a choice which will then reflect extra-legal values or norms. Consequently, once validity has been confirmed, it is not the task of legal science to illuminate the content of the norms, but, instead, of psychology, sociology or history.

However norms are mostly elaborated with the help of concepts, which, like responsibility, personality or property, belong to intellectual systems very closely linked to the legal sphere, to the point that it is sometimes extremely difficult to conceive of them in extra-legal terms. One could say that town planning law (*droit de l'urbanisme*) reflects a conception of the town developed entirely outside of, and prior to, its meaning in the legal system; one cannot, however, imagine an extra-legal conception of property or responsibility or sovereignty.

It is, therefore, impossible to explain the development and the significance of these categories from the point of view of a discipline which conceives of them in a completely autonomous manner, distinct from the legal system. But it is just as impossible to explain them from the starting point of positive law which while using them, can have nothing to say about their genesis. The expression 'national sovereignty' used in the 1791 Constitution was not directly imported from the Enlightenment's political philosophy, and the text of the Constitution itself does not help us to understand its meaning, which was forged during those very debates which led to the vote on the constitutional provisions.

One can understand the constitutional deliberation process in two ways. On the one hand one can conceive of it as simply the confrontation of several political programs, value systems and ideologies, which ends in either the victory of one tendency or a form of compromise. Such an analysis is, at its heart, psychological or sociological. It rests on the presupposition that legal technique is entirely neutral and transparent, that the choice which is finally made reflects accu-

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 27-50.

rately, and only, the relations between the forces within the constituent assembly. It neglects a fundamental factor: within any intellectual construction whatever, there is a certain solidarity between the elements, to the extent that it is often inevitable that, for reasons of coherence, the introduction of rules into the system, on the one hand brings about a change in the meaning of the concepts which define them and, on the other, can also alter the content of the rules themselves in order to reconcile them with other elements of the system.

It is the second of these two processes which I intend to examine here, in order to try and explain changes in the concept of 'citizen' under the French Revolution caused by constraints resulting from related concepts of natural law, sovereignty and representation.

In contemporary legal language, the word 'citizen' has two meanings: on the one hand it identifies those who have political rights (in particular, the right to vote) while, on the other, it designates those who have a number of civil rights resulting from their bond with the state. In this second sense it contrasts with 'foreigner' and is a synonym for 'national' or 'subject' of the given state. Citizens or nationals have different rights from foreigners. The two meanings are often connected in so far as the same individuals can be identified indifferently as either citizens or nationals.

For example, in all modern states, just because a national can, in certain cases, be deprived of his political rights by virtue of a law, he does not cease to be a national and continues to be thought of as a citizen. Nationals normally have political rights and those who have political rights also hold those civil rights conferred by the state on its citizens.

But the two meanings are also linked even where nationals have no political rights but only civil ones, as, for example, was the case in France under the absolute monarchy. In this case, a foreigner who became a French national acquired civil rights and was called a citizen.[1]

It is only possible to conceive of two situations in which the two concepts would cease to be coextensive. The first is purely hypothetical and has never occurred. It concerns the situation where certain individuals have political rights but not the civil rights specifically connected to the state. In this case, they would be known as citizens and non-nationals.

The second situation does, in fact, correspond to certain real political systems. In this case, certain individuals have the civil rights specifically connected to the state but do not have those political rights held by other members of the state, because the system is one of limited suffrage. These individuals are, then, nationals and non-citizens.

Now, for all sorts of ideological reasons which do not need to be elaborated, it can seem inappropriate to deprive people living under a representative gov-

[1] The term *régnicole* was also used. Since Bodin, however, 'citizen' has been the dominant term. (Cf. A. Lefebvre-Teillard, 'Jus Sanguinis: L'émergence d'un principe (Éléments d'histoire de la nationalité française)', *Revue critique de droit international privé* (1993), pp. 225-250.

ernment of the title of citizen. In this respect, the constitutional history of the French Revolution offers a catalogue of methods designed to avoid this eventuality so that those deprived of the right to vote could continue to be known as citizens and not nationals.

One can think of three different techniques all three of which were used in the constitutional texts of the revolutionary period.

The first consists of referring to all individuals, regardless of age or sex, as citizens and of reserving the title of 'active citizen', which implies the right to vote, only to those who fulfil certain criteria. This was the solution used in 1791.

The second technique, which is actually only a variant of the first, also consists of referring to all individuals as citizens, but distinguishes between the status of citizen and the exercise of the rights of citizenship, the latter being confined solely to those who fulfill the conditions to vote. This was the solution settled upon in 1793.

The third technique consists in reserving the title of citizen to those who are allowed to vote. This was the choice of the Girondin project and that of the Constitution of Year III.

The choice between these three techniques cannot be explained by simple ideological reasons, but, instead, was frequently imposed by certain earlier choices and itself carried certain consequences. For reasons of clarity, below follows, in chronological order, an exposition of the choices which were made at the time of the drawing up of the four major constitutional texts of the revolutionary period.

II. THE 1791 CONSTITUTION

The ambiguity in the term 'citizen' appears as early as the accompanying Declaration of Rights. It is never defined, just as connected expressions such as 'sovereignty' and 'participate in the formation of the general will' are not, but it is clear that it was already, at this time, being used with two different meanings. However, these two meanings do not coincide with the two modern meanings because nowhere did the word 'citizen' have the meaning 'national'.

First of all, the word citizen designated those individuals who possess political rights. Thus, if the Declaration of Rights did not directly define the term citizen, this is because it defined, instead, the citizen's political rights. Thus, Article 6 states that *'[...] tous les citoyens ont le droit de concourir personnellement ou par leurs représentants à [la] formation [de la loi]'*,[2] while Article 14 states that *'tous les citoyens ont le droit de constater, par eux-mêmes ou par leurs représentants la nécessité de la contribution publique'*.[3] The right to participate in the law making process was not the same as the right to vote because the former could also be exercised

[2] 'All citizens have the right to participate personally or through their representatives in the formation of the law'.

[3] 'All citizens have the right to confirm, either themselves or through their representatives, the necessity of the public contribution'.

by representatives and Article 6 did not require that these representatives be elected. Thus, all those who were represented were citizens, regardless of whether or not they had the right to vote.[4] This is why the Constitution was, without contradicting the Declaration of Rights, able to create the category of 'passive citizens', who didn't vote, but who, because they were represented were, nonetheless, citizens and had political rights.[5]

In the same way, when article 13 stated that 'une contribution commune est indispensable; elle doit être également répartie entre tous les citoyens',[6] this referred to those individuals possessing political rights such as they have just been defined.

But the word was also employed with a more inclusive meaning to refer to any person. When Article 7 required that 'tout citoyen appelé ou saisi en vertu de la loi doit obéir à l'instant',[7] it referred to all subjects of the law. Similarly Article 11 proclaimed that 'la liberté d'expression est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté'.[8] The passage from 'man' to 'citizen' served to underline the fact that certain natural rights, appropriately called civil rights, are exercised in society, with the result that the man becomes a citizen. In contrast, the Declaration exclusively used the word 'man' because it consisted only of natural rights which one can conceive of in abstraction from society, such as in

4 François Furet and Ran Halvey argue correctly that, '*Ce travail de la représentation explique qu'il n'y ait pas contradiction, dans l'esprit par exemple d'un homme comme Sieyès, entre l'article 6 de la Déclaration des droits et morcellement censitaire de la citoyenneté électorale. Le citoyen 'passif', privé du vote, reste néanmoins un citoyen de plein exercice, jouissant des droits universels de chaque associé*'.' ['This function of representation explains why, in the eyes of someone like Sieyès, there is no contradiction between Article 6 of the Declaration of Rights and the divided suffrage of the electoral system'. The 'passive' citizen, deprived of the right to vote, is nevertheless a full citizen, enjoying all the rights associated with this status.'] *La monarchie républicaine. La constitution de 1791*, Paris: Fayard (1996), p. 195.

5 Conversely, several authors believe that the institution of passive citizenship was incompatible with Article 6 of the Declaration of Rights. This opinion is based on the idea that because citizens could not vote, they did not participate in the formation of law, even through their representatives. In this sense, see G. Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale,* Paris: CNRS (1985), p. 95; B. Baczko, *Être citoyen sous la Révolution, ds. L'homme des Lumières,* coll. St. Petersbourg, particularly p. 292. This idea has been refuted by Duguit and Carré de Malberg: see R. Carré de Malberg, *Contribution à la théorie générale de l'État,* Paris: Sirey (1920), reprinted CNRS (1962), t.II, pp. 433-436. As the representation is not bound by the election, the passive citizens are represented, although they do not vote and are thus members of the sovereign.

6 'A common contribution is indispensable; it must be equally apportioned among all citizens'.

7 'Every citizen called upon or summoned by the law must obey once'.

8 'Freedom of expression is one of the most precious rights of man; every citizen can therefore speak, write and publish freely, except in abuse of this freedom'.

the first article 'les hommes naissent et demeurent libres et égaux en droit'[9] or Article 2 'le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme'.[10] In this broader sense, then, citizen referred to every person who possessed, not political rights, but natural and civil rights.

So, in the Declaration, the citizen was never defined through nationality or, if one prefers, the term 'citizen' was never used in the sense of 'national'. A concept of 'national' is only useful if certain people, who don't exercise political rights are, still, governed by a specific legal regime, which does not govern other people who are not called national. This was the case under the *Ancien Régime*, where nationals had civil rights which were not shared by foreigners.[11] Conversely, according to the Declaration, all citizens had political rights and all those who had political rights also had civil rights. If a foreigner took up residence in France, he would not have political rights, but he would have civil rights in so far as he was a person living in society, because civil rights were natural rights.[12] As for the French, they would all be citizens in the broader sense of the word because they would all have civil rights, but also in the narrow sense, because they would all have political rights, albeit that some would be only passive citizens.[13] Therefore,

9 'Men are born and remain free and with equal rights'.

10 'The aim of all political association is the protection of the natural and imprescriptable rights of man'.

11 French citizenship under the *Ancien Régime* principally had effects in the inheritance matters, cf. Lefebvre-Teillard, *op. cite.*, note 1; M. Vanel, *Histoire de la nationalité française d'origine. Évolution historique de la notion de Français d'origine du XVIe siècle au Code civil*, thesis, Paris (1945), pp. 71 ff.

12 Cf. Sieyès, 'Préliminaire de la constitution. Reconnaissance et exposition raisonnée des droits de l'homme et du citoyen, 20-21 July 1789', in S. Rials, *La Déclaration des droits de l'homme et du citoyen*, Paris: Hachette, coll. Pluriel (1988), particularly p. 600: 'nous n'avons exposé jusqu'à présent que les droits naturels et civil des citoyens. Il nous reste à reconnaître les droits politiques' [So far, we have dealt with citizens' natural and civil rights. Now, we must deal with political rights].

13 The idea of passive citizens, who don't have the right to vote, but nevertheless hold political rights may seem strange. But the Revolutionaries were familiar with the distinction between essence and exercise, possession and enjoyment of rights, or possession and exercise: Condorcet later interpreted the notion of 'passive citizens' thusly: '*Certains publicistes ont cru qu'on pouvait confier exclusivement à une portion de citoyens l'exercice des droits de tous [...]*" ['some journalists believed that it was possible to exclusively grant to a number of citizens the exercise of the rights of everyone']. Rapport au nom du comité de constitution, 23 février 1993, *Moniteur*, reprint. t. 15, p. 466). It is thus although everyone possesses this right, even in the Constitution of 1791.
Unfortunately it is not possible to subscribe to Patrice Gueniffey's ingenious thesis, according to which the constituent assembly understood the active-citizen, passive-citizen differently from Sieyès. According to Gueniffey, Sieyès considered passive citizens as citizens even if they did not have 'the right to take an active part in the work of the public authorities', because for the Assembly 'while all citizens belonged to the association, not all members of society were citizens'. Sieyès' passive citizens - women and children - 'were out of the Revolutionary sphere of citizenship[...]. An attentive reading of the articles dedicated to the acquisition of citizenship in the 1791 Constitution (title II, Art. 2-

no one could be national without being a citizen.[14]

One could, without a doubt, cite one passage of the Declaration of Rights which seems to envisage a category of 'national'. The last phrase of Article 6 reads *'tous les citoyens [...] sont également admissibles à toutes dignités, places et emplois publics'*.[15] In reality, however, it can only be read as envisaging nationals if one uses an anachronic interpretation. In contrast to modern positive law, the law of the revolutionary epoch did not reserve employment in public office to nationals, and there are even several examples of foreigners elected into the primary assemblies.

There was, thus, no need for the Declaration of Rights to add, to the two categories of citizen, the category of national.[16] This was the same for the Constitution itself, although it did not accord the right to vote to everybody.

The Constitution proper, adopted two years after the Declaration of Rights, followed an entirely different logic. Except for in its first section relative to the guarantee of the rights of man, where the word citizen was used in the same sense as in the Declaration, the Constitution was concerned only with the political organization of society. Therefore, it had no effect on civil rights but only

3) leaves no doubt that neither women nor children are citizens'. P. Gueniffey, *Le nombre et la raison. La Révolution française et les élections*, Paris: Éditions de l'E.H.E.S.S. (1993), pp. 43-44, in particular, note 37). An attentive reading of the articles reveals precisely the opposite. Notably, Article 2 starts *'sont citoyens français ceux qui sont nés en France d'un père français'* ['Those who are born in France to a French father are French citizens']. This provision doesn't mention sex, or age, or any other condition. Women, children, domestic servants and idiots were, thus, all French citizens.

14 Pierre Rosanvallon expresses this idea when he says that 'la notion de nationalité finit par se confondre avec celle de citoyenneté' ['the notion of nationality ends up by becoming confused with the notion of citizenship']. *Le Sacre du citoyen. Histoire du suffrage universel en France,* Paris: Gallimard (192), p. 73. However, he based this conclusion on the assumption that the conditions of access to nationality and to active citizenship are the same. This idea is incorrect. If nationality were confused with only active citizenship, the passive citizens would not have nationality. In reality, it is the passive citizenship which is confused with nationality, but his signifies simply that one does not need to have a concept of nationality.

15 'All citizens have equal access to all honours, places and public employment'.

16 Marguerite Vanel notes correctly that, under the Revolution, *'il importe peu de déterminer qui est Français et qui est étranger; c'est là une simple question de fait, qui n'a plus aucune importance, même pour l'État. Le seul problème à résoudre, c'est l'appartenance non à un pays, mais à une communauté politique'* ['There is little relevance in determining who is French and who is a foreigner, which is a simple question of fact of no importance even for the state. The only problem in need of resolution is whether or not one whether or not one belongs to a country but, instead, whether or not one belongs to a political community'] (*op. cite.*, note 11, p. 9). *'Aussi bien la distinction des Français et des étrangers ne présente-t-elle aucun intérêt sensible, puisque tous ont maintenant la jouissance des droits civils, depuis la suppression du droit d'aubaine par le décret du 6 août 1790'* ['Similarly the distinction between the French and foreigners is of no significant interest, because nowadays, ever since the windfall law was suppressed, everyone enjoys civil rights'], p. 96.

on political rights.[17] It was the possession of these latter rights which defined the French citizen. But where these political rights are conceived of as natural rights, one is obliged to settle them on everyone. Title II contained, in this regard, some remarkable provisions. First of all, according to the terms of Article 2, French citizens were

> *Ceux qui sont nés en France d'un père français; Ceux qui, nés en France d'un père étranger, ont fixé leur résidence dans le royaume; Ceux qui, nés en pays étranger d'un père français sont venus s'établir en France et ont prêté le serment civique; Enfin, ceux qui, nés en pays étranger et descendant à quelque degré que ce soit d'un Français ou d'une Française expatriés pour cause de religion viennent demeurer en France et prêtent le serment civique'.*[18]

Article 3 determined the conditions under which a foreigner might become a French citizen. The requirements were five year of residence, to take the civic oath and, in addition to have

> *acquis des immeubles ou épousé une Française, ou formé un établissement d'agriculture ou de commerce.*[19]

This Article explains the preceding Article 2: For a foreigner, it was normally not necessary to obtain an act of naturalization in order to become a French citizen. As soon as the prerequisite conditions were fulfilled, one became a French citizen with full legal status. It was only in the case where the conditions were not met that it was necessary to be naturalized - which came under the exclusive competence of the legislature.[20] The automatic nature of this principle is perfectly understandable taking into account the Declaration of Rights. The foreigner, because he was a person, had the same civil rights as the French. It was, thus, only left to determine the conditions of access to political rights, and citi-

17 In this sense see Lefebvre-Teillard, *op. cite.*, note 1.

18 'Those who were born in France to a French father; - those who were born in France to a foreign father, who are now resident in the Kingdom; - those who were born in a foreign country to a French father, but have come to take up residence in France and have taken the civic oath; - finally, those who were born in a foreign country and descended to a certain degree from a French man or women who emigrated for religious reasons, who have come to take up residence in France and have taken the civic oath'. This is not then, as is sometimes believed, pure *ius soli,* because those descended from expatriate Huguenots are also citizens, but is instead, a combination of *ius soli* and *ius sanguinus.*

19 'Acquired property or married a French woman, or set up an agricultural or business venture'.

20 Article 4 reads *'le pouvoir législatif pourra, pour des considérations importantes, donner à un étranger un acte de naturalisation sans autres conditions que de fixer son domicile en France et d'y prêter le serment civique'* ['The legislature can, on the basis of important considerations, give an act of naturalisation to a foreigner with no other conditions than he take up residence in France and that he take the civic oath']. The competence of the legislature derives from the revolutionary principle according to which legislation *la loi* is the only source of law *le droit.*

zenship was here, simply, 'belonging to a society', not 'society in general', but a particular society, that is, the national society. This belonging was a self evident belonging 'in fact' and the only role of the Constitution was to define the conditions which established the end of belonging and, accordingly, the loss of citizenship. It is from this belonging that the political rights followed. If the foreigner did not fulfill the conditions then he did not belong to the French society. He was a citizen in the broader sense of the Declaration of Rights, but he was not a French citizen, not even a passive one.

All French citizens possessed political rights, although these rights could only be exercised by active citizens. As in the Declaration, the accordance of political rights did not necessarily imply the right to vote. Of what, then, could these political rights consist? Above all, of the right to be represented and, in this way, participate in the formation of the general will. It is remarkable that Article 2 identifies as French citizens '*ceux qui* ... [those who ...]' and introduces no conditions of age, sex, wealth etc. Anyone who did not meet these criteria would be a passive citizen, but she would still be a citizen. In addition, various functions and offices could also be entrusted to the holders of political rights. So it was, that those French citizens who paid a minimum contribution became active citizens who, alone, could vote in the national assemblies. But even those who were not active citizens could, nevertheless, vote to elect municipal officers.[21] Since the suppression of the *droit d'aubaine*, this was, in fact, the principal difference between citizens and foreigners.

The inhabitants of France, could thus be classified and divided up into four large concentric circles, the largest of which comprised all the inhabitants. Only those who met the conditions laid out in Article 2 were French citizens and these included women and minors. These made up the intermediate circle, from which only foreigners were excluded. Because foreigners exercised the same civil rights as the French, their exclusion proves, once again, that even passive citizens had political rights refused to foreigners.[22] The third circle comprised only active citizens. Finally, the smallest circle was formed by those who fulfilled the conditions to be electors.

One understands why it was not necessary, under these conditions, to use a special term to designate those who exercised the civil rights of nationals without being citizens.[23] Such a class of persons did not exist. Everyone, French and for-

21 Title 2, Article 9. Cf. G. Darcy, 'Administration et élection dans la constitution du 3 septembre 1791', in *1791. La première constitution français, 3 septembre 1791*, Paris: Economica (1993), pp. 271 ff.

22 One cannot therefore subscribe to the William Sewell's affirmation, according to which passive citizens 'were not citizens at all, but subjects'. W.H. Sewell, Jr., 'Le citoyen/la citoyenne: Activity, Passivity and the Revolutionary Concept of Citizenship', in C. Lucas (ed.), *The French Revolution and the Creation of Modern Political Culture*, vol. 2, *The Political Culture of the French Revolution*, Oxford: Pergamon Press (1988), pp. 105 ff., particularly p. 111).

23 According to Jean Leca, who cites an opinion of F. Borella, the term 'nationality' appeared only in the middle of the 19th Century, in Foelix's treatise on international pri-

eign, had the same civil rights. Only French citizens, but all French citizens, exercised political rights.

Despite this, however, there was a direct connection between this notion of citizenship and the concept of sovereignty. All those who belonged to the French society were citizens, but not all citizens had the right to vote. The government was not a democracy, nor even a representative democracy. Instead it was a purely representative system, that is, a system in which the legislature is reputed to express the general will, regardless of the manner in which it has been established, whether by fate, election, or hereditary rules. If the main legislative organ or a partial organ of the legislature were elected, this organ would not express the will of its electors, but would continue to express the general will and it is this general will to which sovereignty is imputed. All the citizens whether or not they could vote were, thus, represented and through their representatives participated in the making of law.

In summary, the Constitution of 1791 succeeded in according to everyone, except foreigners, the quality of citizenship - which implied both civil rights and political rights - with the result that, at this point in time, there was no good reason for using a concept of nationality which would serve to distinguish between those who had civil rights and those who, in addition, had political rights.

III. THE GIRONDIN PROJECT

This project marked an important step. After the Declaration of Rights which used the same concepts of citizenship as the Declaration of 1789 - the person living in society and holding civil rights on the one hand, and on the other, the person living in a particular society and disposing of political rights - the Girondin project had a second section entitled 'De l'état des citoyens et des conditions nécessaires pour en exercer les droits' ['Of the status of citizens and the necessary conditions for exercising rights']. Article 1 provided the following definition of citizenship:

> *'Tout homme âgé de vingt-et-un ans accomplis, qui se sera fait inscrire sur le tableau civique d'une assemblée primaire et qui aura résidé depuis une année sans interruption sur le territoire français est citoyen de la République'.*[24]

The principle underlying this definition was the same as that of 1791: It was still a question of establishing an effective belonging to French society, and all per-

vate law, 1843. J. Leca, 'Nationalité et citoyenneté dans l'Europe des immigrations', in J. Costa-Lascoux and P. Weil (eds.), *Logiques d'États et immigrations*, Paris: Kimé (1992), pp. 11 ff., in particular p. 48, note 21).

[24] 'Every man, having reached the age of twenty-one, who is inscribed in the civic register of a primary assembly and who has resided on French territory for one year without interruption is a citizen of the Republic'.

sons, regardless of their place of birth and their ancestry were French citizens.

However, two differences can be discerned. First of all, the concept of *ius soli* was used in a more definitive manner, because, here, citizenship depended neither on ancestry, nor place of birth, but only on place of residence. However, citizenship as here determined was not, any more than in the 1791 Constitution, 'nationality' but the holding of political rights.

The second difference was of very substantial importance. The formulation *'ceux qui'* ['those who'] in the 1791 Constitution was replaced by *'tout homme'* ['all men']. One can guess at the likely motivation for this change: women and minors were no longer citizens. The category of passive citizen no longer existed, and now all citizens would effectively be able to exercise the right to vote. It was also possible to justify universal suffrage, because the quality of citizen was coincident with that of elector. At the same time the notion of political rights was redefined, no longer being the right to be represented but instead the right to choose the representatives. Thus, it became possible to express the theory of sovereignty in other terms. Where, in 1789, the sovereign was only the holder of the essence of sovereignty, now it was the entire sovereignty which belonged to him, which implied that he could actually *exercise* it, at least partially.

These new formulations had three advantages:

In the first place, they avoided the creation, as in 1791, of a class of 'passive citizens' which went against the principle of equality. Now, either one was a citizen or one was not, but if one was a citizen then one enjoyed all the citizenship rights. All citizens were equal, and all could vote. As to the distinction between citizens and non-citizens this was entirely natural, depending only on age and sex and not upon conventional and artificial provisions such as relative wealth. Which is why the Thermidorians, who took over the process and founded their definition of citizenship on financial contributions took care to make clear that theirs was a definition based on an entirely contractual quality.

In the second place, the Girondin project was able to define the sovereign. Because the monarchy had been abolished and there was no longer any mixed government, it was no longer necessary to avoid the ideas of popular sovereignty.[25] The two terms 'nation' and 'people' once again became synonymous, to the extent that the Declaration of Rights could, thereafter, proclaim that 'la garantie sociale des droits de l'homme repose sur la souveraineté nationale [Article 25]'[26] and that sovereignty 'réside essentiellement dans le peuple entier et chaque citoyen a un droit égal de concourir à son exercice [Article 27]'.[27]

[25] M. Troper, 'La constitution de l'an III ou la continuité: la souveraineté populaire sous la Convention', in R. Dupuy and M. Morabito (eds.) *1795. Pour une République sans Révolution*, Rennes: Presses Universitaires de Rennes (1966), pp. 179 ff.

[26] 'The social guarantee of the Rights is to be found in national sovereignty'.

[27] 'Resides, at its essence, in the whole people, and each citizen has an equal right to participate in its exercise'. One can measure the number of times this is habitually erroneously interpreted in Article 3 of the Constitution of 1958, in which one wish to see in the phrase, 'the national sovereignty shared by the people', the fruits of a compromise between the two unrelated theories.

The 'people' was also the totality of those who had the right to participate in the exercise of sovereignty. Later the Montagnards wrote 'le peuple souverain est l'universalité des citoyens français' ['the sovereign people is the totality of French citizens'].[28] However, the Girondins were unable to use this formulation because it signified that those who did not have the right to vote did not form part of the sovereign people, a step which only the Thermidorian Convention dared to take.

The third advantage of these formulations was that they led to a tautological definition of universal suffrage. Universal suffrage is a system in which no citizen is excluded from political rights, even if the power to exercise these rights can be withdrawn. As the defining quality of citizenship was nothing other than the right to vote, suffrage was always, by definition, universal, even where the number of electors were reduced. The Thermidorians retained this formula.

This new concept of citizenship thus permitted proclamations of popular sovereignty and universal suffrage while, at the same time, depriving certain categories of people, women, minors, and at various times migrants, or, where the need arose, paupers of the right to vote. However, this formulation is the source of a serious theoretical difficulty which the Constitution of Year III also encountered: Women, minors, men who had not yet resided for more than a year in France, and all those who neglected to sign the civic register, were not French citizens, What, then, was their status? One could perhaps imagine that they were French without being citizens, but the Girondin Project contained no provisions concerning a concept of nationality distinct from citizenship.

One should, however, note that the question does not have any real practical significance, because those who were not citizens held all civil rights. Moreover, section VI, title X 'Of ways to guarantee civil peace', used the words 'citizens', in the sense of 'members of society', 'men' and 'persons' indifferently. However, there was a definite category of individuals who were neither citizens nor referred to as French nationals.

The Girondin Project did not resolve this ambiguity. We know that Condorcet, who was one of the first proponents of equality between the sexes made no reference to female suffrage in the report which he presented in the name of the constitutional committee.[29]

The Project did however contain the merest sketch of a distinction, which became explicit in the 1793 Constitution. It determined on the one hand the quality of citizenship, on the other the exercise of the right to suffrage. This type of distinction, frequently used in the laws under the *Ancien Régime* had also been used in 1791 for the definition of sovereignty, of which the essence belonged to the Nation, but whose exercise was delegated to the representatives. Thus,

[28] Article 7.

[29] Cf. O. Le Cour Granmaison, *Les citoyennetés en Revolution (1789-1794)*, Paris: P.U.F. (1992), pp. 290 ff.

Article 2: La qualité de citoyen se perd par la naturalisation en pays étranger et par la peine de la dégradation civique.
Article 6: Tout citoyen qui aura résidé pendant six années hors du territoire de la République, sans une mission donnée au nom de la nation, ne pourra reprendre l'exercice du droit de suffrage qu'après une résidence non interrompue de six mois.[30]

One could, thus, lose the quality of citizen, which would of course, lead to the loss of the right to vote, but the exercise of this right could also be lost or suspended without a corresponding loss of the quality of citizen. This explains why a man who was deprived of his right to vote through failing to fulfill the residence requirements remained a citizen and capable of being elected.[31]

IV. THE MONTAGNARD CONSTITUTION OF 1793

On this point, as on many others, the Montagnard Constitution of 1793 extended the Girondin Project. The Declaration of Rights employed the word citizen in the same double sense as the two preceding declarations. It still referred to, on the one hand, all members of a civil society,[32] and on the other hand, to those who possessed political rights.[33] The Constitution, itself, determined the condi-

[30] Article 2: Citizenship can be lost by naturalisation in a foreign country and by virtue of civic debasement; Article 6: All citizens who have been resident out of the territory of the Republic for more than six years, can only take up the right to vote again, after six months' uninterrupted residence.

[31] Title II Article 10 reads, 'Wherever a French citizen resides, he can be elected in any place, or by any *département,* even if he has been deprived of the right to vote through lack of residence'.

[32] In this direction, Article 10 reproduces Article 7 of the 1789 Declaration of Rights 'Every citizen called upon or summoned by a legal authority must obey immediately. Any resistance is incriminating'. One can not, in passing, that this formulations shows the inappropriateness of the classic distinction between a declaration of rights and a declaration of duties. All the Declarations of Rights contain provisions establishing duties and not only, as is sometimes maintained, negative duties in the sense that all rights and freedoms imply a universal duty to respect principles and customs and also because it is not possible to establish these rights and freedoms and without defining their limits to them. Here, however, we witness an autonomous duty to obey, which it was necessary to proclaim in a declaration because it was conceived as linked to the very nature of society itself. the word 'citizen' is here used in the sense of 'member of society' as with Article 16 *'le droit de propriété est celui qui appartient à tout citoyen de jouir et de disposer à son gré de ses biens, de ses revenus, du fruit de son travail et de son industrie'* ['The right to property belongs to every citizen who has the right to enjoy and dispose of his goods, his income, the fruits of his labour and his industry as he pleases'] and as with the famous Article 21 *'Les secours sont une dette sacrée. La société doit la subsistance aux citoyens malheureux soit en leur procurant du travail, soit en assurant les moyens d'exister à ceux qui sont hors d'état de travailler'* ['The right to assistance is sacred. Society owes subsistence to these unhappy citizens, be it through providing work for them or in assuring the means to exist to those who are incapable of work'].

[33] Article 29 reads, *'Chaque citoyen a un droit égal de concourir à la formation de la loi et à la nomination de ses mandataires ou de ses agents'* ['Every citizen has the same right to

tions for the exercise of political rights

> *'Tout homme né et domicilié en France, âgé de vingt-et-un ans accomplis, tout étranger, qui, domicilié en France depuis une année, y vit de son travail ou acquiert une propriété, ou épouse une Française ou adopte un enfant, ou nourrit un vieillard, tout étranger enfin, qui sera jugé par le corps législatif avoir bien mérité de l'humanité, est admis à l'exercice des droits de citoyen français.*[34]

The principle of *ius soli* was, then, retained here, but received a less favorable interpretation than it had in the Girondin Project. Foreigners were, indeed, allowed to vote without undergoing naturalization, provided that they fulfilled the, very liberal, conditions laid out in Article 4. However, at issue was no longer simply their place of residence but also their place of birth.

One might also perceive it as less favorable in so far as the Montagnard text differs from the Girondin project by not making foreigners citizens because, according to Article 4, the foreigner who fulfilled the necessary conditions did not become a French citizen but was only 'allowed to exercise the rights of a French citizen'. Such an interpretation is, however, erroneous. The above formulation was, in fact, identical for both foreigners and men born and resident in France who are also 'allowed to exercise the rights of a French citizen'.

The formulation in Article 4 which dealt identically with both foreigners and men born in France had a considerable advantage over the Girondin project report. The advantage resulted from the substitution of 'allowed to exercise the rights of a French citizen' for the Girondin formulation 'is a French citizen', the latter, while more simple, implied that women and minors were not citizens and did not constitute part of the sovereign people. Conversely the formulation in Article 4 allowed one to consider then as citizens, albeit that they were not allowed to exercise the ensuing rights.

This distinction between rights and the exercise of rights, which was a familiar feature of the law of the *Ancien Régime* and which was also applied to sovereignty allowed the reconciliation of provisions which excluded suffrage from certain categories of individuals, with the Declaration of Rights which gave to everyone 'the legal right to participate in the formation of law and in the nomination of his representatives and agents'. It might seem strange to find the expression 'legal right' in a declaration which professed to set out 'those natural rights which are sacred and inalienable'. It could signify that, upon entering society, man had a natural right to participate in the formation of law, but the conditions

participate in the formation of law and in the nomination of his representatives and his agents'].

34 Article 4: 'Every man, born and resident in France, having reached the age of twenty-one, every foreigner, resident in France for at least a year, who works here or who has acquired property, or married a French woman, or adopted a child, or who looks after an old person. Thus, in fact, every foreigner who would be judged by the legislative body as having well served humanity, is allowed to exercise the rights of a French citizen'.

for the exercise of this law were not natural, rather, they were created by convention. In other words, it was the task of the law (in the sense of positive law) to determine them. To ensure that the legislator respected natural law these conditions of exercise had, themselves, to be natural. In so far as the Constitution excluded from the exercise of these rights only those whose inferior state was considered as 'natural', and this was the case for women and minors,[35] then it was possible to argue that the Constitution did nothing more than put the Declaration of Rights into operation.

It is this logic which allowed the proclamation 'sovereignty resides in the people' to be completed by a definition of 'the people': 'the sovereign people is the totality of French citizens'. In other words, 'the people' was not composed merely of those who were allowed to exercise rights.

This solution had the immense advantage of making it possible to confer on everyone not only civil rights, but also political rights, an advantage which the Constitution of Year III was not able to retain, because the Constitution of Year III linked the right to vote to the level of taxes paid, which, according to the understanding of that era, represented a non 'natural' limit. The Thermidorians were, thus constrained to turn back to the formulations used by the Girondin project.

V. THE CONSTITUTION OF YEAR III

The Constitution of Year III represents an enigma. Without a doubt it clearly elaborated the necessary conditions for French citizenship. But on the question of identifying who was a citizen it had no answer, no more, it should be noted, than did the preceding Constitutions, and especially the Girondin Constitution which inspired it. It created a class of individuals who were not citizens but did not ascribe to this class either a name or a status.

The conditions for being a citizen were elaborated in three articles, clearly inspired by the Girondin project.

> *Article 8: Tout homme né et résident en France, qui, âgé de vingt-et-un ans accomplis s'est fait inscrire sur le registre civique de son canton, qui a demeuré pendant une année sur le territoire de la République et qui paie une contribution directe, foncière ou personnelle, est citoyen français.*
> *Article 9: Sont citoyens, sans aucune condition de contribution, les Français qui auront fait une ou plusieurs campagnes pour l'établissement de la République.*
> *Article 10: L'étranger devient citoyen français, lorsque, après avoir atteint l'âge de vingt-et-un ans accomplis, et avoir déclaré l'intention de se fixer en France, il y a résidé pendant sept années consécutives, pourvu qu'il y paie une contribution directe, et qu'en outre il y possède une propriété foncière, ou un établissement d'agriculture ou de commerce, ou qu'il y ait épousé une femme française.*[36]

[35] Cf. Sewell, *op. cite.*, note 22.

[36] 'Article 8: Every man born and resident in France who, having reached the age of twenty-one, inscribes himself in his canton's civic register, who has been resident for

Without doubt, the conditions for being or becoming a French citizen were much more stringent than those of the Girondin project. Without doubt, they demonstrate a clear intention to reduce the number of voters, to exclude paupers and to make it more difficult for foreigners to get the vote.[37] The anti-democratic nature of these provisions is incontestable, but it is important to stress that the technique used here was the same as that used in the Girondin project: all citizens were equal and had the right to vote in the primary assemblies. The start of Article 8 is identical, virtually word for word, to the first article of title II of the Girondin project, the only additions being the condition of birth and residence in France - which, moreover, was borrowed from the text of 1793 - and the need to pay a contribution. In particular two lines of Article 8 link it conclusively to Condorcet's text. First, in both cases, one reads 'all men, [...] who, having reached the age of twenty one [...]' with the result that neither women nor children were citizens. The second similarity relates to the status of those who fulfill the conditions. Where in 1793, these men were 'allowed to exercise the rights of a citizen', in Year III as in 1791 and as in the Girondin project, they were simply

year on Republic territory and who pays a direct contribution through his estate or personally, is a French citizen. Article 9: The French who have participated in one or more campaigns towards the establishment of the Republic are citizens, without any requirement to pay a contribution. Article 10: A foreigner becomes a French citizen when, after having reached the age of twenty-one, and declaring his intention to settle in France, he has resided here for seven consecutive years, provided that he pays a direct contribution, that he possesses real estate or an agricultural or business establishment, or that he is married to a Frenchwoman'.

37 In this regard, Boissy d'Anglas is often quoted: *'Nous devons être gouvernés par les meilleurs: les meilleurs sont les plus instruits, les plus intéressés au maintien des lois: or à bien peu d'exceptions près, vous ne trouvez de pareils hommes que parmi ceux qui, possédant une propriété, sont attachés au pays qui la contient, aux lois qui la protègent, à la tranquillité qui la conserve, et qui doivent à cette propriété et à l'aisance qu'elle donne l'éducation qui les a rendus propres à discuter avec sagacité et justesse les avantages et les inconvénients des lois qui fixent le sort de leur patrie....un pays gouvernés par les propriétaires est dans l'ordre social; celui où les non-propriétaires gouvernent est dans l'état de nature.'* ['We have to be governed by the best. The best are the most educated, the most interested in upholding law; now, with very few exceptions, you can find these men from only among those who have property, are attached to the country to which they belong, to the laws which protect them, to keeping the peace, and who due to this property and affluence which comes of education are in a position to discuss with wisdom and justice the advantages and disadvantages of the laws which govern the fate of their country [...]. A country governed by property holders is in the social order, one which is governed by those without property is in the state of nature.'] Discours préliminaire, 5 *Messidor*, an III, *Moniteur* T. 25, p. 92. It should however, be noted that Boissy is referring here to the conditions for eligibility to stand in elections rather than conditions for voting in the assembly primaries. In reality those number of those who had the right to vote in the assembly primaries was higher than one would think, totalling six million in 1795 compared with four million three hundred thousand in 1791. Due to the reduction in the age of majority for electors it was more or less the same figure as in 1792, when the *Convention* was elected under universal suffrage. Cf. Gueniffey, *op. cite.*, note 13, pp. 100-101, and Rosanvallon, *op. cite.* note 14, p. 99.

'citizens'. This was equally applicable to foreigners who satisfied the conditions laid out in Article 10: they became 'French citizens'.

The enigma presents itself, then, in the same terms as for the Girondin project: What to call those people who, because they did not fill the conditions of age, sex, residence or income, were not classified as citizens. In 1791 these people would have been passive citizens, in 1793 they were citizens but they were not allowed to exercise the right to vote. The 1795 Constitution did not contain, anymore than the Condorcet project did, any glimmer of an answer. People of the period were well aware of this problem and Thomas Paine, one of the principal democrat adversaries of the project prepared by the *Commission des Onze* stated their case with some force:

> *C'est une chose aisée, en théorie et sur la papier, d'ôter les droits de citoyen à la moitié du peuple d'un pays, mais l'exécution n'en est pas toujours praticable, et il est souvent dangereux de la tenter... et il ajoute on pourrait ici demander: puisque ceux-là seuls doivent être reconnus citoyens, quel nom aura le reste du peuple?*[38]

This enigma has not failed to arouse perplexity and authors frequently suggest that the Thermidorian Constitution, in fact, reinstated the 1791 distinction between active and passive citizens, but without daring to be explicit for fear of popular uprisings. This interpretation is tempting.[39] It can be based on two arguments: first, the requirement to make contributions in order to vote in the assembly primaries, which recalls the 1791 Constitution, second, statements made by certain speakers, during the course of debate and notably by Boissy d'Anglas who asserted in his report:

> *Mais nous n'avons pas cru qu'il fût possible de restreindre le droit de citoyen, de proposer à la majorité des Français, ou même à une portion quelconque d'entre eux, d'abdiquer ce caractère auguste [...] il ne faut pas diviser le corps social et porter atteinte à l'égalité.*[40]

Boissy seemed to consider that those who would not be eligible to vote, because, for example, they did not pay any contribution, would still be citizens, but 'passive' citizens. The fact that, in contrast to 1791, the Thermidorians did not clearly formulate the distinction between active and passive citizens in the constitutional text can be explained only on the basis that they wanted to avoid

38 'It's an easy thing, in theory and on paper, to give the rights of citizenship to half the people in a country, but carrying it out is not always practicable and is often dangerous to attempt [...] One could also ask, if those people are to be known as citizens by what name will the rest of the people be called?'. Séance du 19 *Messidor*, Moniteur reprint t. 25, p. 171.

39 One can find it, for example, in the work of Aulard, 'La constitution de l'an III et la république bourgeoise', in *La Révolution française* (1900), t. 38, pp. 113f.

40 'But we didn't believe that it would be possible to restrict the right to citizenship, to propose that the majority of the French, or even a part of them, should relinquish this noble status [...], it is not necessary to break up society [le corps social] and undermine equality'. Discours préliminaire, Séance du 5 *Messidor*, *Moniteur*, reprint. t. 25 p. 93.

political troubles.[41]

In reality, however, everything leads to a rejection of the notion that, without explicitly saying so, the Convention re-established the category of passive citizens.

In the first place, in contrast to the Declaration of Rights of 1789, the one of Year III did not use the word 'citizen' in the double sense of both member of society and also holder of political rights, but only in the latter sense. Moreover, the term itself appeared only three times:

> *Article 17: La souveraineté réside essentiellement dans l'universalité des citoyens.*
> *Article 18: Nul individu, nulle réunion partielle de citoyens ne peut s'attribuer la souveraineté.*
> *Article 20: Chaque citoyen a un droit égal de concourir, immédiatement ou médiatement, à la formation de la loi, à la nomination des représentants du peuple et des fonctionnaires publics.*[42]

In all other cases, where civil rights were at issue, the text used words like 'man', 'individual', 'everyone', 'no one', etc. As a result, 'citizen' was exclusively employed here to refer to those who enjoy political rights.[43]

This terminology was, moreover, entirely consistent with the new thesis of the Convention on the division between natural law and positive law: by nature, man has only the rights of liberty, equality, property and safety.[44] Society must guarantee these rights to everyone. In contrast, there is no natural right to participate in the government of society, because this right is, according to this theory, artificial. The only right of man in this regard, is the right to live in a society where sovereignty belongs to the people. But the determination of the quality of citizenship is dependent upon a decision taken at a given time. It can only result from positive law, that is, from the Constitution.

Daunou argued this explicitly during the debate on the voluntary contribu-

41 Le Cour Granmaison, *op. cite.*, note 29.

42 'Article 17: Sovereignty resides in the totality of the citizens. Article 18: No individual, no partial group of citizens, can attribute sovereignty to themselves. Article 20: Every citizen has an equal right to participate, directly or indirectly, in the formation of law and the nomination of the people's representatives and functionaries'.

43 In the first version adopted at the 17th *Messidor,* Article 88 of the Declaration of Rights used the 1789 formulations: 'Every *citizen* called upon or summoned by a legal authority must obey immediately' (*Moniteur* t. 25 p. 156). It is significant that this use of the word 'citizen' was carefully removed from the final text.

44 But, despite what many authors believe, this does not represent either a novel demarcation or a new philosophy of the rights of man and is neither new with respect to 1793, nor with respect to 1789. Cf. notably, F. Gauthier, *Triomphe et mort du droit naturel en Révolution 1792-1795-1802*, Paris: P.U.F. (1992), in particular, pp. 252 ff.; also Y. Bosc, 'Ordre social et révolution. Boissy d'Anglas et le rejet de la Déclaration de 1793 en l'an III' in *Colloque: l'an I et l'apprentissage de la démocratie*, Saint-Ouen, 21-24 June 1993 (forthcoming); 'Le citoyen contre l'homme? (À propos de la Révolution des droit de l'homme de Marcel Gauchet)' in M. Vovelle (ed.), *Recherches sur la Révolution,* Paris: La Découverte, IHRF, Société des études robespierristes (1991), pp. 126 ff.

tion (known as the personal contribution) which allowed those who were not taxable to become citizens in spite of everything. Dubois-Crancé had proposed that this contribution should not replace the contribution foreseen in Title II, but should instead accompany it, with the result that the contribution would really be voluntary for everyone and the same amount for everyone - the same for paupers as for more affluent people. One of his arguments was that,

> *le droit de cité ne peut pas s'acquérir par le paiement de l'impôt; il est dans la nature.*[45]

Dubois-Crancé was thus aligned with the discourse of the period between 1789 and 1793: every individual is a citizen by nature, as soon as he belongs to society in general, he has civil rights and as soon as he belongs to a particular society he also has political rights, regardless of his age or sex. The constitution can therefore distinguish between several classes of citizens, as was the case in 1791, or between rights and the exercise of those rights, as was the case in 1793.

Daunou, who represented the *Commission des Onze* and who was followed by the Convention, gave a response which clearly embodied the new philosophy and which would be followed by the Convention:

> *il est si peu dans la nature qu'on ne l'acquiert que par convention, c'est-à-dire après qu'on s'est mis dans l'état de société.*[46]

Here, Daunou was expressing an idea which arose again at the start of the Convention, according to which it is the task of the society to mould the good citizen.[47] Boissy, himself, had written a constitutional project under the reign of the Montagnards, which started thus: 'Art. 1: [la Constitution] reconnaît comme citoyens français, habiles à en exercer les droits...'.[48] One was then, here, citizen, not by nature, but in virtue of the Constitution.[49]

If the Convention considered that all men were not citizens by nature it could not later state, without contradiction, that those who could not vote were, nevertheless, citizens. This was, indeed, the sense of Thomas Paine's question: if they are not citizens then what should one call them? But Thomas Paine was, himself, mistaken when he said that one 'gives the rights of citizenship to half the people', because the people was nothing other then the totality of the citizens. In defining the citizens, the Constitution defined the people.

45 'The right to establishment cannot be acquired by the payment of a tax, it is in nature'. Séance du 23 *Messidor*, *Moniteur*, reprint. T. 25, p. 219.

46 'It is, in fact, so little in man's nature that one acquires it only through contract, that is, only after one has been placed in society'. Séance du 23 *Messidor*, *Moniteur*, reprint. T. 25, p. 219.

47 Cf. L. Jaume, *Le discours jacobin et la démocratie*, Paris: Fayard (1989), pp. 245 ff.

48 '[The constitution] recognises as French citizens, those fit to exercise the associated rights'.

49 This text is cited by C. Le Bozec, 'Sur quelque projet constitutionnel', *in Colloque: l'an I et l'apprentissage de la démocratie, op. cite.*, note 45.

As to the idea that the fear of popular uprisings which would have been provoked by using the expression 'passive citizens' prevented explicit incorporation of this phrase into the text, it should be noted that what would have invoked people's anger was not the use of the expression itself but the limitation of the right to vote, and this limitation was in no way concealed but, rather, very clearly expressed and perceived.

The remaining argument is the one which relies on Boissy's statement arguing against restricting the right of the citizen, as this would divide society and undermine equality. This certainly does not tally with the idea that some people would not be, even passive, citizens. In reality, the statement can only be understood in the light of the initial project of the *Commission des Onze*. Boissy was not referring to the text which was finally submitted to the Convention but, instead, to an earlier project which, when dealing with the political status of citizens, combined elements of the Girondin project with elements of the 1793 Constitution.[50] This text provided that:

> *Tout homme né et domicilié en France, qui âgé de vingt-et-un ans accomplis, se sera fait inscrire sur le tableau civique d'une assemblée primaire, et qui aura résidé depuis, pendant une année sur le territoire français;*
>
> *tous étranger résidant sur le territoire français depuis sept années après avoir atteint l'âge de vingt-et-un ans accomplis et qui a déclaré l'intention de s'y fixer, s'il y a acquis des immeubles ou formé un établissement d'agriculture ou de commerce, ou s'il a épousé une Français [...]*
>
> *sont admis à exercer les droits du citoyen français.*
>
> *Les hommes admis à exercer les doits du citoyen français peuvent seuls voter dans les assemblées primaires et remplir les fonctions établies par la Constitution.*
>
> *L'exercice des droits de citoyen se perd ....*[51]

The initial text of the *Commission des Onze* perfectly expounds the approach of the members of the Convention. First, one notes that the text does not define citizenship but instead prescribes the necessary conditions for the exercise of the rights of the citizen. As in the 1793 Constitution, one can therefore presume that everyone, including women, minors and the incapacitated, was a citizen, but not

50 Archives Nationales, C 232, C II 183b 15^{c},(3rd part).

51 'Every man, born and resident in France, who having reached the age of twenty-one, inscribes himself in the civic register of one of the primary assemblies, and who has been resident for at least on year on French territory; all foreigners, already resident on French territory for seven years, who have reached the age of twenty-one and who have declared their intention to settle in France, if they have acquired property or set up an agricultural or commercial establishment, or married a French woman; are allowed to exercise the rights of a French citizen. Only men allowed to exercise the rights of a French citizen can vote in the primary assemblies or undertake the functions established by the Constitution. The exercise of the rights of the citizen is lost by ...'.

everyone could exercise the accompanying rights. It was, therefore, correct for Boissy to say that the text did not restrict the right of the citizen, because, in reality, it only restricted the exercise of this right.[52]

But, on the other hand, it is notable that this initial project did not envisage the requirement to pay a contribution in order to exercise rights. It seems then, that the introduction of this condition into the final version was what led to the replacement of the expression 'is allowed to exercise the rights of a citizen' with 'is a citizen' - something which is perfectly understandable.

If one considers that the rights of the citizen are natural rights then while the Constitution can restrict the exercise of these rights it can only do so by justifying the exclusion of certain categories of people with a reference to nature. In 1793 the exclusion of those who were deprived of or incapable of independent judgment, those such as women, children, domestic servants,[53] was considered 'natural'. In so far as the members of the Convention did not exclude other classes of people, they could continue to maintain that everyone was a citizen but only those who were not 'naturally incapable' were able to exercise the associated rights. But it is difficult to maintain that those who do not pay a contribution are 'naturally' incapable of exercising their rights. The only solution was,

[52] Several authors have, on the basis of some formal similarities, stated that the famous passage of Boissy's speech is only a paraphrase of a report that Condorcet made to the Convention: '*nous n'avons pas cru qu'il fût possible chez une nation éclairée de ses droits de proposer à la moitié des citoyens d'en abdiquer une partie, ni qu'il fût utile [...] de séparer un peuple activement occupé des intérêts politiques en deux portions, dont l'une serait tout et l'autre rien en vertu de la loi, malgré le vœu de la nature, qui, en les faisant hommes, a voulu qu'ils restassent tous égaux.*' ['We didn't believe that it was possible, in a nation which has clarified its rights, to suggest to half of the citizens that they surrender a portion of these rights, nor that it would be useful to separate a people, all with active political interests, into two portions, one portion which would be everything and the other nothing as a result of the law, which would go against the wishes of nature, which in creating men, wanted them all to be equal.'] Archives parlementaires, 15 February 1793, t. 58, p. 595). This is notably the case with R. Carre de Malberg, *Contribution à la théorie générale de l'État*, Paris: Sirey (1920), reprint. CNRS (1962), t. II, p. 426; G. Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale*, Paris: CNRS (1985), p. 105; Le Cour Granmaison, *op. cite.*, note 29, p. 100; S. Caporal, *L'affirmation du principe d'égalité dans le droit public de la Révolution française* (1789-1799), Paris: Economica (1995), p. 258. In reality, while the Condorcet report incontestably inspired the Boissy's stylistic approach, its meaning was substantially corrupted. It should be emphasised that where Condorcet did not want to deprive 'half of the *citizens* of their rights, Boissy did not want to deprive 'the majority of *the French*' of theirs. This change of vocabulary is very easily explained. Condorcet was concerned with the passive citizens of the 1791 Constitution, who were deprived of the exercise of their rights. He declared, therefore, that all citizens should be able to exercise their rights. For him, not all the French were citizens, but all the citizens should be able to vote. Boissy, on the other hand, was reasoning according to the scheme of the 1793 Constitution. He considered that all the French should be citizens, but he evidently had to concede that not all citizens could exercise the associated rights. It was however, the Condorcet technique which triumphed.

[53] Rosanvallon, *op. cite.*, note 14.

then, to redefine the concept of citizenship, such that it was not founded on nature but on convention, that is, on the constitution. It then became simple to say that citizens were only those who were identified by the constitution, but that all citizens could exercise their rights.

In adopting this solution one also achieves another objective: it is possible to continue to write, without contradiction, that 'sovereignty resides in the totality of the citizens',[54] because the citizens are not the inhabitants of the country but, instead, those whom the Constitution defines as citizens, all of which have the effective right to participate in the nomination of representatives and functionaries, conforming to the terms of Article 20 of the Declaration of Rights. This naturally implies that the sovereign body is only composed of citizens.[55] Those people who under the 1791 Constitution had been passive citizens, but citizens nonetheless, were now excluded from the totality that constituted the sovereign and, thus, could neither vote, nor be represented.

The members of the Convention were, in reality, constrained to adopt this concept of sovereignty by the need to simultaneously maintain the ideas that sovereignty resided in the totality of the citizens and that all citizens had the right to participate in the nomination of representatives. They were deprived of both the possibility of calling certain citizens 'passive citizens'(because they were represented without participating in the nomination of representatives, as had been done in 1791), and the Montagnard distinction between the status of citizen and the exercise of rights (because the exercise of these rights could only legitimately have been refused on the basis of a 'natural' distinction).

The solution adopted by the members of the Convention was, thus, dictated by the conceptual arena in which they found themselves. There was only one path open to them: to say, as Laferrière had argued, that those who were not citizens were quite simply French, that they were nationals.[56] The term 'national' did not exist at that time and they were thus bound to use the only term which they had at their disposal 'citizen', which, at the moment, first took on its modern double meaning of holder of political rights and 'national', precisely because, as we have seen, the usage of the word 'citizen' in one of the two meanings of 1789, that of being a member of society, became less frequent.[57]

The Constitution of Year III used the word 'citizen' with the modern meaning of national, for the first time. The French citizen in this sense was the person who, whether or not in possession of political rights, was not a foreigner. Article 335, thus, provided that

[54] Article 17 of the Declaration of Rights. The same formula is repeated word for word in Article 2 of the Constitution.

[55] The opposite opinion is defended by Bacot, *op. cite.*, note 53, p. 106.

[56] The Constitution of Year III, he writes 'had introduced a fundamental distinction between the simple status of being French and that of being a citizen' (quoted in Caporal, *op. cite.*, note 53, p. 257).

[57] This usage, which disappeared from the Declaration is found again only in title XIV 'General provisions', notably in Article 359: 'Every citizen's house is his inviolable sanctuary'.

les étrangers, établis ou non en France, succèdent à leurs parents étrangers ou français; ils peuvent contracter, acquérir et recevoir des biens situés en France, et en disposer de même que les citoyens français, par tous les moyens autorisés par les lois.[58]

This Article reproduced, word for word, a provision of the seventh title of the 1791 Constitution.[59] But the word citizen was, at the same time, able to refer to both 'national' and 'passive citizen'.

The Constitution of Year III thus introduced an innovation of considerable importance which would later facilitate the distinctions made in the *code civil*. Up until then everyone had been a citizen: in 1791, people were at least 'passive citizens'; in 1793 they had at least the status of citizen without, however, being able to exercise the associated political rights. Everyone was thus, at the same time a holder of political rights and of civil rights. From that point on, however, political rights and the exercise of them were reserved to citizens and all others possessed only civil rights.

The Constitution of 1795 thus inaugurated the distinction between political rights and civil rights.[60] The Constitution, which had defined civil rights and political rights simultaneously in 1791, now defined them separately: civil rights in the Declaration of Rights and political rights in the constitutional document itself.

This disassociation of political rights from civil rights took on its greatest sig-

58 'Foreigners, whether or not they are established in France, can inherit from their parents, be they French or foreign; they can contract to buy and receive goods located in France, and dispose of them in the same way as French citizens, by all the means authorised by law'.

59 This text was more liberal than the law of 6-18 August 1790 abolishing the windfall law, which allowed foreigners only to collect the goods which their foreign parents had had in France but not to inherit those of their French parents.

60 C. Demolombe, *Cours de droit civil*, Paris (1845) provided a commentary of Article 7 of the *Code civil* which read thus: *'La qualité de Français ne suffit donc pas pour avoir les droits politiques; il faut de plus être citoyen; et ce titre dans ce cas, n'est plus, comme très souvent, le synonyme de Français, de régnicole; il indique spécialement l'aptitude à exercer les droits politiques. Ainsi, tous les Français jouissent des droits civils. Mais les Français citoyens jouissent seuls des droits politiques. Les uns, les droits civils, sont le but même de la société; ils sont le prix et la compensation des sacrifices qu'elle impose à chacun de ses membres, sans distinction; tous y ont un égal droit. Les autres, les droits politiques, sont plutôt le moyen, ils supposent, ils exigent certaines garanties de capacité et d'intérêt, qu'il appartient au législateur de déterminer suivant les temps et les progrès des mœurs constitutionnelles et de l'education publique.'* ['The status of being French is not sufficient to enjoy political rights; in addition it is necessary to be a citizen; and this title, in this case, is not, as very often, a synonym for French or for *'régnicole'*; it indicates in particular the capability of exercising political rights. So, while all the French enjoy civil rights, only French citizens enjoy political rights. The former, the civil rights, are, themselves, the very goal of society; they are the prize and the compensation for the sacrifices which it imposes on all its members, without distinction; everyone has, in this sense, an equal right. the latter, political rights, are rather the means, they presuppose, they require certain guaranties of capacity and interest, which it is the ask of the legislature to determine, according to the time and progress of constitutional customs and public education.']

nificance when it was used to refuse to foreigners the benefit of certain civil rights. It was then possible to identify two concepts of the citizen, one referring to the enjoyment of civil rights, the other to the possession of political rights, the citizen in the strict sense of the term.

This point was, moreover, later confirmed by Cambaceres, who wrote in his first project for the *Code civil:* 'the Constitution regulates the political rights of the French citizen; it identifies who is allowed to exercise these' (Article 1) and that 'legislation regulates their civil rights' (Article 2). He thereby confirmed that the Constitution defined only those French called upon to exercise their political rights and not the French in general.

This is definitely the meaning of the *Code civil*, Article 7 of which provides 'the exercise of civil rights is independent from the status of citizen, which is only acquired and retained in accordance with the constitutional law'. This Article only confirms what was already to be found in the Declaration of Rights of 1795. The novelty resides in the articles which follow and, notably, in Article 11 'the foreigner in France enjoys the same civil rights as those which are, or would be, accorded to the French by the treaties of the nation to which the foreigner belongs'. Thus, it is possible that foreigners would not even have the same civil rights.[61] In this way, the code departed from the natural law proclaimed by the revolutionary Constitutions which recognized that every man had the same civil rights.

The Constitution of Year III marks a determinate step in the evolution towards a concept of national and a law of nationality. The first two revolutionary Constitutions recognized in all the French the status of citizens, that is, of having political rights, but then made the distinctions between citizens, between active and passive citizens, or between those who held political rights and those who were allowed to exercise them. The sovereign was certainly formed by the totality of citizens, but they were not a homogeneous class. The Constitution of Year III re-established the homogeneity of this class: it did not distinguish between rights and the exercise of rights and all the citizens - who comprised the sovereign people - had the right to vote. The totality of citizens was not however the totality of inhabitants, nor even the totality of inhabitants less the class of foreigners, with the outcome that, without having used a particular term to identify it, without

[61] The differences concern the obligation to provide a guarantee for a legal action and the possibility to inherit goods located in France. Demolombe provides the following commentary on these provisions. After having cited a commentary to the *Code civil* written by Demante, which distinguishes between natural rights and positive law which list several practical consequences, and notably this one, '3. natural laws being common to all human beings, and given that their insertion in the positive law of a people does not make them lose their primitive character, it follows that, in every State, positive laws, which express natural rights, are even applicable to foreigners' (p. 5), he exposes that this distinction is not absolute and that positive laws 'appropriate' natural law, with the result that they do no always apply to foreigners. He invokes, in this respect, the exclusions elaborated against windfalls for foreigners *(droit d'aubaine)* by the law of the *Ancien Régime.*

having instated a specific legal institution, the Constitution gave birth to a new concept, that of 'national'. A concept, the real function of which is not to distinguish the French from the foreigners but to distinguish the French from each other.

CHAPTER II
CITIZENSHIP: PROBLEMS, CONCEPTS AND POLICIES

Vincenzo Ferrari

I. THE CRISIS OF THE 'WESTPHALIA MODEL' VIS-À-VIS THE GLOBALISM-LOCALISM ALTERNATIVE

The topic which is discussed in this conference, *Citizenship: a Contested Ideal,* has already been at the core of the intellectual debate in the social sciences for many years. The idea that the nation-state, derived from the so-called 'Westphalia Model', inspired by the 1648 Peace Treaty, had become incapable of coping with contemporary problems, has been developing and has been taken almost for granted for not quite two decades: one of economic crisis, the seventies, and one of relative prosperity, the eighties. Stagflation, the shortage of raw materials and the clash between expectations and means were the dominant concern in the seventies. In the eighties, the wealthier *élites,* which had taken advantage of *laissez-faire* policies, shifted their attention to such phenomena as the technological revolution, the withering away of distances and the globalisation of the market. Yet, the feeling of deception about the state, as centralist, bureaucratic and slow in its decision-making processes, remained unchanged through the two periods.

This feeling of deception toward the state has also remained in the early nineties, accompanied by a growing sense of economic and social insecurity stemming from the visible contradictions which our countries are experiencing. The OECD countries are still the world centre, as is revealed by such a large scale immigration from poorer world areas, that the Barbarian invasions at the times of the late Roman Empire come to mind spontaneously. On the other hand, economic growth seems to be standing still, unemployment has become endemic, public resources are decreasing and deficits in both budgets and balances of payments seem to be irremediable in at least some of the First World countries: in a word, 'the party is over', to quote an expression of Ralf Dahrendorf.[1] In the political field, we perceive more than a measure of uncertainty. The crisis of the state 'from above' has been increasingly accompanied by a crisis 'from below', so that we have already been talking in terms of the globalism-localism al-

[1] R. Dahrendorf, 'Cittadinanza: una nuova agenda per il cambiamento', *Sociologia del diritto* (1993) pp. 7 ff.

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 51-64.

ternative for years. Many look at the state as if it were about to collapse. The end of the Westphalia Model seems to be close. People feel they are citizens of the world, of a region, of a municipality: sometimes the village coincides with the planet, sometimes with our house walls. However, this swing between such distant poles often brings about a sense of distress.

II. A NEW CITIZENSHIP POLICY?

The world-wide discussion on citizenship may be seen as a reflection of this distress. In modern culture, the concept of citizenship is strictly connected with the principle of state sovereignty and to the related principles of effectiveness, mutual recognition and reciprocity.

The landscape designed by such principles shows fairly clear contours. Metaphorically, they recall the image of a land divided in an orderly manner into well-defined pieces by clear-cut borderlines. The modern sovereign state is the public projection of private ownership, conceived as *ius utendi et abutendi,* according to the Roman juristic idea: a kind of right whose limits can only be self-imposed or negotiated on an (abstractly) evenly base, according to unequivocal and enduring rules. Everyone owns his own visible fragment of territory. Beyond all fragments, the existence of communal land is admitted, but as an exception, quite often stemming historically from the relatively or wholly unknown nature of such unoccupied spaces.

Needless to say, this neat vision – neat but by no means peaceful in that conflicts about borderlines have been exceedingly frequent – seems to be challenged by the events of recent decades. On the one hand, there has been increasing consciousness that borderlines are not sacred, because they have been drawn by history and its protagonists quite arbitrarily. Such consciousness is at the origin of tendencies both to expand countries or to dissolve them; it inspires both offensive wars and liberation struggles. It is true that in this case, the question is always one of borders. Yet, historical uncertainty about frontiers has provoked uncertainty about the territory or group to which one belongs.

On the other hand, a feeling has been growing that there are phenomena whose penetrative force is such that all frontiers are overcome and appear wholly precarious. Human relationships, especially in the economic sphere, have become dependent no longer on only one legal system (and on those intriguing rules of private international law which provide for cross border legal relations), but rather on a multitude of systems, highly intertwined, some of them inserted in the ideal state legal system, some of them externally connected to it or even indifferent and sometimes superior to it. The image is that of the *polysystémie normative* described by André-Jean Arnaud,[2] which synthesises the renaissance

[2] A.-J. Arnaud, *Pour une pensée juridique européenne*, Paris: Presses Universitaires de France (1991).

of pluralistic theories *à la* Ehrlich or *à la* Gurvitch. Even more, an ever wider set of relationships has been increasingly conceptualised in terms of universal rights, belonging to human beings as *personae,* not as citizens or subjects. The sphere of these rights – 'human' or 'fundamental' as they are called – has been so extended that there is virtually no human pretension of some significance that may not be traced back to them explicitly or implicitly also. Further, by reason of the vagueness of the normative texts, be they general declarations or judicial decisions, which may be invoked. In short, everyone may be induced to escape state sovereignty, and thus his citizenship duties, as traditionally conceived: the right to conscientious objection may be raised against the duty to serve in the army; the right to abstain from voting counterbalances the duty to vote; and the duty to comply with a state's laws may be overwhelmed by a people's universal right to self-determination. For, all such rights are usually claimed as being absolute, not open to negotiation, at least not on the state level and even on the international level, in that they are 'transnational' rights.

In this panorama, abandoning the concept of sovereignty, on the prescriptive level, may appear to be a necessary step, because sovereignty resembles an ever-growing hindrance of the self-determination, free movement and economic transactions of human beings. 'Against sovereignty', says Eligio Resta, concluding a monographic issue of *Sociologia del diritto,* devoted to transnational law. In his view, we should shift from 'the universalism of merchants, currencies and bureaucracies' to 'the universalism of the content of legal regulation'.[3]

The Kantian ideal which Resta embraces is perpetually resurging. The same issue of *Sociologia del diritto* opens with the doctoral *lectio* given by Ralf Dahrendorf at Urbino University, already mentioned above. As a good liberal, Dahrendorf points to 'heterogeneity' as the most relevant condition for equal access of individuals to entitlements. He is therefore firmly opposed to localistic thrusts, which bring peoples to shut themselves up in a ghetto of self-contemplation and ethnocentrism. On the one hand, Dahrendorf recognises that 'the heterogeneous nation state ... is the greatest constitutional achievement in history'; on the other, he sees, at the end of the tunnel, 'Immanuel Kant's vision of a world civil society'.[4]

It is easy to see that we find ourselves in the field of great ideals, of noble Utopias if we prefer. When we try to tackle problems more closely, their coerciveness is confusing and perplexing. We desperately look for the *quid novum* which should be a guide for us in the future, but we easily turn onto the footpaths to which we are more accustomed. The remarkable collection of essays edited by Danilo Zolo,[5] which offers a complete panorama of the most recent reflections

3 E. Resta, 'Contro la sovranità', Vol. 20, *Sociologia del diritto* (1993), no. 1, pp. 195 ff., at page 200.

4 R. Dahrendorf, *op.cit.* note 1, p. 16.

5 *La cittadinanza. Appartenenza, identità, diritti,* ed. by D. Zolo, Laterza: Roma-Bari (1994).

on citizenship, seems to give evidence of this phenomenon. The book is intended to denounce the failure of the traditional models of political organisation, the 'liberal capitalist' and the 'socialist', as well as the insufficiency of the corresponding intellectual currents, the 'liberals' and the 'communitarians', whose opposition is arguably devoid of significance vis-à-vis today's challenges. Yet, while moving to concrete proposals that may go beyond Marshall's evolutionary vision of citizenship rights, the Zolo volume is confronted with some evergreen concepts and questions: should we practice a policy of rights, which may transcend the very concept of citizenship, as Luigi Ferrajoli proposes, or should we rather adopt a duty-centred policy, as Robert Bellamy says, echoing Onora O'Neill and involuntarily going back to Giuseppe Mazzini's nineteenth century views? Within what limits may social rights be sacrificed? What new liberties should we recognise?

In other words: liberty or equality? The classical question is obviously re-proposed by the various authors in renewed terms, taking into account not only the relations of production, but also the globalisation of exchanges, and advancements in bioethics and information technology. However, it is still the old question, that not only Thomas H. Marshall, but a number of authors (in books ranging from John Rawls' *A Theory of Justice*[6] to Philip Selznick's *Communitarian Liberalism*[7]) have recurrently tried to answer. In the end, the shadow of the nation-state, be it heterogeneous as Dahrendorf wishes, is still clearly perceivable in the background of the picture. The state still seems the only dike against both localistic and universalistic thrusts proceeding from social *milieux* characterised by a lack of democracy as compared with the admittedly imperfect state democracy.

All this, I think, teaches us two lessons. The first is certainly that we should try to renew our way of thinking. The second, however, is that we should also show a degree of humility: perhaps, in order to find new solutions, we are only required to update our schemes, not to uproot them.

III. CONDITIONS IN THE WORLD: OECD AND ELSEWHERE

As a first step, the social, economic and institutional picture needs to be updated. This picture is fairly well known in its constituent elements, but we could not say that the overall significance of such elements has been understood by the governing *élites* of the First World developed countries.

I shall confine myself to some of the major problems, as a matter of example.

6 J. Rawls, *A Theory of Justice*, Oxford/London/New York: Oxford University Press (1971).

7 Ph. Selznick, *The Moral Commonwealth*, Berkeley/Los Angeles/London: The University of California Press (1992); Ph. Selznick, 'The Jurisprudence of Communitarian Liberalism', paper presented for discussion at the Hokkaido University Symposium on the Sociology of Law (1995).

A first and immediately visible problem is obviously that of large-scale immigration. All our countries have been assailed by cyclical waves, some of them destined to remain, some of them likely to flow back, always being replaced by others arriving. Italy, a marginal country with respect to the problem for years, is a good example. If we ignore prehistory (the Chinese immigration in the thirties, following the fall of the Empire), the first waves, i.e. the Egyptians in the sixties and seventies, then the Ethiopians, the Eritreans and a number of Filipinos in the seventies and eighties, became residential, though showing different degrees of integration. The second waves, in the eighties, far more conspicuous in numbers, concerned a multitude of Third and Fourth World countries: the Maghreb, west and central Africa (especially Senegal), again the Philippines, the Seychelles, Madagascar, Sri Lanka and a number of Latin American countries. The characters and social habits of such groups are diverse. We have had only women from some countries and only men from others, more rarely have we had families. Job opportunities have mostly been precarious, quite seldom regular whether when lawful in principle or sometimes criminal. The majority tend to return when they achieve a revenue that may enable them to enjoy some comforts in their countries of origin: yet, for everyone who leaves, another one comes in. The third wave, which began in the late eighties with the collapse of the communist régimes is Eastern European in origin, especially ex-Yugoslavian, Rumanian and Albanian. If one characteristic is visible in these latter groups, as compared with the former, it is eradication, a lack of alternatives, and often despair. Returning home seems to be out of their reach. Not for a paradox, but rather as a consequence, these immigrants' aggressiveness is far higher. These are people who share a part of our own culture, have built a sort of myth about our way of life for years before leaving their homes, and who feel they have a right to enjoy it. They do not react well to the deception they suffer when faced with unexpected reality. They are easily corrupted and exploited, which means that they are often channelled into criminal paths, possibly by the same organisations which managed their arrival.

In terms of mere numbers, the dimensions of the immigration phenomenon are probably not as substantial as they are said to be. 'Extra-communitarians', as we call them in Italy, might amount to 1,500,000 - 2,000,000 persons, i.e. between 2.5% and 3.5% of the population. This and other estimates are however, uncertain. The most probable thing is that 'regular' immigrants, in terms of the existing law, dating from 1990 (and slightly amended in 1993 and 1996) and based on the combination of a residence permit and a regular job, are but a minority of these persons. As finding a 'regular' job is already difficult for Italians themselves, it is obviously more complicated for immigrants, who are all the more easily exploitable if they are clandestine visitors.

The fact is that immigration, more on the ground of social alarm than on that of numbers, is likely to provoke citizenship problems, not only in the framework of cultural integration, so much discussed in other European countries (polygamy among Muslims in Great Britain and Sweden, excision on African girls and the chador of Islamic school girls in France), but also, and more brutally, in

the field of elementary societal ties. In social imagery, anything 'different' is easily confused with 'deviant', so much so that 'different' people are frequently labelled as deviants and taken as scapegoats, as centuries of persecution of the Jews demonstrate. If, in addition, there are concrete signs of a link between cultural differences and deviances, it is also easy to forecast a dark future in the short run. 'Honest citizens' are currently patrolling the streets of Milan and Turin, aiming at 'liberating' the cities from prostitutes, *viados,* drug dealers and the like. Needless to say, foreigners are the main target.

A second aspect of our 'developed' societies is large-scale criminality, which knows no boundaries, following the same transnational logic as the financial capital and economic exchanges governed by the so-called *lex mercatoria.* This issue is universally well-known, but again, its implications upon the themes of this conference have not yet been fully disentangled.

Illegal deals (arms, drugs, prostitution, art masterpieces) have reached such dimensions that they affect governmental action not only indirectly, but also directly. Criminal élites are increasingly represented at the cross-roads of power, political and economic, in many countries, including those of the First World. The flux of illegal capital has being invading banks for years and may cause their success or their failure, not unlike petrodollars in the seventies.

Widespread criminal organisations orient their action in relation to the state-centred structure of international relations. They single out the *loci minoris resistentiae,* avoiding those places where control is more strict. Thus, they can avail themselves of groups such as Colombian *campesinos,* lacking any economic alternatives or any union rights; of Italian under-14 minors, without any responsibility in penal law; of stateless gypsies; of Swiss bank secrecy; of Monegasque or Dominican fiscal exemptions. Here, they exploit the lack of an extradition treaty, there, cyclical amnesties, here, the inefficiency of the justice system, there, the due process of law. The most reliable ally of organised criminals is the decision-making time span of international organisations, as well as the difficulties which these organisations encounter in framing projects of anti-crime co-operation and especially in enforcing them. To say nothing of the hidden representatives of organised crime in the different bodies.

A third element which should also be highlighted is the profound transformation of working procedures, a transformation which can be traced back to a phenomenon that was at the core of socio-economic and socio-legal reflection at the end of the nineteenth century and the beginning of this century: the division of labour. The automation of working procedures, on the one hand, expels masses of workers, both blue and white collar, from the labour market, at a speed that the slowing down of economic growth has accelerated in the last years. On the other hand, a less-known effect of automation is that it brings about a sort of disruption of both work structures and jobs. The factory itself, as a place of convergence and a centre of fragmented activities governed from above, tends to disappear. Labour contracts, as a consequence, tend to be replaced by a panoply of kinds of 'free' service that have very little in common with traditional legal concepts and are, above all, hardly compatible with the traditional systems of

social security.

This phenomenon, which bears heavy social implications *per se,* enhances the effects caused by the transferral of production activities to Third World countries, which are experiencing tremendous economic growth and will soon become the biggest source of challenge for the relatively stagnant economies of the First World.

Once again, as in the case of large-scale criminality, the state-centred structure of international relations facilitates such processes. While industrial and financial investments easily avoid all legal obstacles and go beyond frontiers, labour relations are entrapped in the nets of state legislation which function as valves for controlling and channelling labour conveniently. Not only labour law regulations, but also the rules concerned with the civil, economic and social conditions of labourers – true citizenship norms *lato sensu* – have such an effect.

In the foregoing discussion, I have considered three paramount phenomena only. Many others should be added. However, I think that the examples produced suffice to cast doubts on the permanent opinion that our countries will continue to be the First World. I do not wish to be apocalyptic. There are, indeed, counterbalancing aspects and our countries still enjoy a relative monopoly of advanced technologies. However, we should question whether the theme of citizenship can still be tackled in terms of a comparison between OECD countries and the rest of the world. The next century might at least shade the force of this logic. The transnational dimension of movements, of legal and illegal exchanges, of the redistribution of powers and wealth, seems to bring about a kind of (relative) homogeneization of the various areas of the world.

This obliges us to re-examine the question of citizenship accordingly.

IV. A GLANCE AT THE CONCEPTS: BETWEEN ASCRIPTION AND CHOICE

Some of the basic concepts on which citizenship is grounded should now be commented upon.

I shall only say a few words about the legal principles which are usually applied in order to recognise and award the status of citizenship. I refer to such rules as *ius sanguinis, ius soli, iuris communicatio* and *beneficium legis,* especially the former two, the latter two being exceptions to them. In this respect, it should only be observed that the adoption of so many different criteria by different countries entails an increasingly unbearable legal uncertainty. The fact that such anomalies as multiple citizenship or, more rarely, stateless status, may have positive effects for individual persons, is obvious. Yet, a number of changes would be welcome, especially within the same geographical and political area, as is the case with the European Union.

It is more relevant, for our purposes, to analyse the alternatives between what can be called the ascriptive and the contractual models of citizenship award. In other words, whether citizenship should mainly stem from a person belonging to

a political entity originally and automatically, or should rather be a matter of choice. This is a historical question whose enduring importance has been stressed by many authors, among them Jürgen Habermas.[8]

Over the centuries, there has been a swing between the two poles. We cannot follow this development in its various stages here, nor can we investigate whether, and to what extent, there is any correspondence between the socio-political dichotomy, which we are referring to, and the seemingly analogous dichotomy framed by legal science, which has recurrently questioned whether citizenship is a 'status' or rather a 'relationship'.[9] From a socio-legal viewpoint we can only observe that the ascriptive model, stemming from a *gens*-like social organisation and almost automatically applied also in feudal times, has prevailed for centuries, although with exceptions. It should have come as no surprise if, with the success of social contract doctrines, especially in the liberal version, the contract model of citizenship had succeeded gradually, as a corollary of the emancipation of human beings 'from subjects to citizens'[10] and of the shift from a status-based to a contract-based society.[11] In fact, however, this did not occur. Even though, from the French Revolution onward, the idea of the *contrat de citoyenneté* has been put forward and has met some success, the sovereign state of the nineteenth and twentieth centuries, also in its liberal-democratic version, has preferred to adopt the model of ascription instead of that of choice as far as citizenship was concerned.

Moreover, cases of obvious choice have been treated as if they derived from the state authority, as is the case with the award of citizenship by *legis beneficium.* This has an explanation, of course. The nineteenth century substantially discarded the ideas of the Enlightenment and enshrined a correspondence between state and nation, where the latter is taken to mean a community of language, traditions, customs and culture (be it a primogenial community, as in the European countries, or a melting-pot community, as in the United States). Belonging to such a community is obviously an automatic event, basically unmodifiable.

A large part of this century has been covered by a conflict between the nationalist ideal, which the Fascist régimes brought to perverse consequences, and the internationalist ideal adopted by other currents of political thought: Roman Catholicism, Marxism and sectors of Democratic Liberalism. The success of internationalism, perceivable in a series of events ranging from the Nuremberg trials to the international charters of human and social rights, has been contrasted in recent years by a vehement nationalistic reaction whose character has gradu-

8 J. Habermas, 'Citoyenneté et identité nationale. Réflexions sur l'avenir de l'Europe au soir du siècle', in J. Lenoble and N. Dewandre (eds.), *L'Europe au soir du siècle. Identité et démocratie,* Paris: Éditions Esprit (1992).

9 E. Betti, 'Cittadinanza', in *Novissimo Digesto Italiano*, Turin: UTET (1947); G. Biscottini, *'Cittadinanza'*, in *Enciclopedia del diritto,* Milan: Giuffrè (1960).

10 G. Zincone, *Da sudditi a cittadini,* Bologna: Il Mulino (1992).

11 H.S. Maine, *Ancient Law* (1861), London: Everyman's Library (1961).

ally become closer to tribalism, also (not to say, especially) when it was supported by religious groups and justified through the display of religious values. This has happened (and is still happening) in Europe as well as elsewhere; and has concerned all the great monotheistic religions alike, obviously in their fundamentalist versions.

The end of this century and the beginning of the next one are also destined to be marked by this challenge, which goes hand in hand with the economic and commercial challenge issued by the developing countries, as already mentioned. I am convinced that we should respond to the nationalist challenge in Europe and the rest of the world.

I do not intend to refute the reasons for 'automatic' membership, or ascription, in absolute terms. We certainly 'belong' to some social groups. However, we cannot hide the fact that this feeling is particularly strong when one's horizons are more limited and one's alternatives are poorer, in the cultural, political and economic field. While speaking at this conference, I cannot ignore the fact that I am expressing myself in English and I am having recourse to ideas and words which are spread universally. Somebody else might speak in Spanish or French, with the same transnational leaning. Again, I cannot hide that my feeling of being Italian is subject – so to say – to variations in terms of both time and space. It increases when I hear stereotyped criticisms raised against the Italians (I understand and admire those Jews who say, as Renato Treves did, that they 'feel most Jewish especially when the Jews are persecuted'). However, my feeling of being Italian decreases substantially when I happen to be represented by unpresentable governments, as was the case quite recently. Besides, my feeling of being an Italian is tempered by the feeling of 'belonging' to more limited or more extensive social groups: a family, a city, or the European Union. I should stress that this measure of uncertainty about what I 'belong' to is consistent with a pluralistic vision of the normative world. As a conclusion, and besides the psychological nuisance which derives from the idea of 'belonging' to something or to somebody, I would be inclined to answer that I belong to the 'human race', as Einstein said.

I confess that I feel much more at ease with the idea of a chosen citizenship. Obviously, I admit its limits. Citizenship cannot be bought and sold in supermarkets, nor can it be completely disconnected from one's being born of other people, in a given place and in a given culture. However, I believe that the potential of the *contrat de citoyenneté* is great and still largely unexperienced. Above all, I believe that the idea of chosen citizenship is more compatible with today's world than the opposite idea of ascribed citizenship.

First, chosen citizenship is a concept which fits in with a world of large mainstreams of immigration, which cannot be hindered through legal means and which it is, therefore, easier to recognise openly, with all the checks and balances which may be opportune.

Second, the concept itself seems to be consistent with the construction of a system of duties aside from the traditional system of rights. Automatic citizenship obviously confers rights. It also grants protection and security. Yet it im-

poses automatic duties that an individual may consider as excessive with respect to the rights. The Soviet citizen used to be entangled from birth in a sort of forest of duties surrounded by a wall. Within that wall, the provisions made for him were relatively secure, though substantively modest, but his entitlements were virtually non-existent: he had no right to choose his leaders, nor to flee the country, nor to practice his religion, nor to have access to information sources, actively or even passively. Citizenship by choice allows one to choose rights and duties at the same time.

Third, citizenship by choice has the advantage of being more strictly linkable to a specific normative system. Here I would like to make a brief digression. As I said before, citizen by ascription may appear paradoxically consistent with a pluralistic idea of the normative world. As we 'belong' to many social *milieux* simultaneously, we can say, and claim, to 'belong' to many legal systems at one time. Yet this is a source of uncertainty. Legal pluralism is a fact, but it is not necessary that this fact should gain normative recognition. The fact that each human being refers to one and only one legal system in terms of citizenship rights may be theoretically simplistic, but nonetheless opportune normatively. Citizenship is a normative fact, not a sheer fact. It is the effect of practical decisions which may spring from a quest for clarity.

Fourth, citizenship by choice, as a principle, is consistent with a higher meta-principle, normatively recognised: that everybody holds rights by birth, as a person, i.e., as a world citizen. World citizenship in a technical sense may well be a Utopia. But Utopias are there to be approached as closely as possible, and one step is necessarily the protection of the normatively recognised right to move freely in the world of which we are citizens and to submit ourselves to the laws we prefer.

It is obvious that citizenship by choice can and should be counterbalanced by measures intended to protect the citizen, above all, in the case that the government of the chosen country fails to comply with the social contract and, for example, suppresses recognised citizenship rights. Among such measures, many could respond to the sentiment of 'belonging'.

V. WHAT DOES OBEDIENCE IMPLY?

There are two different but intertwined aspects of the citizenship question: that of the content of the rights and duties which derive from it, and that of the identification of the political structure to which citizenship must be referred. Let us examine these two aspects separately.

The set of rights and duties stemming from citizenship needs to be redefined. Although the question can only be examined country by country, some guidelines should be singled out, especially in view of an international citizenship policy. I shall only examine some of the main implications of citizenship.

One first, important problem is that of cultural differences, which should be accorded wider recognition.

The theme of diversity is usually associated with the diversity of religions, but should not be confined to this, if we are to avoid the risk that governments discriminate between religious and nonreligious morals, both being entitled to the same kind of consideration on the level of public ethics. From this standpoint, the western countries are certainly more open than others: they do not oblige people to marry in a church, they do not impose a state religion nor do they prohibit public manifestations of one's religion, they do not impose demographic or eugenic policies, they do not forbid the practice of a private set of moral values, even if they are dissonant with the prevailing societal values, they do not hinder information, they grant due process of law. It is true that these characteristics, corresponding to as many entitlements, are not full and do not always correspond to reality: homosexuals cannot build up a formal family, access to information sources is hindered by private and public monopolies, the chance of due process of law in a reasonable time span is often purely theoretical.

There are not, however, so many preliminary legal ligatures, to refer to Dahrendorf's terminology.[12] This gives the western countries, and especially Europe, the opportunity to insist on these advantages in international negotiations, when the rights of immigrants are at stake and, first and foremost, when the extension of citizenship to immigrants is the matter under discussion. Our countries should try to convince other countries to adopt the same kind of legal openness, at least gradually, in the recognition of cultural diversities. But the most important thing is the example they may offer, taking advantage of the world-wide diffusion of news and cultural models. The construction of a mosque in Rome has done more to combat Islamic fundamentalism than any international negotiation based on the principle of reciprocity.

A second problem, equally important, is that of political participation. The question of giving voting rights in local elections to foreign residents is open in Europe and will find a solution sooner or later on a continental level. But the question of a General Election is no less crucial, at least in Europe for European citizens. The choice of one's own political leaders deeply affects everyday life. Active and passive franchise should depend on residence, not on origin.

A third question deals with access to work and with the corresponding rights and duties. As mentioned above, the international labour market is strongly affected by national borders. Also in Europe, notwithstanding the principle of free movement, the fences deriving from state frontiers are still difficult to overcome in this field. Both entrepreneurial speculative policies and union protectionist attitudes play against openness. Once we leave the borders of Europe, the problem becomes extremely serious. The opportunity to exploit cheap labour abroad corresponds to forms of quasi-slavery for labourers who do not even have any access to their effective employer. In poor countries, such workers may be more privileged than the average inhabitants. Still, they are incomplete citizens, in that

[12] R. Dahrendorf, *Lebenschancen. Anläufe zur sozialen und politischen Theorie,* Frankfurt am Main: Suhrkamp (1979).

they are deprived of a defence against their employer and, at the same time, non-citizens of the country which they depend on economically.

A fourth and last problem is related to the theme of criminality, as previously mentioned. With respect to penal laws, there should be no frontiers. The obligation not to transgress the fundamental principles of common living cannot be limited by particular conditions of privilege. No state, or macro-state, should be allowed to exercise the same function of asylum that convents performed centuries ago. International policies in the field of penal laws should therefore be perfected and extended. However, one condition for successful action in the field is a profound change in the function of criminal laws, whose aim is to protect fundamental values, whereas they have gradually been used instrumentally to achieve contingent governmental goals, through an impressive extension of the so-called *mala quia prohibita*, artificial hypotheses of crime which have brought about fundamental uncertainty in a field where certainty should be the most crucial meta-value. The construction of an internationally uniform penal law should go hand in hand with the return to a minimal penal law.

VI. OBEYING WHOM?

Approaching the second aspect of citizenship, i.e., the question of 'obeying whom', the matter is clear: what level should be envisaged for the coming decades: the local, the state, the macro-state, or the world? The answer, in principle, is also clear: all of them.

'All', in the sense that different 'citizenship' rights should correspond to each level. We are citizens of a municipality when we vote for our mayor; state citizens when we look for protection in an embassy, serve in an army, vote for parliamentary elections; European citizens when we make a plea to the Luxembourg Courts or vote for the Strasbourg Parliament; citizens of the world when we seek protection from the international mafia or when we demand not to be discriminated against by reason of our skin colour or of our religion. South African blacks have achieved full citizenship rights in their own country because they had been recognised previously as world citizens.

Citizenship is therefore a matter, metaphorically, of concentric circles as some scholars use to say – among them Dahrendorf – though attributing different meanings to the expression. History provides examples of this. At the time of the Barbarian invasions, people were subject to the Roman *ius commune* and to Romano-Barbarian laws simultaneously. In the Middle Ages they were subject to the Emperor, a king and a local lord at one time. That was not citizenship, however, since the legitimacy of such authorities could not be challenged, especially from below. The modern state has monopolised citizenship, as well as both law and force. Its time is not over and to a certain extent this is positive, since states can be more easily submitted to democratic control than both wider and more limited political entities.

However, the state's powers cannot be unlimited in a world where *Alles ist*

verbündet. The system of jurisdictions should be rationalised, by singling out the diverse levels to which specific rights, obligations and powers should correspond. In addition, we are called upon to opt, perhaps in the short run, for a privileged level, on which the majority of such rights, obligations and powers should be concentrated.

Here the problem is purely political and therefore to a large extent arbitrary, since politics is a function of both calculations and ideals. I think that Dahrendorf is right when he denounces the dangers of localistic policy, essentially based on ethnic identity. Such dangers, he says, may also jeopardise the idea of a 'Europe of Regions' that has been discussed so much in the past twenty years. I accept this, without implying that the autonomy of regions should not be extended and that a model of federalism should be adopted uniformly in the diverse European countries, as is the case with Germany or Spain. It is anyway true that regions display a weak measure of heterogeneity, as Dahrendorf puts it.

However, I should observe that the idea of a 'heterogeneous' nation state, advocated by Dahrendorf, may be dubious. Such a concept may even seem an oxymoron. If a state is heterogeneous, that is because diverse 'nations' live jointly within its boundaries. There are exceptions, I admit, which demonstrate that even oxymora can have concrete life in the theatre of human things. Switzerland is a heterogeneous nation state. The United States, as well, displays the same character, since diversities and unity seem to converge there somewhat harmonically. But precisely this example brings me closer to my goal.

It will be evident that my preference goes today to a confederation model, one that Europe might adopt, although it has not for the moment. I therefore dissent from the recent decision of the *Bundesverfassungsgericht,* according to which a European people would not exist. If we do not adopt the romantic idea of the *Volk,* with its specific *Geist,* a European people seems to me to exist. There are a number of indicators in this respect: the width of historical memories, some common origins in ancient history, the common experience of the medieval system, the humanistic and the scientific revolutions, the adoption of similar literary, artistic and musical models, the diffusion of written rational law, be it in the form of laws or in the form of principles, the movements of rights through the various stages described by Marshall, liberalism, democracy and socialism, the rule of law, the separation between State and Church, the welfare state with its attitude towards balancing conflicting interests and recognising the entitlements of the underprivileged. For a peculiar effect of ethnocentrism, to which the German Constitutional Court has paid homage, such indicators may not be appreciated from within. But they will appear exceedingly significant once you visit Asia, Africa or even America. Differences appear so evident that internal diversities between Europeans become immediately negligible. Besides, if it were not so, Europe would have been incapable of constructing such a political entity as the Union, somewhat artificially, according to a rational and predefined project: something unique in human history.

All this leads me to conclude that, among the concentric circles whereby the diverse expressions of citizenship should be inscribed, the circle coinciding with

confederations, whether existing or likely to exist, should in my opinion be the widest. This seems evident, especially, as far as Europe is concerned. It would be difficult to hold the same opinion, from without, about the Commonwealth of Independent States, or NAFTA, or the Caribbean network or any other concentration of homogeneous-heterogeneous states. It seems in any case that the logic of aggregations and even conflicts speaks in this sense and I dare to proclaim my consent with the panorama described in the last pages of Maurice Duverger's *Europe des hommes*,[13] despite their apparent Utopian nature.

VII. BY WAY OF CONCLUSION

One more thing can be added at this stage. If Kant's ideal of a world citizenship is Utopian, it is not Utopian, indeed it is necessary, that citizenship policy be world-wide, at least in its basic principles and in some more specific elements, especially those concerning criminality, as said before.

We know that citizenship, as such, is seldom a matter of international treaties and covenants. We do not go far beyond the formal recognition of the right to citizenship and the right to change one's own citizenship, as proclaimed by Art. 15 of the Universal Declaration: principles which suffer exceeding limitations as a matter of fact, since they are at odds with the more traditional principle of effectiveness, by which states enjoy the widest freedom of behaviour. One of the next stages of world politics should therefore be devoted to establishing the guidelines of a more uniform regulation of citizenship.

So is it not high time that the UN proclaimed the Year of the Citizen?

[13] M. Duverger, *Europe des hommes*, Paris: Odile Jacob (1994).

CHAPTER III
CITIZENSHIP: A JURISPRUDENTIAL PARADOX

J. Donald Galloway

I. INTRODUCTION

The concept of citizenship has begun to figure prominently in legal analysis and constitutional theory. However, even a cursory examination of ongoing debates reveals that the concept's relationship with other abstract concepts is highly controversial and that the citizen appears in many different narratives with a different persona in each. In this paper, I identify nine focal points of dispute which provide a clear picture of the breadth of the debate and the depth of the problem. For convenience, I have divided them into three separate categories.

The first group embraces three problems relating to legal regimes of citizenship and immigration; the second embraces three problems relating to membership in a democratic polity; and the three issues in the third group bring to the fore some very basic and general questions about the constitutional status of the citizen. It is on this third group of problems that I want to concentrate in this paper, since I believe that resolution of the conundra in the other two categories depends on clarity about the basic premises. The source of many of the puzzles can be traced to what might be called a paradigm-shift in thinking about citizenship. Such a shift has been noted by Yasemin Soysal who writes,

> The trends toward elaboration and standardization of the legal status and rights of migrants, and expansion of national and transnational institutional arrangements for incorporating them signify a reconfiguration in the predominant European schemes of citizenship. The change is from a model of national citizenship to one of postnational membership, predicated on notions of personhood.[1]

As with all paradoxes, the challenge is to reframe the problems of citizenship so that the apparent contradictions disappear; that is, to develop a normative account of constitutional law and citizenship which is coherent and defensible and which takes account of law's claim to comprehensive authority, including its claim to have authority to define membership in the political community. I cannot hope to resolve here all the difficulties to which I draw attention, but I take a stab at resolving some of the more basic ones, while making reference to at least

[1] Y. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe*, Chicago: University of Chicago Press (1994), p. 44.

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 65-81.

some of the others and rendering visible the links amongst them. Thus, I merely identify the first six focal points of dispute, and then proceed to analyse some of the fundamental assumptions.

My central claim is that it is misleading to regard the paradigm-shift as a move away from a theory of state legitimacy based on contract to a theory which has an alternative foundation. I question the pre-occupation with contract-based theories of legitimacy, and regard the modern developments as an expression of a commitment to principles of equality which have always been deeply embedded in our legal institutions. While defending the view that the status of citizenship should not play a major role in legal orders founded on liberal democratic principles, I also take issue with those who regret the 'devaluation' of citizenship and who condemn the paradigm-shift as involving an erosion of citizenship rights.

A. The Conflicting Premises of Immigration and Citizenship Law

1. Citizenship and Political Rights

Immigration to Europe and North America has led to the creation of a number of political statuses within each country. Thus, in Canada, there is recognized the status of citizens, that of permanent residents, that of visitors (which includes students and those with short term work permits), minister's permit-holders, who is allowed into the country even though unqualified to immigrate, live-in caregivers, and many others. The recognition of different statuses carries with it a complex scheme of distribution of benefits and entitlements.

The existence of different statuses is recognized in international and constitutional bills of rights which commonly distinguish between rights available to everyone, so-called human rights or civil rights, and rights available only to citizens. In the *Canadian Charter of Rights and Freedoms*,[2] the rights reserved for citizens include, under the heading Democratic Rights, the right to vote in federal or provincial elections and the right to stand as a candidate, if otherwise qualified; and under the heading Mobility Rights, the right to enter, remain in, and leave Canada.[3]

The reservation of these rights for citizens is problematic. Citizens are not the only group whose interests are affected by legislation. Permanent residents, in particular, often have a clear stake in the content of legislation, yet they have no constitutional right to vote. Thus, we have a conundrum of democratic legitimacy: how are we to reconcile the denial of a legislative voice to those whose interests are significantly affected with democratic principles?

Furthermore, where a constitution guarantees the equal protection of the law

[2] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11.

[3] There is also an idiosyncratic third category, Minority Language Educational Rights, under which citizens whose first language is that of the English or French minority in the province of their residence, are granted the right to have their children educated in that language.

to everyone, and not merely to citizens, the reservation of rights for citizens is itself problematic. This is the egalitarian conundrum. It has revealed itself in Canada recently when a permanent resident who had arrived in Canada at age 15, and who had been resident in Canada for all his adult life fought a deportation order on the ground that he had as clear a stake in remaining in the country as any citizen. The issue was rendered more problematic by the fact that the Supreme Court had earlier sustained on equality grounds a challenge by a permanent resident against provincial legislation which denied membership in the legal profession to permanent residents who were not British subjects. Ironically, one reason cited for this prior holding was that since permanent residents were not represented in the legislature, they constituted a disadvantaged group whose rights required protection. This latter case raises the question of how to distinguish between those benefits, such as membership in the legal profession, which cannot be kept from permanent residents, from those, such as voting in elections, which apparently can.

2. Citizenship and Closed Borders

In a post-colonial world which suffers gross inequalities, liberal regimes have maintained legal arrangements which exclude all but the fortunate few from the territories where there are greater opportunities to generate wealth, to make life choices from a variety of meaningful options, and to live one's life with a decent level of security. The existence of closed borders seems to conflict with the liberal commitment to equality. The conundrum is but one instantiation of another conundrum to which I refer below, that of resolving a commitment to universal principles while maintaining that they should have only a bounded application. The central question is whether it is possible to generate a normative framework by which to assess the immigration and citizenship regimes which have been developed by Western states in the twentieth century.

3. The Arbitrariness of the Qualifications for Citizenship

Citizenship is rarely a matter of choice. It is a status that is imposed upon the individual by the state. The criteria which are employed to make the ascription, the *ius soli*, the *ius sanguinis*, or an amalgam of the two, seem arbitrary in nature and resistant to normative assessment. Both are relied upon by liberal regimes. It is difficult to justify the use of one set rather than another, on grounds other than administrative convenience. Yet the consequences of the grant are of great moral significance. A justification of citizenship practices is important, yet seems beyond our grasp.

In Canadian law, citizenship is determined by federal legislation. It is an Act of the federal legislature, the *Citizenship Act*, which identifies those to whom the status is ascribed and the means whereby others can become citizens. Until 1982, it was justifiable to regard determinations of citizenship purely as acts of political will, governed by the whole gamut of reasons which may enter a legislature's de-

liberation, and unconstrained by constitutional restrictions. In this context, it made no sense to speak of a legal right to citizenship unless and until the legislation granted it. For example, the legislation provided for removal of citizenship status from someone who has made misrepresentations in his or her application for status. This provision determined finally and conclusively the legal question of whether such person was still a citizen.

The *Citizenship Act*, however, did not, and still does not, define the entitlements and obligations of citizenship. The *Act* creates a purely formal status, whose content has been filled by the provisions of other statutes. In other words, the *Act* defines a set of criteria for membership in a political community without identifying what type of political community it is. The same *Act* could be part of a totalitarian or a radically democratic regime; the citizen could be author of the law or a mere character in a tale authored by the state.

In 1982, after the repatriation of the Constitution and the enactment of a Charter of Rights and Freedoms, the law of citizenship explicitly assumed a constitutional dimension. As noted above, the Charter contains provisions which guarantee particular rights to citizens. The Constitutional recognition of citizenship status has had some impact - legislation which disenfranchised citizens who were prisoners has been struck down on the grounds that it violates the guaranteed right to vote.

However, the Charter does not define who has a right to the status of citizen. It explicitly outlines a blueprint for the type of community which is to be realized, but does not explicitly identify who belongs. Members (citizens) are to have positive rights to participate in government formation, whosoever these members may be. While citizens are designated as the group to whom the law makers are accountable, their identity is left undetermined.

Some important issues are left unresolved by the constitutional silence on the question of membership: is the individual to which the Constitution refers the same individual recognized as a citizen within the federal legislation or is the federal legislation subject to an overriding, but implicit Constitutional understanding of the status? In other words, does an individual have a constitutional right to be considered a citizen, even when the legislature has not accorded that status to him or her? If the latter is the case, on what criteria should citizenship be recognized? Can one formulate a theory of citizenship which identifies those entitled to the status? If the federal legislature were to change the law by adopting the *ius sanguinis*, would an individual be able to mount a successful constitutional challenge? In sum, is there a normative theory of citizenship to which liberal states must subscribe?

B. Membership in a Democratic Polity

1. Citizenship and the Political Realm

Citizenship is a political status which substantially defines the bond between the individual and the state. Yet the nature of this bond is hazy since the state is not

a clearly defined entity. The public realm is not easily distinguished from the private realm. Many organizations and institutions inhabit a murky borderland which defies classification in these terms. Hospitals, banks, universities, voluntary associations, the market, the family, even the judiciary, have dimensions which with good justification, could be classified as either public or private.

In Canada, this problem has surfaced in cases which challenge the ambit of the *Charter of Rights and Freedoms*. This constitutional document grants rights only against government actors and not against non-governmental individuals and groups. The problem of developing a doctrine of state action has proved to be intractable. Without an adequate conception of the state, it is impossible to construct a normative account of a status conceived as being political in nature. This is the conundrum of the public and the private.

2. *Citizenship and Identity*

Citizenship is also conceived as a group status which defines the bonds of solidarity between the individual and others who share the status. It is difficult to delineate the nature of these bonds. Broader than those which link ethnic groups, family or friends, they are nevertheless narrower than those which link humankind.

Communitarian attempts to define the bonds in terms of a unifying cultural project deny the individual's capacity to transcend and reject the demands of the social group, while also denying the heterogeneous character of the group. Republican attempts to define the bonds solely in terms of a cooperative political project assume a shared sense of what falls within the realm of the political and a shared confidence in our ability to establish and maintain institutions which can cope with all political conflicts no matter how deep the level of divergence. Liberal accounts of social and political life as a forum in which individuals pursue life plans of their own devising threaten to deny the very existence of any communal bonds of solidarity. In postmodern accounts of individual life where individual identity itself has a fluid quality, and where loyalties shift as if in the wind, the very notion of a bond of obligation is destabilized.[4]

The difficulty of elucidating the bond of citizenship is revealed in legal decisions relating to the qualifications for becoming naturalized. In Canada, those seeking naturalization must reside in the country for a defined period of time. There is debate, however, about what counts as residence. For some judges, it is sufficient to establish a place of residence; the number of days that one actually spends in the country is of little concern. For other judges, the question of physical presence is of vital concern since it is by 'rubbing shoulders with Canadians' that one can oneself become Canadian.[5]

[4] See Antonella Besussi, 'To Share or not to Share? The Liberal Treaty Revisited', in M. Dunne and T. Bonazzi (eds.), *Citizenship and Rights in Multicultural Societies*, Keele: Keele University Press (1995).

[5] This latter view has been endorsed in the Report of the Standing Committee on Citi-

Likewise, our immigration laws seem to embrace a pastiche of liberal, republican and communitarian perspectives.[6]

3. Citizenship and Popular Sovereignty

The common wisdom is that in a democracy it is the people who are sovereign. The law is responsible to the citizenry, and it is the citizens who, through their representatives, hold the reins of power, and who have access to machinery to ensure that the law maintains its proper direction. Yet in the modern bureaucratic-administrative state, the bulk of political decisions are made by officials who are outwith the control of the legislature. The legislature has relinquished authority on issues which it has deemed worthy of resolution by experts in the field. Moreover, the courts have also acknowledged the relative expertise of these decision-makers and have frequently chosen to defer to their better judgement, when they have considered themselves ill-equipped to review a decision. In Canada, we have witnessed massive grants of uncontrolled discretion in such important fields as telecommunications, immigration and the regulation of securities. What in Europe has come to be known as the Democratic Deficit is but one facet of a more general conundrum: the conundrum of democratic accountability pits the need to have political decisions rendered by experts against the need to have a government accountable to its citizenry. To guarantee to the citizen only voting rights is an inadequate control over government.

C. Basic Premises

1. Citizenship and Political Obligation

One of the deepest and most mystifying paradoxes of constitutional theory is the persistence and resilience of consent theories of political obligation in the face of the fact that citizenship is, for the most part, an ascribed status. Citizenship is not a status which most individuals seek, nor is it a status from which they can easily escape. Yet the basic image of a constitution as a form of bargain between individual and the state, with the citizen partially surrendering his or her autonomy in return for guaranteed rights, perseveres. The creation and maintenance of a polity is regarded as an act of will that creates obligations rather than an act that is made in recognition of a pre-existing obligations or a natural duty. It is perhaps because of the difficulty in constructing an alternative theory that explains the persistence of the contractual model.

Constitutional theorists have frequently either denied the involuntary nature of the status of citizenship or have assumed that since the only way to defend po-

zenship and Immigration. See *Canadian Citizenship: A Sense of Belonging*, Ottawa, Canadian Communication Group - Publishing (1994).

6 For a discussion of how these normative models influence immigration and citizenship policies in the United States, see G. Neuman, 'Justifying U.S. Naturalization Policies', Vol. 35 *Virginia Journal of International Law* (1994), p. 237.

litical authority is through acts of consent it must exist, even if tacitly.

Also, scholars of citizenship have frequently failed to draw a distinct line between the normative and the empirical, a failure which contributes significantly to our confusion about constitutional ordering. Most prominent is the failure to distinguish inquiries into constitutional history from inquiries into the grounds of political obligation.

Historical inquiry does not, of course, merely focus on the institutions that have been established; it also focuses on the beliefs and aims of those who constructed them. However, to correctly identify these beliefs and aims does not get one any further ahead on the question of identifying the normative grounding of our institutions. This should be obvious but it has not been. Constitutional scholars have been particularly lax in drawing this distinction. Having identified the ideology that historically has been used to defend the creation of a set of institutions, they see no need to say any more about their legitimacy. Hence the continuing influence of consent theories of political obligation in constitutional discourse.

For example, consider the claim that citizenship has become devalued through various immigration and naturalization programmes. David Jacobson is one writer who has made this claim vigorously. His book *Rights Across Borders: Immigration and the Decline of Citizenship*[7] is a fascinating account of the way in which transnational human rights as embodied in international human rights codes have destabilized state sovereignty and national self determination. However, Jacobson covertly introduces normative assumptions into his analysis. His position is encapsulated in the following remarks:

> Transnational migration is steadily eroding the traditional basis of nation-state membership, namely citizenship. As rights have come to be predicated on residency, not citizen status, the distinction between 'citizen' and 'alien' has eroded. The devaluation of citizenship has contributed to the increasing importance of international human rights codes, with its (sic) premise of universal 'personhood'...
>
> The devaluation of citizenship, together with the weakening of sovereign control and the principle of national self-determination, creates questions about the legitimacy of these states. The ability of the state to govern comes into question, conflicts arise on immigration and foreign populations, and, most important, the 'pact' between state and citizen is broken. That pact symbolizes the political-cultural integrity of the nation and also determines how politics should be conducted and how goods should be allocated. What is the basis of state authority when such a pact is broken or strained? Who are 'the people'? [8]

In this passage we see both a historical claim - previously a pact between state and citizen was in existence but now it has been broken - and a claim about political obligation - unless there is a pact between state and citizen, the state has no legitimacy.

[7] Baltimore and London: The Johns Hopkins University Press (1996).
[8] Ibid. at p. 8-9.

We should evaluate each claim separately. The historical claim seems to rely on the construction of an idealized past when citizenship was granted its due, when the law did reflect a pre-existing pact amongst abstract equals, where the law was experienced not as an oppressive power ruling from above, but as a negotiated field of commonality and cooperation.

This idealization belies the reality of constitutions as entrenched mandates imposed on future generations by the decision-makers of the past. Extensive reliance on *ius soli* or *ius sanguinis* contradicts the idea of citizens reaching an agreement with the state. The dominant experience of citizenship has always been that of involuntary ascription rather than consensual assumption of status.

As a claim about political obligation, the passage is also problematic. Would the fact of a pact, even if it did exist, create obligation? Jacobson ignores this inquiry preferring to adopt a sociological definition of legitimacy rather than a normative one. Quoting Thomas M. Franck, he writes,

> Legitimacy is 'that quality of rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with the right process.'[9]

Joseph Raz has provided good reason to question this claim. He notes that law's claims to authority are comprehensive.

> In just about all states there are legal means to change any law, and to pass any conceivable or inconceivable law.[10]

If the ground for recognizing consent as a source of obligation is that it enhances an individual's autonomy, recognizing consent as way of legitimating the powers that law claims to have is misconceived. Raz's summarizes his argument as follows:

> Consenting to be ruled by a government, when understood as the granting to it the powers that it claims to have, is not only an exercise of autonomy, it is also a submission to a power that at any time take away all one's autonomy.... To the extent that the validity of consent rests on the intrinsic value of autonomy, it cannot extend to acts of consent that authorize another person to deprive people of their autonomy.[11]

Raz rightly emphasizes the fact that law does not claim limited authority over its subjects. It claims total authority. Even constitutions which respect indi-

9 Ibid at p. 140. The quote is from Thomas M. Franck, 'Legitimacy in the International System', Vol. 82 *American Journal of International Law* (1988) p. 706. Even in sociological terms this definition is suspect. Surely what matters is the perception that the rule is substantively rather than procedurally right.

10 Joseph Raz, 'Government by Consent' in *Ethics in the Public Domain*, Oxford, Clarendon Press (1994) p. 339, at p. 347.

11 Ibid. at p. 348.

vidual rights can be amended by legal institutions. The demand that its subjects obey it is not a qualified demand, with the individual remaining able to appeal to a higher authority. In legal regimes there is no such higher authority.

In their influential work, *Citizenship Without Consent*,[12] Schuck and Smith, while doing a better job of interpreting the historical record, fall victim to the same error as Jacobson. The authors concede the dominance of a doctrine of birthright citizenship in Anglo-American law but claim that 'its historical and philospohical origins make it strikingly anomalous as a key constitutive element of a liberal political system.'[13] They suggest that it may have survived because 'because it has "worked" in the sense of performing practical tasks that have been set for it'.[14] They maintain that the liberal system as a whole is predominantly grounded on a theory of consensualism, that the authority of the government comes from the consent of the governed. A cast of historical characters and their speeches and judicial decisions is introduced to make the point. But the question which Schuck and Smith do not ask is, What if these historical figures were wrong in their political judgement? The fact that those who framed the Constitution and our legal institutions were guided by a belief that government can be legitimized by mutual consent does not entail that the belief was correct, or that we are forever doomed to replay their mistake. Schuck and Smith offer pragmatic reasons why the model of consensualism should be adopted and why the anomaly of birthright citizenship should be abolished - primarily that such a move would allow controls to be established to prevent illegal immigrants and nonimmigrants who have been allowed into the country temporarily from taking advantage of the loophole for their newborn children, and from making demands on the public purse. The authors do recognize costs - 'we would not want this reinterpretation to make it easier for the United States to adopt harshly restrictive immigration policies'.[15] They conclude optimistically however that this should not result:

> If contemporary attitudes toward immigration are perhaps not as generous toward immigration as they were in the early nineteenth century, neither are they as nativist or restrictive as they were even as recently as the 1950's.[16]

Not only does the authors' optimism appears somewhat naive in the 1990's, the resort to pragmatism begs the question of the whether consent is the only means of legitimating authority.

Consent theory, if valid, would allow us to solve some of the conundra outlined above. Since the alleged bargain struck by citizens is different from that struck by permanent residents, or other noncitizens, we have grounds for treating them differently. Such would not be discriminatory action against them since

12 New Haven and London: Yale University Press (1985).
13 Ibid. at p.90.
14 Ibid. at p. 91.
15 Ibid. at p.119.
16 Ibid.

it would not be disrespectful of their autonomy.

It would also provide a grounding for adopting a particular regime of immigration and naturalization, in that a state would be justified in writing into the 'contract' whatever criteria for citizenship or residence which it considered appropriate, and presenting them for the consent of the applicant.[17]

However, if consent lacks validity as a ground of political authority as Raz and others have argued persuasively,[18] the paradoxes remain.

2. The Local and the Universal

A more robust and challenging account of citizenship is that offered by Ulrich K. Preuss in his article, 'Problems of a Concept of European Citizenship',[19] but here also I suspect that normative and empirical issues are not adequately separated, and that a consent theory of political obligation is surreptitiously introduced.

Preuss locates the concept of citizenship within a historically rooted ideology, and explains it in terms of the other concepts which it embraces. He unpacks the claim that 'there is an inherent connection between the nation-state, the concept of citizenship and the idea of constitutionalism'.[20] One of his primary aims is to distinguish a community grounded on the ideal of citizenship from one based on kinship or ethnic ties and, following Max Weber, he proceeds by tracing the modern idea of citizenship to the medieval city,

> which was not the place of settlement of clans, families, tribes, or other predominantly religious communities; ... rather it was a place of settlement for individuals who were alien to each other. They were bound together through oaths of fraternisation which affirmed a secular community.[21]

It is the commitment to this ideal of a society of individuals bound together by nothing other than the glue of common commitment which differentiates the modern polity from 'the primordial character of the ethnic nation':

> The distinct and exceptional character of citizenship consists in its capacity to push the individual beyond the boundaries of his or her 'natural' affiliations to their family, clan, tribe or ethnic community and to allow them a community in which aliens can become associates. The *abstract* character of association shapes the rather unique idea of the polity.(emphasis added)[22]

According to Preuss, citizenship is linked to a particular conception of nationhood. He points out the ambiguity in Sieyes' definition of a nation ('a body

17 Neuman refers to this model as the model of bilateral liberalism.
18 See L.Green, *The Authority of the State*, Oxford: Clarendon Press (1988).
19 1 *European Law Journal* 267 (1995).
20 Ibid. at p. 273.
21 Ibid. at p. 274.
22 Ibid. at p. 275.

of associates living under *common* laws and represented by the same legislative assembly') and suggests that it should not be read to mean

> a [pre-exisiting] primordial association of individuals that creates itself a legislative assembly in order to be properly represented - the conceptual meaning is rather the reverse, in that it is the creation of the 'same legislative assembly' and the 'living under common laws' which generates the 'body of associates'. The nation is conceived by an act of representation which transforms a multitude of insulated individuals into the society of a body of associates.[23]

One implication of this is that

> the concept of the nation is an inherently political one which must not be confounded with pre-political communities based on common descent and fate and which are more appropriately named `nationalities'.[24]

A second implication is that representation assumes primary importance:

> [T]he democratic claim is not that the people *are* the nation; the claim is, rather, that the people represent the nation.[25]

Up to this point in his analysis, Preuss is content to unpack a particular historically rooted ideology in which citizenship belongs as part of a family of concepts. It is an ideology which had its heyday in the aftermath of a constitutional revolution, and which was used to defend the changes and to legitimate the new loci of authority. But this inquiry will only have relevance in current politics if there are reasons for adopting the ideology today as a means of defending a particular structure of authority. I suspect that Preuss believes that there are. Otherwise, he could just as easily have unpacked the Aristotelian conception of citizenship or that found in Roman Law.[26]

It is, however, an ideology which is quite alien to constitutional systems, such as the Canadian one, which have undergone evolutionary rather than revolutionary change, and have stressed tradition and continuity rather than a rupture with the past. The idea of isolated individuals coming together to form a political pact disconnected from their prior allegiances and associative obligations is incomprehensible within a system that has transformed itself incrementally. As Rod Macdonald has noted,

> Constitutions rest on legitimacy, and legitimacy arises not from a momentary ratification of a text, but from a continuing commitment to the practices that the text

23 Ibid. at p. 272.
24 Ibid.
25 Ibid.
26 See J.G.A. Pocock, 'The Ideal of Citizenship since Classical Times' in Beiner (ed.) *Theorizing Citizenship*, Albany: State University of New York Press (1995).

> authorizes. And a commitment to these practices requires that they be tributary to the lived experiences and expectations of the citizens of the new state.[27]

In the United Kingdom, Scotland retained its own legal system, its own common law, after the *Treaty of Union* of 1707. Similarly in Canada, Quebec retained its civil law, while the English common law was maintained by the other provinces. The continuing friction between Scotland and England and between Quebec and the rest of Canada can be explained in part by the perceived inability of the Scottish and Quebecois institutions and political traditions to sustain their unique character against infiltrations from their dominant neighbours within the current political arrangements. These traditions and practices have their source not in any political pact or agreement. They respect the idea that obligations can have their source in patterns of life that have developed over time and are thus rooted in 'common descent and fate.' We find ourselves born within a web of social and family ties, with parents, children, and neighbours who make legitimate moral demands upon us. It is these demands which have been recognized in our legal institutions. It is no accident that the Scots law of delict, that branch of law which identifies involuntarily incurred legal obligations, is founded on the question, 'Who is my neighbour?' Nor are separatist claims, or at least the most level headed of them, in Scotland and Quebec based on a nostalgic interest to live in the past, in an ethnically pure society. Instead, they are based on the claim that it would be better for modern and future citizens of the country if they were able to cope with the novelties and fast paced changes of modern life by moulding and altering the patterns of life and the formal institutions that had been developed within the jurisdiction in the past, rather than being forced to cope with patterns and institutions that are experienced as foreign to the tradition. In legal systems which rely upon the common law and in which the constitution has developed incrementally the link between law and traditional patterns of life is basic.

However, Preuss emphatically denies that

> [P]re-political feelings of commonness like descent, ethnicity, language, race - nor representative institutions as such are able to create a polity.[28]

I suspect that Preuss is not making an empirical claim here but a normative claim - we ought not to consider such a body based on such feelings of commonness to be a polity in the true sense since the feelings of commonness are based on 'descent and fate' and are not based on abstract principles.

Again, this claim sounds alien to lawyers brought up in a common law tradition which regards justice as an immanent quality of practices that had developed over time rather than a matter of transcendent abstract principles.

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[27] R. A. Macdonald, *The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity: The Canadian Experiment.*

[28] Op. cit., note 19.

Ultimately, I think Preuss's attack upon ethnically based political communities is based upon the perceived illegitimacy of grounding community upon that ground, and also upon the claim that political organization should only be based on abstractions. But one consequence of this would be that claims to self-government by North American Indians would be illegitimate, being founded upon the continuity of tradition and practices or beliefs rather than an act of voluntary association.

A second consequence is that it leaves no room for policies of multiculturalism and the recognition of group rights. We are to think of immigrants not as community members bringing prior attachments and practices with them, and justifiably seeking public recognition of these grounds of difference, but as individuals like any other member of the polity. The formality of the abstract principles leads to a very narrow conception of the public half of the private/public split.

The internal coherence of Preuss's account comes into question when he focuses on the bounded nature of the liberal state. He maintains that it is an abstract association that gives shape to the nation: the members govern themselves through the medium of the law which respects their commitment to principles of abstract equality, but which also respects that their association is one which is founded on mutual solidarity. Thus, while denying that citizenship bonds are analogous to those of kinship, Preuss insists that it is not founded solely on the rights of humankind:

> [C]itizenship presupposes the existence of social boundaries, i.e. the existence of particular communities as opposed to other communities and to mankind at large. The distinction between rights of man and rights of citizen remains significant.[29]

But reconciling an account of political order based on adherence to abstract universal principles with the existence of discrete communities is problematic. In what way can one be committed to abstract principles but also identify that it is mutual solidarity which defines the association? On what grounds should others who share a commitment to the same principles be excluded? Why should anyone willing to swear an 'oath of fraternization' be kept out? Preuss's account does not adequately cope with the conundrum of closed borders. Should the response to the person seeking admission be that the political project can only function with a limited number of members, the outsider can claim that there is no reason not to expel some other members to make room for her - she has as good a claim as any existing member.[30]

A resolution to this problem is available if we reject the ideological claim that the liberal polity is composed of individuals who come together bound by abstract commitment and instead adopt the insights of common lawyers and non-

[29] Ibid. at p. 275.

[30] See B. Ackerman, *Social Justice in the Liberal State*, New Haven and London: Yale University Press (1980) at p.94.

revolutionary constitutionalists. The legal institutions which govern our relations with others do not have their source in a voluntary pact which established a new political association, and which superseded the pre-existing ties of 'common descent, culture, religion, or ethnicity'. Our constitutional systems developed slowly as socially embedded individuals sought means to better fulfil their obligations to others. Even revolutionary regimes, whether in France the United States or Zimbabwe have been unable to dispense with all prior forms of life. Our obligations to each other are understood only with a full appreciation the locality in which they are found. The commitment to equality and other liberal values emerges from and is informed by one's local interactions.

The analogy with the law of delict is again apt. The search for the principles grounding the law was not located within texts of abstract political theory. Instead it was driven by the belief that there must be common elements which explain the cases where obligations were recognized to govern particular relationships - the doctor and patient, the innkeeper and traveller, the blacksmith and horse owner. The principle discovered gained its meaning from an appreciation of concrete instantiations. The application of the discovered principle to other relationships was founded on the understanding that, in these relationships, the obligation already existed. Joseph Raz's 'service conception of authority'[31] which traces the legitimacy of law to its ability to help us to do things that we already have reason to do, is helpful in that it links the realm of political obligation with the realm of local social ties. In a sense, these ties are as political as any obligations found in the formal provisions of a constitutional text. As Raz has pointed out the legitimacy of our institutions depends on their ability to identify correctly our obligations to ourselves as members of pre-existing communities and to others. Thus, in some circumstances an ethnically based political organization may be necessary if the autonomy of individual members of the group would be threatened by another scheme. A political organization which did not protect linguistic practices would be doing its citizens a disservice if these practices contributed to the construction of valuable forms of life. Likewise, the law must pay heed to the way in which immigration practices are likely to affect the patterns of life which people inhabit, while also attending to the needs of strangers. It is perhaps because legal institutions have shown themselves to be insensitive to such matters, preferring instead to base immigration decisions on an appreciation of short-term economic needs, that there is so much public dissatisfaction with these decisions. As Canada has experienced, one does not combat racism by giving priority to wealthy immigrants.

My view that liberal principles must be context sensitive leads me to have grave doubts about attempts to internationalize some forms of decision. For example, Canada and the United States have recently signed an agreement relating to asylum seekers, which will ensure that a negative decision in one jurisdiction will be effective in the other. Since there is good reason to believe that there is little in common between the Canadian and the American image of the relation

[31] See J. Raz, *The Morality of Freedom*, Oxford: Clarendon Press (1986).

between between individual and the state, there is also good reason to believe that there will be a different conception of who fits the definition of a refugee.

3. The Redundancy of Citizenship

The last conundrum to which I will refer is a conundrum relating to the very need to recognize citizenship as a legal status. While citizenship is widely regarded as an important political concept, its usefulness as a ground for legal decision making is open to question. Stephen Legomsky has recently made a vigorous argument to justify the highly sceptical position that the law could in fact dispense with the status of citizenship (at least on domestic grounds).[32]

Legomsky attacks those who assume the naturalness of a citizenship regime and who identify as most fundamental the questions, who should be granted the status, and what entitlements and obligations should attach to it. Instead, he asks,

> Why ... should the law classify all earthlings as citizens or noncitizens and create rights, duties, and disabilities that hinge on that distinction?[33]

Instead of doing so, he urges, the law could separate the package of rights and obligations into its component parts and allocate each individually, according to an appreciation of particular reasons for and against that mode of distribution. Individuals are constructed as individuals, and not as citizens, and the question of which rights they should have should be based on the merits of the case.

Thus, Legomsky argues that the concept of citizenship is redundant if it is merely a proxy for determining who should have rights of political participation. We don't need a concept of citizenship if we confront directly the question of who should have these rights. Such an approach would allow us to address the issue of whether a person residing permanently within a jurisdiction has sufficient stake in the polity to be granted the right to vote and to represent others. It would lead us to focus on the question of why, if at all, residence is important to voting and if so, how much should be be demanded. Similarly, in relation to the problem to which I alluded earlier, that of prisoners' voting rights, the question of whether those convicted of serious crimes should be allowed to vote is confused by allocating the status of citizen to the prisoner. By introducing this concept, we commit ourselves to using an all-purpose criterion, a rough and ready, blunt instrument in the determination of allocative problems which demand precision and attention to the particular features of the case.

Voting is not the only issue addressed by Legomsky. He also argues that we could have an immigration law without a law of citizenship. Referring to his

[32] S. H. Legomsky, 'Why Citizenship?' Vol. 35 *Virginia Journal of International Law* (1994) p. 279. Legomsky does concede that 'international law provides some compelling rationales for the concept of "nationality"' (p. 297).

[33] Ibid. at p. 285.

own jurisdiction he says:

> If it is thought desirable to immunize classes of individuals from immigration restrictions, that class can be defined by reference to specific physical characteristics and events rather than by reference to a legal abstraction such as citizenship - for example, all individuals who have resided permanently in the United States for a certain duration, or all individuals whose parents meet designated residence requirements.[34]

And the same goes for other entitlements and responsibilities. For Legomsky, the basic question is:

> Do we really need - indeed is it even beneficial to have - a single requirement common to all those rights and obligations? Why not abolish the citizenship concept entirely and redefine, by reference to ultimate facts rather than to a legal abstraction, the criteria on which each of those very different determinations is to be based?[35]

In sum, Legomsky stresses that citizenship is a legal construction that is used primarily as a means for distributing a variety of burdens and benefits. The wisdom of engaging in a single package distribution is what he questions.

Legomsky also identifies secondary purposes meant to be served by citizenship, but again questions its efficacy. For example, the grant of the status may be used to make people feel that they belong to a special community, thereby encouraging feelings of civic pride, which might in turn encourage responsible and altruistic behaviour towards fellow members. However, as Legomsky notes, other methods of instilling pride can be devised which do not restrict the mobility and political input of non-members.

I would also note that the concept of citizenship has figured prominently within debates about Canadian federalism where the central government and courts have used it to prevent what they regard as excessive use of provincial powers. Where provinces have severely curtailed options open to an individual, they have been attacked on the ground that the measure attacks the individual's status as a citizen. Racist legislation and legislation attacking free speech have fallen victim to this strategy. Where people inhabit a legal community that is a community of communities, the concept of citizenship has been used to come to terms with why the central power is needed and with what membership in the whole involves. It has provided a touchstone for public debate about the needs for megagovernment. But again the concept seems redundant and unhelpful since it distracts us from the main point of contention: which government should have authority over which issues.

Legomsky's question, Why citizenship?, is particularly salient when considering the status of European Citizenship as recognized in the Treaty on European Union. If the sole purpose of the status is to grant rights to nationals of

[34] Ibid. at p. 289. (footnote excluded).
[35] Ibid. at pp. 290-1.

Member States then it is redundant. One does not need to refer to the status to achieve the purpose. It should be regarded merely as excess baggage.

I am very sympathetic to this sceptical view. If we dismiss the force of consent theory and ask the law instead to identify correctly our obligations to each other, our obligations to those we allow in our midst, and our obligations to those who seek to join us, we will be less likely to miss the point than we are by establishing a hierarchy of political statuses.

Returning to the references to citizens in the Canadian Charter of Rights, it should be noted that the provisions do not deny the vote or the right to enter and remain to non-citizens. They state merely that citizens, at least, should have these rights. This leaves open the question whether these others should also be granted them. One could interpret the Constitution as holding to the view that immigration practices are not an essential part of life. People may stop seeking to come to Canada, or may be granted full membership before they arrive. What doesn't change is the idea of a political membership to which fundamental rights should attach. This is an unavoidable, non-contingent aspect of our politics and hence should be recognized within the basic law.

But this is an antediluvian view of our social reality. Even if Canada was to close the door to immigrants, it would still have to deal with the waves of refugees who are making and will continue to make claims of entry. Refugee flows are not, never have been and will not in the foreseeable future be a merely contingent aspect of our world. Our obligations to those who have lost political membership rights in their country of origin cannot be forgotten.

CHAPTER IV
CITIZENSHIP AND *RAISON D'ÉTAT.* THE QUEST FOR IDENTITY IN CENTRAL AND EASTERN EUROPE

Valentin Petev

I. ANALYTICAL AND HISTORICAL FRAMEWORK

A. The Role of Citizenship

We normally think of citizenship in terms of the formation of the state and the relationship between the individual and the state organization to which we assume he belongs. To be subjected to the power of a particular state does not mean being entirely at the mercy of an anonymous institution. Ever since the emergence of the modern state, which in the course of its development has increasingly felt itself bound to the principles of constitutionalism and the rule of law, the status of the individual has been ever more precisely defined as encompassing both rights and duties. In possession of this status, the individual expects the state to treat him in a favourable manner; he enjoys material and personal security. More precisely, he expects a guaranteed position within the framework of functioning legal institutions which contribute to the stability of the social relationships. All these institutional arrangements provide the individual with external guarantees as well as with a feeling of belonging to the political entity called the state. In this traditional perspective the individual is a citizen of a state, who, in turn, takes on a series of duties, from the particular obligations of paying taxes and performing military service up to a general obligation of loyalty.

Very often an inner commitment to the community of citizens is required. This is due to the assumption dear to the Romantics that cultural and psychological ties, such as language, customs, history and tradition, further strengthen the community at the national level. A sense of belonging is the result.

Citizenship has also been described as participation in the socio-cultural standards a political community of a given epoch puts at the disposal of the individuals belonging to it. These standards have been qualified as providing the means for the individual to achieve a socially valuable life.[1] Citizenship has

[1] R. Forst, *Kontexte der Gerechtigkeit. Politische Philosophie jenseits von Liberalismus und Kommunismus*, Frankfurt am Main (1994), p. 215.

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 83-93.

also been described in terms of the distinction between *citoyen* and *bourgeois*, the former being qualified especially by the ability to take part in the political decision-making of a state, and the latter being characterized by his autonomy as a private subject (as owner of the means of production and entrepreneur), free from any state intervention.[2]

This multitude of theoretical efforts to grasp the category 'citizenship' shows us that a comprehensive analytical notion can probably not be formed at the present time. And indeed, a brief historical review makes clear that under various circumstances, the one or the other characteristic trait of citizenship has been predominant. The present-day political constellation in Europe seems to favour the component of political participation. This is particularly true with regard to the process of integration in today's Europe.

The problem we have to deal with in the course of our deliberations on a future European citizenship seems to me to be a twofold one: first, we have to ask what the political community called the unified Europe, to which the individuals belong as citizens, will or should be; and second, whether the category of citizenship as traditionally conceived is the appropriate form in which the individual will be politically bound to an integrated Europe.

This chapter will address a particular aspect of this problem, an aspect involving the specific situation of individuals who are presently citizens of a state which previously was a socialist one. The chapter first presents a brief historical review of some crucial problems of the foundation of the so-called nation-state in the course of the 19th and early 20th centuries. Next, three specific areas are considered. First, some of the peculiarities of the process of the formation of the nation-state in the region of Central and Eastern Europe. Second, to what extent the citizens of those countries were committed to their national institutions initially and during the socialist period. Third, what will be the impact of the national or ethnic component - which nowadays plays a disastrous role in many conflicts - on the future of the states in this region with regard to their integration into a unified Europe.

B. The Role of the Nation-State

The different forms the process of nation building took in Europe during the last centuries have been very often described and presented in a multitude of variant.[3] Many authors have emphasized the role predominant ethnic groups in quest of their common history and tradition have played in this process. Other authors believe that the process of national formation did not necessarily happen in this way; they have pointed out that non-dominant ethnic groups have greatly influenced the 'national renaissance' in many cases. It has been stressed on the one hand, that nation building was in the final analysis,

2 M. La Torre, 'Citizenship: A European Wager', Vol. 8, *Ratio Juris* (1995) p. 113.
3 E. Gellner, *Nation and Nationalism*, London (1983).

the result of a self-conscious bourgeoisie which was the bearer of a new mode of production that could not flourish within the confines of a feudal societal order. On the other hand, many nation-states have been formed without this economic element. Finally, we have nation-states whose formation was the result of the demise of great state conglomerations (those states issuing from the Austro-Hungarian and Ottoman Empires).

The societies of Central and Eastern Europe have experienced different forms of nation building. In rare cases, a nation of this region stems from a unique demographic and cultural substrate and experiences a common history. Poland was fairly near to this type and the formation of the nation in Hungary was based to a great extent on ethnic homogeneity and a common history. Nevertheless, it could be said that characteristic for all the countries of the region under consideration was their appearance as nation-states as the result of wars of liberation and the collapse of older complex and heterogeneous states.[4] Once again, history repeats itself. We can see the same process carried even further after the collapse of communism, which has brought about a multitude of states pretending to be nation-states. The reason for the dissolution of federal states and the appearance of many new states was not so much national incompatibility as rather political calculation, that is to say, the desire to obtain better prospects for the future in the framework of today's Europe.

Let us return to the past. Various authors have pointed out that the economic backwardness of Central and Eastern Europe gave rise to a further feature of nationhood there. In contrast to Western Europe, where a strong bourgeois class was preoccupied with the consolidation of its power, in Central and Eastern Europe it was not the bourgeoisie but the intellectuals who formulated and supported the main nationalist ideologies. This seeming intellectual purity of nationhood justifies the label 'nations by design' given to the countries of the region. But a further effect of this phenomenon has been intolerance towards political opponents by calling them 'aliens' and excluding them from the redistribution of power.[5]

Yet it cannot be denied that in the complex nation-states active in the region being discussed, all the specific problems of a multi-national society were latently present.[6] The legitimate demands of the different national groups as well as the potential conflicts and rivalries between them, although present - as in the case of Czechoslovakia and Yugoslavia - did not however, cause existential problems for the states concerned. Nevertheless, from time to time and particularly during the socialist period, in which ethnic conflicts were held in

4 E. Hösch, *'Die Entstehung des Nationalstaates in Südosteuropa'*, in G. Brunner (ed.), *Osteuropa zwischen Nationalstaat und Integration, Schriftenreihe der Deutschen Gesellschaft für Osteuropakunde*, Vol. 33, Berlin (1995) pp. 73ff., 77.

5 G. Schöpflin, 'Nationalism and Ethnicity in Europe, East and West', in C.A. Kupchan (ed.) *Nationalism and Nationalities in the New Europe*, Ithaca (1995) p. 52.

6 D. Kosáry, *'Der Nationalstaat und seine Zukunft'*, in G. Brunner (ed.) *Osteuropa zwischen Nationalstaat und Integration, Schriftenreihe der Deutschen Gesellschaft für Osteuropakunde*, Vol. 33, Berlin (1995) p. 20.

check, problems of national cultural identity were resolved by covert coercive measures. The persecution of the German minorities in Poland and the expulsion of a great number of citizens of Turkish origin from Bulgaria are rare examples of the open use of force.

In any case, the picture of nation building and the formation of nation-states in Central and Eastern Europe was not dominated by genuine national and subsequent state conflicts. In the remote past, pre-national traditions of coexistence and a fruitful interethnic exchange existed in this area and provide examples of a 'peaceful interrelationship of peoples and cultures instead of a blind artificial nationalism'.[7] This fact should prevent us from making rash judgements on the supposed purely nationalist reasons for the contemporary rivalries between the newly formed nation-states in the region and especially for the disastrous conflicts in former Yugoslavia.

II. CITIZENSHIP AND THE CONCEPT OF THE SOCIALIST STATE

We can see that theories of the state have used citizenship as a justification of the state. This relationship between the citizens and the state to which they belong replaced other justifications of the state such as those based on dynastic or religious grounds. Since monarchial power was thought of as having sacred character, it was therefore easy to justify the monarchy on this ground. Where state power was based on religious beliefs, the justifiability of the state did not pose serious problems because religion was always self-justifying. Citizenship has been regarded in Western Europe, since the end of the 18th century at least, as a justificatory ground when it rests on the ethno-national element. Thus, in this period states could claim to be authentic only if they were the organized form of the aspirations of a particular nation.[8] The socialist state did not at any time seek its justification in nationhood. Here, citizenship was theoretically grounded on completely different premises.

The socialist state saw its justification as having been provided by history. It was the 'logic of history', as propounded by Marx's social philosophy, which yielded the different types of state which human society experienced (slave-holding, feudal, bourgeois). According to this model, the socialist state was the final product of a supposed progress in history introducing the era of the stateless communist society. It was not the formation of a particular nation or of an overall socialist nationhood, but rather class struggle and revolution which brought about the socialist state. Individuals and social groups were to be bound to the socialist state according to their membership in a particular social class. This ideological analysis brings us therefore to a different explication of the status of citizens in the socialist state, leading away from the concept of nationhood. A sociological analysis however, that will be undertaken below,

[7] Hösch, *op. cit.*, note 4, p. 89.
[8] Schöpflin, *op. cit.*, note 5, p. 39.

will quickly show that the individuals' ties to the socialist state were by no means determined by class membership.

The Marxist doctrine has always emphasised that the individual will be really free in the future communist society because only then will individual interests coincide with those of society as a whole. Such a privileged status of the individual is evidently not bound to a distinctive personal trait such as nationhood. It is rather the result of the socialist/communist structure of society. Seen in this way, the intention was not to create different national socialist states. The state born in the socialist revolution would attain the characteristics of a socialist state irrespectively of its national origins.

This idea becomes more clear in the image the ideology presented of the communist society as lacking state structure and national ties. Here the individual as a societal member is not subjected to an external power within the relationship of rulers and ruled. All the individuals constitute simultaneously the substrate of the society and the societal power. They are not 'supplementary' elements - as citizens - to the state power conceived traditionally.[9]

In the initial phase of its existence, the socialist state, as is well known, was conceived of as a dictatorship of the proletariat. Thus the individuals, though formally regarded as citizens with equal legal status, were strictly divided into partisans of the regime and its enemies. Participation in the one or the other group was not determined by a true sociological class membership but rather by mental attitude. And what is more, this attitude was not an actual one demonstrated by deeds of political relevance, but one simply assumed by the regime on the basis of the public statements the individuals made or omitted to make. The practical consequences of this were tremendous. The supporters of the regime enjoyed all the privileges - for instance, access to jobs and appointments and even to education - which were given without precondition. Opponents or those merely assumed to be so, were confronted with difficulties that had no legal basis or were even subjected to illegal persecutions.

The equal legal status was merely a formal one. It was not uncommon for litigants to lose a case, not because their claims were unfounded, but because they were suspected of being opponents of the regime. Many subjective rights, though formally sanctioned by law, were inoperative in practice. Significantly, some fundamental rights, although recognized by the constitutions of the socialist states, were without effect: the right to freedom of expression or the right of association were condemned to total insignificance. The socialist political regime did not have any place for institutionalised opposition. The right

[9] Yet, I do not want to pursue this idea much further. Interesting as it may be as a social utopia, the fact that - as a theoretical model - it could never be realized, even in part, takes it outside the scope of a practical philosophical analysis. Therefore, I will concentrate on the political data and theoretical constructions of society in the so-called 'real socialism' as an era in which Marxist-socialist ideas were put into practice. Thus, theoretical criticism stemming both from intrasystemic analysis and a confrontation with the political reality of the former socialist states can be brought to bear.

to free formation of political parties that did not fit into the party spectrum established by the communist party was, although formally admitted, practically forbidden. To take another example, the very fundamental right to freedom of action had no chance of being realized in any social sphere: the participation of individuals in the regulation of social affairs was not guaranteed. Rather, the participation was reduced to a level tolerated and sanctioned by the communist party and its state machinery. Entrepreneurial freedom was excluded for fundamental reasons: within the confines of the socialist economic system, this freedom was without any significance as a parameter of the individual's economic activity. We should not fail to recall the well-known fact that for many years, freedom of movement did not exist in the socialist countries - in the former Soviet Union, even within the boundaries of the state. All of this lack of liberties dominated the day-to-day political life in the socialist states and indicated the real situation of the citizens there, although their formal legal status gave a picture of freedom, of protected rights and of personal prosperity.

Up to this point, this chapter has confronted the Marxist doctrine of the individual in a socialist society - which is claimed to be a just one - with objections stemming from this very doctrine. The flaws of this society do not lie in its utopian character, but in the main premises it makes: these are the assumptions that a communist society will be so rich as to be capable of covering all individual and societal needs, and accordingly, conflicting interests between individuals and society as a whole will not exist. This chapter has then analysed the formal legal status of the individual in contrast to his real position in everyday political life. Here, we saw the deep discrepancy between theory and normativity on the one hand, and social reality on the other. Thus we became aware of the fact that legal status and citizenship in a socialist state cannot - even theoretically - meet the conditions of an open democratic society in transition to supranationality.

The next step will be an analysis of the inner attitude of the citizens of the former socialist states towards political power, in order to assess citizenship itself as a social value there. The first assumption this chapter makes is that this attitude has not been determined by the class structure of the socialist society. Why? Because it cannot be asserted that the proletariat, or better the working class, truly felt the close connection to political power supposed by the ideology. Nor did the other strata of the socialist society, such as the peasants or the so-called intelligentsia, have a group-specific attitude toward state power. The citizens did not sense an inner allegiance to the socialist state and did not develop a specific identity based on the values of socialism.

In the course of time, the initial hopes for the construction of a new, more just society were abandoned. The state's power degenerated. It became an instrument for protecting the privileges of a small dictatorial group, devoid of ideological ideals. The citizens of the socialist state were neither committed to the state nor to an ethnic group and were definitely not committed to a new entity called the socialist nation. Even in multi-national states such as the former Soviet Union or former Yugoslavia, the individuals did not sense an effec-

tive link to their national group; rather they experienced themselves as that which they really were, subjects of a dictatorial regime.

III. CITIZENS AND DEMOCRACY IN THE OLD AND THE NEW EUROPE

A. The Role of the European Union

Nowadays, we are entitled to assert that the integration of Europe since Rome and Maastricht has been one of the most important, if not *the* most important political achievement on the continent in this century. This process of integration was surely not a manifestation of the success of the nation-state.[10] Nor has integration resolved the ethno-national problems existing in these states. Rather, European integration has been the response to security needs which became evident during World War II and which individual states could not resolve on their own. Another great aim of the integrational process was to provide economic prosperity for the Member States of the community - an aim the individual states could not reach in full. In any event, one can argue that the European Community has saved Western Europe from national rivalries and hatred.

Despite the various obstacles and some pessimistic views, until now, the European Community has been successful in its undertakings. In its next phase development, the Community will have to confront a series of new problems arising from the goal of political integration presently pursued by its members.[11] The crucial problem now is that of the political nature of the new entity created at Maastricht, i.e., the European Union. What should this union be? Merely a federal state, a kind of 'United States of Europe', or a new political creation, a 'citizens' Europe? The last alternative has different practical consequences for the management of the Union's affairs. And yet, the principal question remains: What is the democratic justification for all the political power the European Union has been given? As Jacques Delors once put it, there will be no Community without democracy.[12]

This chapter will not address the problems of the democratic legitimation of the European Union at great length. Nevertheless, the purpose of our deliberations will be, at this stage, to explore the attitude the citizens of the European Union adopt towards this institution as a whole. We will not dwell on any concrete problems of the function and accountability of the Union's institutions; nor will we re-open the discussion on the transfer of sovereignty to the level of the Union. Assuming that democratic legitimation is intrinsically linked to the political will of citizens, we have to ask ourselves what is the ba-

10 E. Suleiman, 'Is Democratic Supranationalism a Danger?', in C.A. Kupchan (ed.) *Nationalism and Nationalities in the New Europe*, Ithaca (1995) pp. 68-71.

11 *Ibid.*, pp. 71 ff.

12 *Ibid.*, p. 77.

sis on which the citizens of the nation-states in Europe, the members of the Union, build up their commitment to it, and additionally, what are the specific aspects of the attitude East Europeans are developing toward the political union in contemporary Europe?

Western Europeans have experienced for many decades a social life within the Community which provides them with many benefits: they have enjoyed freedom of movement and their money has kept its value beyond the state boundaries. Citizens have indirectly profited from the free movement of capital, goods and services. For a long time citizens showed little appreciation for these achievements of the Community, regarding them rather as achievements of the individual Member States. At that time, the approval given by the citizens to the Member States and to their interrelations was sufficient to legitimate the Community as such. The citizens were not called upon to justify a new political entity. Nowadays, the supranational political power of the Union requires a new justification; this can only come from a full commitment to the socio-ethical values and organizational political principles enshrined in the constitutions of the Member States of the Union. That is to say, what we need is not a 'national' but rather a 'constitutional' patriotism, as Habermas rightly calls it.[13]

The 'constitutional patriotism' or - what amounts to the same thing - the socio-ethical and political commitment to the new European Union, is a conviction shared by all individuals, or at least by a significant majority, that democracy, fundamental rights and the rule of law are, and should also be in the future, the essentials of the political order in Europe. Only by such an attitude can Europe be unified, and political integration be achieved. This conviction is not an abstract category; it will fulfill a very important function expressing itself in various practical matters, from participation in the formation of a European public opinion, through voting for Community institutions, to active participation in official decision-making. In this way a common political culture can take hold in Europe, arguably a long and complex process. In my opinion the result of the long period of peace and cooperation in Western Europe is about to culminate in this common political culture, represented by the high esteem for the human person, for tolerance, democracy and an active participation of Europe's citizens in public affairs. These are social values already experienced in the everyday political life of Western Europe. Thus we do not have to create completely new inner attitudes and political commitments, but rather we have to reinforce those already familiar and make them workable.

The idea and the practice of regionalisation within the European Union with the emphasis on regional economic and cultural specificity will not contradict the process of the formation of a common political culture. We must allow for communitarian concepts and values coming to the fore in the context

[13] J Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt am Main (1992), pp. 643 ff.

of regionalisation. But this will not deflect those social values pertinent to a common political culture in Europe if we profit from the communitarian achievements in a constructive way. This assumption should not preclude other forms and constellations of the future political structures of Europe. However for the time being, the question as to what type of new political entity the European Union will become,[14] should remain open.

But how should a new European citizenship be concretely organized by legal means? Whether this citizenship will retain its 'national focus' or will enable citizens 'to appeal to more than one set of enforceable standards when claiming their rights' is a question that cannot be dealt with in this paper.[15] In any event, it appears quite certain that the status of the new European citizen will be a more complex and rich one. The citizen will be detached from his purely economic role. He will not be a 'protected' person expecting assistance from the state and security from its overwhelming power. We must refrain from the deeply rooted habit of thinking of the citizen solely in terms of rights and duties in respect to the state. I am quite sure that the most important parameter of the new, European citizenship will be the political and cultural 'participation' which is surrounded by a vast range of (as we would say today) fundamental rights and freedoms. This participation presupposes a public autonomy that the individual exercises alongside his daily life, not as a voting machine but as a political agent.

A further problem to be analysed separately is that of the legal status of minorities within the European Union. For a long time to come this problem will be on the agenda, but it is already particularly relevant for the old and new nation-states in Central and Eastern Europe.[16] Yet, we can say that the minority problem will probably lose its traditional shape within the new political structures of the European Union in which nationhood will not be a constitutive element. Moreover, ethnic minorities will possibly form those small communities in which cultural diversity can best flourish.

B. The Situation in Central and Eastern Europe

Central and Eastern Europe are characterized today by a widespread social malaise. The collapse of the former communist regimes left behind a political and psychological vacuum. It was not only an historical expectation, but also the dream of the citizens there that this vacuum would be filled by a genuine democratic power. The first developments of the new political regime were

[14] A.D. Smith, 'The Reconstruction of Community in Late Twentieth-Century Europe', in P.J.S. Duncan and M. Rady (eds.) *Towards a New Community. Culture and Politics in Post-Totalitarian Europe*, Hamburg and Münster (1993), pp. 66 ff.

[15] On this problem, see E. Meehan, *Citizenship and the European Community*, London et al. (1993), p. 2.

[16] For further details, see W. Kymlicka, *Multicultural Citizenship. A liberal theory of minority rights*, Oxford (1995).

promising in this respect. They showed that despite the long dictatorial period individuals did not lose the capacity for political self-determination. Within a short time a constitutional regime and a set of functioning institutions were established. With a degree of enthusiasm not previously seen, important elections were held and fundamental political decisions taken. An enormous body of legislation concerning nearly every social domain was passed.

Yet, for a long time important legal regulations - especially in the economic sphere - remained unsatisfactory (for example, the slow pace of (re-) privatisation of industry, the restrictions on foreigners acquiring property, and the confusing tax legislation). Quite in contrast to this, the political life preserved its intensity. The political rights conferred on individuals, such as comprehensive voting-rights, freedom of expression, and freedom of association, allowed a flourishing political landscape to develop. Respect for the rule of law was strengthened for an initial period. A set of administrative and constitutional courts supervised the legality of all state activity.

Unfortunately, the political élan was broken within a few years. The increasing economic problems, especially the lack of efficient productive work and high levels of unemployment, have had a disillusioning effect. The disastrous consequence of the economic stagnation has been the loss of faith in democracy.[17] This was due not least to the fact that many people (especially the younger generation) in Central and Eastern Europe were for decades not familiar with the spirit of democracy and had had no experience of democratic political life within the system of socialism. Under the new social conditions, they falsely regarded the intrinsic difficulties of the transformational process to democracy as deficiencies in democracy itself. In addition, the supporters of the previous regime, the 'Old Communists', who still hold important positions in middle management, have boycotted the transformational process in the economy and thus hindered the development of the economic basis for the transition to democracy.[18] From the very beginning and increasingly in recent times, the Old Communists have cast aspersions on the ideas of liberalism, democracy, fundamental rights and social security, which the Western world has been able to achieve.

The consequences of the social atmosphere thus created are disastrous: The lack of commitment to the main values of the social ethics of democracy demoralized and destabilized all of the forces indispensable to substantive economic undertakings and, in turn, the lack of economic success shattered faith in these values. Optimism and a spirit of solidarity have been completely destroyed. This fact has been crucial to the attitude of the citizens of Central and Eastern Europe towards European political integration. It can be rightly said that at present, this attitude is a negative one. Rapid integration into the European Community was popular some years ago in the expectation that this

17 C.A. Kupchan, 'Conclusions' in Kupchan, *op. cite.*, note 5, p. 183.

18 V. Petev, 'A New Concept of Law for Eastern Europe', in M.M. Karlsson et al. (eds.), *Recht, Gerechtigkeit und der Staat*, Rechtstheorie, Beiheft 15, Berlin (1993), p. 321.

would bring great economic advantages and concrete improvements in the situation of the individual citizens living in the region. Neither the individuals nor the politicians were aware of the immanent economic obstacles to such an integration. The fact that up until the present, these countries have not been given entry into the European Union has only increased the disenchantment. The revitalization of communist ideologies and the imperial bearings of the former superpower in the East have further destabilized the moral impetus of the citizens in Central and Eastern Europe. The citizens are now interested only in security and economic survival and their minds are becoming more and more closed to the main ideas of integration within a multi-faceted European society.

What is to be done? It would surely be wrong to expect genuine economic prosperity to develop of its own accord in the region, the economy being to a great degree a function of social psychology, that is to say, of an inner attitude to social values and of a corresponding political commitment. The response has to be sought on the level both of social psychology and political deeds. Under the present conditions Central and Eastern Europe will, in my opinion, be able to find its political identity only in the framework of an integrated Europe and not on the basis of an ethno-nationalism isolated from the integrational process in Western Europe. The division of the region under consideration into different nation-states, as they presently exist, was from the very beginning not justified on ethno-national grounds. It is, as has already been mentioned, rather the result of political calculations and constellations of power. The crucial point seems to be that the political future of the region greatly depends on the willingness and capability of Western Europe to establish an appropriate dynamic cooperation with it. And conversely I think that the attempted political integration of Europe will in the last analysis, only be successful when the countries of Central and Eastern Europe find their due places.

The philosophical foundation of the citizenship in the next century, if we are still using this category then, will not rest on nationality: not only will there be French, British, Germans, Poles and Serbs but also 'such animals as European citizens' (to quote Raymond Aron inversely). At the end of the day, the degree of success will depend upon what attitude the individuals in Eastern and Western Europe adopt to the new political structures on the continent.

CHAPTER V
CITIZENSHIP AND NATIONALITY: TRACING THE FRENCH ROOTS OF THE DISTINCTION

Benoît Guiguet

It is, quite obviously, always difficult to try to define the notions of citizenship and nationality and, in particular, their fluid and, to say the least, ambiguous borders. National historical experience and linguistic usage frequently hamper efforts towards clarification of the issues. At risk of repeating a commonplace, the French are often perplexed at the usage of generic and vague terms such as 'citizenship' or '*cittadinanza*', to name just two significant examples. However, the distinction which can be made in Italian between two specific concepts of citizenship, *cittadinanza in senso lato* and *cittadinanza in senso stretto*,[1] has some rapport with the French conception deriving from the Revolutionary Period. I intend to undertake a study of the French interpretation of the two notions, which will draw out the political nature of citizenship and, consequently, distinguish it from other legal categories,[2] being, however, always aware that the distinction, thus conceived, offers only a partial response to the problem of the content of these notions, and in particular the notion of citizenship.

This conceptual differentiation of the terms citizenship and nationality, did not rule out a period of confusion. The fact that the concept of citizenship is older than that of nationality accounts for this confusion, because citizenship united two types of belonging - political and national - in a single word.

I. THE DOUBLE SEMANTIC FUNCTION OF CITIZENSHIP

This double function, which characterises the *droit intermédiaire* [laws during the Revolutionary period] can, from a more diachronic point of view, equally said to be derived from the *ancien droit* period (law under the *Ancien Régime*).

1 G. Biscottini, 'Cittadinanza', in *Enciclopedia del diritto*, Milan: A. Giuffré (1960), pp. 127 ff.

2 Cf. L. Ferrajoli, 'Dai diritti del cittadino ai diritti della persona', in D. Zolo (ed.), *La cittadinanza*, Laterza (1994), pp. 264 ff.

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 95-111.

A. CITIZENSHIP IN THE *'ANCIEN DROIT'*

Contrary to widespread opinion, and in spite of the extreme heterogeneity of the country at this time, a legal concept of citizenship did, in fact, exist in France under the *Ancien Régime.* It was elaborated and defined from the 16th century onwards. Despite the anachronism, one can say that in the *ancien droit* the word *citoyen* was a synonym for *national*, that is, it was used in its civil meaning. People also spoke of *naturel*, or *régnicole*, or *sujet*, which can be considered as equivalent terms. The condition of citizenship was primarily perceived in terms of allegiance and attachment to the Kingdom;[3] for which the dominant criterion was permanent residence.

It is, however, difficult to determine who was considered as citizen, and who, as foreigner, at the beginning of the 16th century. This question seems to have been only incidentally considered by the authors, as a result of the application of the *droit d'aubaine,* which became in this period an issue of *droit régalien* (under the royal prerogative).[4] Thus, it was, above all, as a result of the practicalities of inheritance matters that the principles used to define the foreigner, and, consequently, the citizen, were first developed. The distinction was based less on a theoretical approach than on fiscal issues; who did the *droit d'aubaine* apply to? In order for the King to assert his claim of the goods of a deceased, it was necessary to distinguish between the national subject and the foreign subject. The determination of *nationalité* was therefore considered to be a question of private law,[5] and determined inductively.

The principal criterion for this distinction remained one of *ius soli,* albeit only for technical purposes. In general terms, foreigners were individuals born outside the Kingdom, or those who had severed their links with the sovereign by taking up residence abroad, and, as such, were incapable of making out a will, or inheriting, in France. The question was, then, to determine whether the child of

3 See R. Kiefe, 'L'allégeance' in *La nationalité dans la science sociale et le droit contemporain,* Paris: Librairie du Recueil Sirey (1933), pp. 47-68.

4 Thus while previously *aubain (alibi natus)* identified someone as 'foreign to the seigniory', it now came to mean 'foreign to the kingdom'. The *droit d'aubaine* referred to the incapacity to both inherit and bequeath which characterised the inferior status of the *aubain*. See, for example, J. Bacquet, *Oeuvres*, Lyon: Frères Duplain (1744), Vol. 2, Chap. I-XLI; J. Domat, *Les Lois Civiles dans leur Ordre naturel*, Vol. 2, Book 1, Title VI, Section IV (*'Du Droit d'Aubaine'*), Paris: la Veuve Cavelier (1766); or, in addition, A. Weiss, *Droit international privé*, Vol. 2, *Le droit de l'étranger,* Paris: Sirey 2nd ed. (1908), pp. 57 ff.; C. Jandot Danjou, *La Condition civile de l'étranger dans les trois derniers siècles de la Monarchie*, Paris: Thesis, Librarie du Recueil Sirey (1939), 158 pp.

5 O. Beaud, *La Puissance de l'État*, Paris: PUF (1994), p. 113. Cf. also M. Vanel who picks out a doctrine of allegiance, which forms the base of the distinction between *citoyens* and foreigners which, in its practical application remained an issue of private law, but, despite this, did not exclude political considerations linked to the unifying of the French Kingdom: 'Place de la première moitié du XXe siècle dans l'évolution du droit de la nationalité' in *Le Droit privé au milieu du XXe siècle, Études offertes à Georges Ripert,* Vol. 1, Paris: LGDJ (1950), pp. 542-543.

a foreigner, born within the Kingdom, was able to inherit and thus to be considered as *régnicole*. In this respect, one should underline that, one cannot exclude the possibility of some 'competition' being posed by the principle of *ius sanguinis*, inspired by ancient law. However, in practice, it did not seriously undermine the principal rule.[6] The definition given by Bodin, according to which 'le citoyen naturel est le franc sujet de la République où il est natif, soit de deux citoyens, soit de l'un ou l'autre seulement',[7] only reflects the current of opinion favourable to *ius sanguinis*,[8] although, as I have said, this opinion was still nascent and lacked any normative value.[9] Despite the inclusion of the work of the *post-glossateurs*,[10] linked to the realities of Italian cities, which made it possible to overcome the effects of long standing residence and being born abroad, notably due to *l'esprit de retour* [the notion of homecoming][11] and the notion of *origo*,[12] *ius soli* remained the general rule.[13]

6 Confirmed by the existence of letters of naturalisation given to French people born abroad: J.-F. Dubost, 'Significations de la lettre de naturalité dans la France des XVIe et XVIIe siècles', Working Paper, HEC no. 90/3, European University Institute, October 1990, p. 16-17. The appearance, or the reappearance, of *ius sanguinis* in the XVI century no less constitutes an explanation of the triumph of the criterion of *ius sanguinis* through the *Code civil*: A. Lefebvre-Teillard, 'Ius sanguinis, L'émergence d'un principe (Éléments d'histoire de la nationalité française), *Revue Critique de Droit International Privé*, Vol. 82, no.2 (April - June 1993), pp. 223-250; Cf., also, C.C. Wells for a 'linear' conception of citizenship: *Law and Citizenship in Early Modern France*, Baltimore, London: The John Hopkins University Press (1995).

7 'The natural citizen is the loyal subject of the Republic where he was born, whether he be of two citizens or of one or the other only'. J. Bodin, *Les six livres de la République*, Book 1, Chap. VI, Paris: reprinted Fayard (1986), p. 116.

8 One could refer to the frequently cited plea by the lawyer Le Maistre in the celebrated case *Baïl* of the *Parlement* of Paris, 26 June 1634, recognising the advantage of blood ties over the accidental nature of being born in French soil: *'Et qui peut douter que ce soit plus d'être né d'un Français que d'être né seulement en France, que le père ne soit plus à son enfant que le lieu où il vient au monde: le père luy est naturel, le lieu luy est étranger. En l'un c'est le sang qui est français, en l'autre il n'y que l'air qui soit de France'* ['And who can doubt that it means more to be born of a Frenchman than it does only to be born on French soil, that the father is more to his child than simply a place where he comes into the world: his father is natural to him, whereas 'place' is a stranger to him. In one case it is the blood which is French, in the other, nothing more than the air from France'] (Archives nationales, X1A 5577, 22nd plea, in M. Vanel, *La notion de Français d'origine du XVIe siècle au Code civil*, Paris: Thesis (1945), p. 59. Cf. Lefebvre-Teillard, *op. cite.*, note 6, pp. 239-240.

9 Wells, *op. cite.*, note 6.

10 See in particular, the work of Bartolus and Baldus in Wells, *op. cite.*, note 6, pp. 2. ff.

11 As M. Vanel emphasises, *'en se fixant définitivement en France, celui qui est né à l'étranger supplée au vice de sa naissance. Il devait vivre en France, son retour réalise cette condition: il est donc bien Français'* ['By definitively settling in France, someone born abroad could make up for the vice of his birth. He must live in France, his return realised this condition: he was, thus, really French'], Vanel, *op. cite.*, note 9, p. 56.

12 This notion, which distinguishes between one's own origins and paternal origins, signifies the reintroduction of *ius sanguinis* into French law: A Lefebvre-Teillard,

Without going into the details of the criterion on which the distinction is based, which a study of the 'fluctuating'[14] jurisprudence of the Parliaments of the Ancien Régime reveals, I emphasize that the term 'citizen' was, here, reduced to its civil meaning. In particular, one should note this fundamental characteristic, and the rights associated with it.[15] The rights of citizenship, as defined by Bodin and 16th century jurists,[16] are based more on 'nationality' as corollary of subjectivity. O. Beaud expresses this point clearly:

> *Le terme citoyen ne doit pas ici faire illusion: il correspond à l'acception prérévolutionnaire qui fait du citoyen davantage le national ou le ressortissant de l'état que le membre du souverain jouissant de droits politiques.*[17]

B. 1789-1804: The Predominance of Politics

In proclaiming that *'le principe de toute souveraineté réside essentiellement dans la nation'*[18] (Article 3 of the Declaration of the Rights of Man and the Citizen), the French Revolution broke the feudal and monarchic tradition. The *droit intermédiaire* established, for the first time, the political notion of citizenship embodied in the democratic principle, with individual participation in the elaboration of national sovereignty.[19] Certainly, despite its title, the Declaration of 26 August 1789 did not define the concept of citizen.[20] However, despite this, it still refers to those who participate in the formation of the general will,'who form the Nation, in the sense of being the moral title holders of sovereignty'.[21] The idea of national belonging, thus, no longer derived from feudal ideas, but,

'Citoyen', *Droits* (1993), no. 17, p. 36.

13 It is usual to cite the *Mabile* case, 1576, known as the *arrêt de l'Anglese*: the *Parlement* of Paris recognised the new rule of *ius sanguinis* for the first time, but subordinated it to a requirement of permanent residence in France: in Wells, *op. cite.*, note 6, pp. 40-41; Lefebvre-Teillard, *op. cite.*, note 6, p. 232. Also, Cf. P. Weil, *La France et ses étrangers*, Paris: Calmann-Lévy (1991), p. 291-294.

14 P. Weil, 'Nationalities and Citizenships, The Lessons of the French experience for Germany and Europe' in D. Cesarini & M. Fulbrook (eds.), *Citizenship, Nationality and Migration in Europe*, London: Routledge (1996), p. 76.

15 When in the 18th century, Pothier drew up the list of civil rights reserved to citizens, in contrast to the Roman model he made no reference to political rights: *Oeuvres*, Vol. 8, *Traité des personnes et des choses*, Paris: Béchet Ainé, nouvelle éd. (1825), p. 24.

16 On Bodin, Choppin and Bacquet, Cf. Wells, *op. cite.*, note 6, pp. 58 ff.

17 *'The term citizen should not create misunderstandings: it corresponds to the prerevolutionary meaning which posits a citizen more as 'national' or 'ressortissant'* of a state, than as a member of the sovereign people enjoying political rights'. O. Beaud, *La Puissance de l'État*, Paris: PUF (1994), p. 112.

18 'Sovereignty resides essentially in the nation'.

19 Weil, *op. cite.*, note 15, p. 76.

20 On this question see M. Troper, 'The Concept of Citizenship during the Period of the French Revolution', in this volume, pp. 34-35.

21 F. Borella, 'Nationalité et citoyenneté en droit français', in Colas (ed.), *L'État de droit. Travaux de la mission de la modernisation de l'État*, Paris: PUF (1987), p. 35.

instead, from the will to live according to the laws of a State before which all individuals are equal. These individuals were now called *citoyens*[22] instead of *régnicoles*. The citizen, as the holder of rights, liberties and obligations became 'a politically active being in a system of government from the roots',[23] thus replacing the concept of citizen under the *ancien droit*.

National belonging became political. It was only the question of political rights which preoccupied the Revolutionaries. The determination of who was French and who was a foreigner was of little importance: this was a simple question of fact. The only problem to resolve was not the issue of belonging to a State, but, instead, of belonging to a political community, which, in fact, did not radically transform the criterion which distinguished a Frenchman from a foreigner. Thus, W. R. Brubaker stresses that:

> *La citoyenneté était devenue un statut caractéristique, significatif; mais à la question: 'qui était français', on répondait encore selon la jurisprudence des Parlements d'Ancien Régime, en tenant compte du lieu de naissance, de l'ascendance et du lieu de résidence.*[24]

Despite Article 1 of the Declaration of Rights of 26 August, which provided that 'les hommes naissent et demeurent libres et égaux en droit',[25] the affirmation of a universal, legal equality had to be compatible with equality within the nation.[26] But how was this belonging to the nation, that is, to the *corps politique*, actually defined? In this context the criterion of residence had an important place. As C. Bruschi explains:

> *La résidence sur le territoire est le critère de l'appartenance à la société; c'est la raison pour laquelle elle donne droit à la citoyenneté. On ne peut exclure du corps politique dans lequel se projette la société des individus qui participent justement à cette société. La citoyenneté est donc confirmative d'une vie sociale partagée.*[27]

[22] While Rousseau defined citizenship through political participation, Sieyès defined it not only through participation, but also through the enjoyment of civil rights: *'Les droits politiques, comme les droits civils doivent tenir à la qualité de citoyen'* ['political rights, like civil rights, must stem from the status of citizen'], *Qu'est-ce que le Tiers-État?*, PUF (1982), p. 44.

[23] Borella, *op. cite.*, note 22, p. 40.

[24] 'Citizenship had taken on a characteristic and significant status; but the question: who was French, was still answered according to the jurisprudence developed by the *Parlements* of the *Ancien Régime*, by taking into account place of birth, ancestry and place of residence'. R. Brubaker, 'De l'immigré au citoyen', *Actes de la Recherche en Sciences sociales*, no. 99, Sept. 1993, p. 9. (R. Brubaker employs the term *citoyenneté* to designate formal belonging to a nation-state).

[25] 'Men are born and remain free and with equal rights'.

[26] C. Bruschi, 'Droit de la nationalité et égalité des droits', in Laacher (ed.), *Questions de nationalité*, Paris: CIEMI, L'Harmattan (1987), p. 26.

[27] 'Residence on its territory is the criterion for belonging to a society, which is why it gives rise to citizenship. It is not possible to exclude from the *corps politique* into which society is moulded, any individual who fairly participates in this society. Citizenship thus confirms the existence of a shared, social life'. C. Bruschi, 'Le droit de la nationalité

This conception is, quite naturally, to be found in the Revolutionary Constitutions, where a period of residence would accord citizenship to foreigners without the intervention of the public authorities (five years of continual residence in France, under certain conditions and after having taking the civic oath[28] under the Constitution of 1791,[29] seven years of residence according to the 1795 Constitution of Year III,[30] ten in the case of the Constitution of 1799 (Year VIII)[31] and particularly in the Constitution of 24 June 1793 (Year I), although it was never applied.[32] According to Article 4 of the Constitution of 1793,

> *Tout homme né et domicilié en France, âgé de vingt-et-un ans accomplis, tout étranger, âgé de vingt-et-un ans accomplis, qui domicilé en France depuis une année, y vit de son travail ou acquiert une propriété - ou épouse une Française ou adopte un enfant - ou nourrit un vieillard; tout étranger enfin, qui sera jugé par le corps législatif avoir bien mérité de l'humanité, est admis à l'exercice des droits de citoyen français.*[33]

On this issue the decree of 26 August 1792 is revealing. The Assembly 'will award the title of French citizen [to those foreigners] who, while not having

et les principes républicains', *Échanges Méditerranées* (1987), p. 3.

28 The requirement to take a civic oath *'Je jure d'être fidèle à la Nation, à la loi et au roi et de maintenir de tout mon pouvoir la constitution du royaume, décrétée par l'Assemblée nationale constituante aux années 1789, 1790 et 1791' ['I swear to be faithful to the Nation, to the law and to the king and to uphold, with all my power, the kingdom's Constitution, as decreed by the national, constituent Assembly of 1789, 1790 and 1791'],* shows that citizenship was essentially envisaged as adhesion to the corps politique. See C. Bruschi, 'Droit de la nationalité et égalité des droits', in Laacher (ed.), *Questions de nationalité,* Paris: CIEMI, L'Harmattan (1987), p. 27-28.

29 If there were other conditions in addition to that of residence, then the foreigner who fulfilled the conditions prescribed by the Constitution became a French citizen *de plein droit*. See in this sense, in connection with the 1791 Constitution, M. Troper, 'The Concept of Citizenship during the Period of the French Revolution', *supra,* p. 38.

30 *Article 10.*

31 *Article 3.* Note that the Constitution of 22 *Frimaire* Year VIII (13 December 1799) re-established, once again, universal suffrage, the principle was however more or less negated by a complex system of notabilities.

32 In the first Article of Title II *(De l'état des citoyens et des conditions nécessaires pour en exercer les droits* [Of the status of citizens and the necessary conditions for exercising rights]), the Girondin project spoke simply of 'tout homme' [all men]: *'Tout homme âgé de vingt-et-un ans accomplis, qui se sera fait inscrire sur le tableau civique d'une assemblée primaire et qui aura résidé depuis, pendant une année sans interruption, sur le territoire français, est citoyen de la République.'* ['Every man, having reached the age of 21, who is inscribed in the civic register of a primary assembly and who has resided on French territory for one year without interruption is a citizen of the Republic'].

33 'Every man, born and resident in France, having reached the age of 21, every foreigner, resident in France for at least a year, who works here or who has acquired property, or married a French woman, or adopted a child, or who looks after an old person - thus, in fact, every foreigner who would be judged by the legislative body as having well deserved humanity, is allowed to exercise the rights of a French citizen'.

fulfilled any of the conditions, are to be judged worthy to participate in the regime of liberty to whose triumph their labours contributed'.[34]

As M. Vanel explains in *La notion de Français d'origine du XVIe siècle au Code civil,* 'Unity was no longer built up between the French to the exclusion of foreigners but, instead, between partisans of new ideas, between revolutionaries, against the tyrants'. Moreover, the distinction between the French and foreigners was now of less substantive relevance, because as a result of the suppression of the *droit d'aubaine* by the law of 6 August 1790, foreigners now enjoyed full civil rights. This conception is the origin of the constitutional definition of French people *{le peuple français}* in purely political terms: 'What mattered was not to define the French, but only the citizen - the individual with the right to vote and to elect a representative to the Assembly'.[35]

But this also opened the door to a huge semantic confusion, linked to the imprecision of the language used. So, in its strict meaning, the word '*citoyen*' identified those who were allowed to exercise political rights. But, according to its customary usage, it was also the term used to identify the rest of the people *{le peuple}*, whether or not they had political rights. This was, then, the root of the conceptual difficulty which still bedevils the issue.

This double content is very clear in the Constitution of 1791, which distinguished between passive citizens and active citizens, in other words, between egalitarian national belonging and political citizenship. There is no doubt that the Constitution of 1791, which is the origin of the theory on the function of

[34] Eighteen foreigners were granted the title of French citizen in the name of the defence of the people's cause against the Monarchy. It was really an honorary title, but two, Anacharsis Cloots and Thomas Paine, were members of the Convention; Cf. S Caporal, 'Citoyenneté et nationalité en droit public interne', in G. Koubi (ed.), *De la citoyenneté*, Paris: Litec (1995), p. 64 note 8.

[35] M. Vanel, *op. cite.*, note 12, pp. 96 and 107 ff.
It is true that, within the revolutionary period, one can distinguish two sub-periods. The first (1789-1793) is clearly marked by internationalism, solidarity towards foreigners, descendants of Protestant immigrants and Jews - although with some delay, regulated by the decree of 28 September 1791 etc. As I have said, after the outline of the distinction between citizenship and nationality contemplated by the 1791 Constitution, the retained criterion of citizenship was the only thing which remained true to the revolutionary ideas, the decree of 26 August 1792 marked the culminative point of this period in granting the title of French citizen to a certain number of foreigners judged worthy to participate in the Regime of Liberty. However, one should not pass over, without remark, the change in direction which occurred in 1793, the start of the second period (1793-1804), characterised by the exacerbation of nationalism and the first decrees hostile to foreigners. Under the Reign of Terror, citizenship was summed up by its linkage, without exception, to Montagnard ideas, the people *(le peuple)* being submitted to what O. Le Cour Grandmaison refers to as '*un processus croissant de déréalisation*' ['an increasing process of 'de-realisation'] (*Les citoyennetés en Révolution (1789-1794)*, Paris: PUF (1992), p. 163). But even if France felt threatened at that time, The Assembly did not consecrate a real system of either exclusion or inclusion - considering the exceptions. Constitutional law remained favourable to foreigners, but the objective became one of more rigorusly ousting all the adversaries of new ideas.

the electorate,[36] clearly distinguishes between native *{naturel}* and citizen, the two conditions being treated separately. This Constitution could be considered as the first code on nationality,[37] in the sense that it laid down the conditions for possession, acquisition and loss of French citizenship.[38] It is in Title III (*Des*

[36] See, notably, the analyses of Duguit (*Traité de Droit constitutionnel*, Paris: De Boccard (1928)), Hauriou (*Précis de Droit constitutionnel*, 2nd ed., Paris: Librairie du Recueil Sirey (1929)) and Carré de Malberg (*Contribution à la Théorie générale de l'État*, t. 2, Paris: CNRS (1922)).

[37] We could speak of a law of '*citoyenneté passive*': As I indicated above, it would not be right to overestimate the interest of the notion of '*nationalité*' for the Constitution of 1791, insofar as both the French and foreigners, in their status as men, enjoyed the same civil rights. The distinction between citizens and foreigners only affects the enjoyment of political rights. On this point then, I share M. Troper's position, who argues that, in 1791, it was not necessary to use an additional term 'to designate those who exercised the civil rights of nationals without being citizens. Such a class of person did not exist.' (*op. cite.* note 30, p. 40). But the lack of nationality is all the more understandable given that the Constitution did intend a distinction between active and passive citizenship, which was merged with nationality.

[38] Title II, *De la division du royaume et de l'état des citoyens* [Of the division of the kingdom and the status of citizens].
Art. 2: Sont citoyens français: ceux qui sont nés en France d'un père français; - Ceux qui, nés en France d'un père étranger, ont fixé leur résidence dans le royaume; - Ceux qui, nés en pays étranger d'un père français, sont venus s'établir en France et ont prêté le serment civique;- Enfin ceux qui, nés en pays étranger, et descendant, à quelque degré que ce soit d'un Français ou d'une Française expatriés pour cause de religion, viennent demeurer en France et prêtent le serment civique.
Art. 3: Ceux qui, nés hors du Royaume de parents étrangers, résident en France, deviennent citoyens français, après cinq ans de domicile continu dans le Royaume, s'ils y ont, en outre, acquis des immeubles ou épousé une Française, ou formé un établissement d'agriculture ou de commerce, et s'ils ont prêté le serment civique.
Art. 4: Le pouvoir législatif pourra, pour des considérations importantes, donner à un étranger un acte de naturalisation, sans autres conditions que de fixer son domicile en France et d'y prêter le serment civique.[...]
Art. 6: La qualité de citoyen français se perd: 1. Par la naturalisation en pays étranger; 2. Par la condamnation aux peines qui emportent la dégradation civique [...]; 3. Par un jugement de contumace [...]; 4. Par l'affiliation à tout ordre de Chevalerie étranger ou à toute corporation étrangère qui supposerait, soit des preuves de noblesse, soit des distinctions de naissance, ou qui exigerait des vœux religieux.
[Art. 2: French citizens are: those who were born in France to a French father; - Those, born in France to a foreign father, who are now resident in the Kingdom; - Those, born in a foreign country to a French father, who have come to take up residence in France and have taken the civic oath; - Finally those, born in a foreign country and descended at any remove from a French man or women who emigrated for religious reasons, who come to take up residence in France and take the civic oath'.
Art. 3 'Those who were born outside the kingdom to foreign parents and are resident in France become French citizens after five years of continuous residence in the Kingdom, if they have, in addition, bought property, or married a French woman, or set up a commercial or agricultural enterprise, and if they have taken the civic oath'.
Art. 4 'The legislative power can, under pressing considerations, naturalise a foreigner, who fulfils only the conditions of having become resident in France and having taken

pouvoirs publics) Chapter I, Section II where the celebrated distinction between *citoyens passifs* and *citoyens actifs* appears, the latter, alone, having the right to form the primary assemblies.[39] In contrast, the subsequent Constitutions did not make this distinction between national belonging and political rights.[40] The method implied by the 1791 Constitution for legally defining the native French was abandoned. Subsequently it was only the question of the people's political status which prevailed. The Constitution of 24 June 1793 no longer defined the native Frenchman but only the French citizen.[41] The same went for the Constitutions of 1795[42] and 1799.[43]

Abandoning the definition of native would have been legitimate if the Revolutionaries had adopted the new definition proposed by Rousseau[44] and

the civic oath'.

Art. 6 'The status of French citizen is lost: 1. By naturalisation in a foreign country; 2. As a result of punishment which carries a loss of civic status [...]; 3. By a judgement in absentia [...]; 4. By affiliation to any chivalrous order, or to any foreign corporation which requires proof of nobility, distinctions of birth or religious vows.]

39 Article 2 clearly states: *'Pour être citoyen actif, il faut: être né ou devenu Français [...]'* [To be an active citizen it is necessary to either be born, or become, French]. One can see Sieyès' influence on this article. According to Sieyès *'Tous les habitants d'un pays doivent y jouir des droits de citoyen passif: tous ont droit à la protection de leur personne, de leur propriété, de leur liberté, etc., mais tous n'ont pas droit à prendre une part active dans la formation des pouvoirs publics; tous ne sont pas citoyens actifs'.* ['All a country's inhabitants must enjoy the rights of the passive citizen: all have the right to protection of their person, their property, their liberty, etc. but not all have the right to take an active part in the formation of the public powers, not all are active citizens']: Sieyès, 'Reconnaissance et exposition raisonnée des droits de l'homme et du citoyen', Comité de Constitution, 20 and 21 July 1789, in Y. Bosc and S. Wahnich (eds.), *Les voix de la Révolution*, Paris: La Documentation française (1990), pp. 42-43. On Sieyès and the distinction between active and passive citizens, see O. Le Cour Grandmaison, *op. cite.*, note 36, pp. 34 ff.

40 For Robespierre, the distinction between active citizens and passive citizens was a manifest violation of the rights of man which ran contrary to the sovereignty held by the totality of French citizens: *Oeuvres*, Vol. VII, Paris, PUF (1952), pp. 161-162.

41 Cf. *supra*, Art. 4.

Article 5: L'exercice des Droits de citoyen se perd: Par la naturalisation en pays étranger; Par l'acceptation de fonctions ou de faveurs émanées d'un gouvernement non populaire; Par la condamnation à des peines infamantes ou afflictives, jusqu'à réhabilitation.

Article 6: L'exercice des Droits de citoyens est suspendue: Par l'état d'accusation; Par un jugement de contumace , tant que le jugement n'est pas améanti.

[Article 5: The exercise of the rights of citizen is lost: by naturalisation in a foreign country; by accepting offices of favours emanating from a non-populaire government; By sentencing for ignominious or grievous action, until rehabilitation.

Article 6: The exercise of the rights of citizen is suspended: while under accusation; by a judgement in absentia, until the judgement has expired].

42 Cf. Title II, *État politique des citoyens* [political status of citizens], Arts. 8 - 16.

43 See *infra*.

44 *Du Contrat Social*, Book 1, Chap. IV *in fine: 'les associés prennent collectivement le nom de Peuple, et s'appellent en particulier citoyens comme participant à l'autorité souveraine, et sujets comme soumis aux lois de L'état'.* [The associates take, collectively, the name

immediately contemplated another term with which to identify the rest of the people.[45] But, instead, the confusion was constitutionally enshrined: several articles of the Declaration of Rights of the 1793 Constitution seem to refer to citizen *lato sensu*, whether or not he enjoyed political rights, while the Constitution proper, in its title *De l'état des citoyens* [on the status of citizens] seemed more to specify the conditions of exercise of active citizenship. The case law does not help us to draw a definitive conclusion one way or the other.[46]

Given this, some people have seen in the expression 'tout homme né et domicilié en France [...] est admis à l'exercice des droits de citoyen français'[47] a nationality condition for being allowed to exercise political rights; from this perspective the phrase would refer to all the French, the foreigner being considered, *ipso facto*, naturalised[48] the other interpretation being that, in the absence of a clear distinction, the 1793 Constitution was not trying to define the French but only the citizen, that is, the individual *admis à l'exercice des droits de citoyen*.[49] It should be noted that this provision does not provide for access to the status *{qualité}* of French citizenship, but for the *exercise* of the rights of the French citizen. One could, then, be a foreigner, while still being competent to exercise the rights of citizen.[50] Even if the superposition between the exercise of these rights and the status of 'French' existed, it was not exclusive. Citizenship was, above all, understood as the status of those who comprised the nation, the nation being, itself 'implicitly understood as a true *corps politique* and not only as a

'peuple', and, in particular, *citoyens* when participating in the sovereign authority, and *sujets* when subjected to the laws of the State].

45 Jurists such as Lanjuinais tried to intervene to establish a little clarity regarding the employment of these terms, but they had no success - even without taking into account the use of terms such as *citoyen* and *citoyenne* which became synonyms for *Monsieur* and *Madame*. Cf. *Extraits du discours de Lanjuinais* (Archives parlementaires, t. LXIII, p. 561 f.), in Vanel, *op. cite.*, note 12, pp. 96-97 and A. Lefebvre-Teillard, *op. cite.*, note 13, p. 40. See also, Thomas Paine's speech on the Constitution (7 July 1795), *Dissertation on First Principles of Government*, London: R. Carlile (1819), pp. 23-28.

46 Vanel, *op. cite.*, note 12, p. 95, note 11.

47 'Every man, born and resident in France is allowed to exercise the rights of the French citizen', Vanel, *ibid.*

48 Vanel, *ibid.*

49 The first interpretation does, however, seem difficult to maintain with regard to the Constitution of Year VIII. In effect, while possibly valid for 1799, it was no longer defensible in 1804. Because while the *Code civil* declared all those children born in France or abroad to a Frenchman to be French from birth, the constitutional text, itself, was not modified. On the first interpretation this would have led to two different definitions of foreigner in the same period: *'l'une, donnée par la loi constitutionnelle: tout homme né en France est Français; l'autre, œuvre du Code civil, et déclarant français ceux qui sont nés d'un père français'*. ['one provided by the Constitution: all men born in France are French; the other, the work of the *Code civil*, designating as French those who were born to a French father'] (M. Vanel, *op. cite.*, note 12, p. 102).

50 The first decrees against foreigners and, notably, the one of 26 *Nivôse* Year II (26 December 1793) referred to this conception, according to which foreigners had, up until then, been able to 'représenter le peuple français'.

community of origin, language and culture'.[51]

According to the terms of the Constitution of 1793 and later Constitutions, one could argue that the (active) citizenship which derived from the democratic principle, did not merely confirm, but, in fact, transcended, legal belonging to a State (nationality).

It is, however, still true to say that the double semantic function, more or less explicit throughout the successive constitutional projects[52] of the single term *citoyen* is at the heart of the confusion and the interdependence of the terms *citoyenneté* and *nationalité*. Some proof of this lies in the fact that the loss of the status of citizen was always associated with naturalisation in a foreign country. The word *citoyen*, thus, condensed two distinct conceptual meanings whose relationship was, as a result of the predominance of politics, far from being clearly defined. It is from this perspective that one can say that French citizenship is basically French nationality, insofar as the latter confers the prerogatives attached to the status of citizen'.[53] This results in a clear interdependence which reflects a particular conception of the life of individuals, understood in terms of a political entity participating, as such, in the elaboration of a collective will. This may be the reason why, in the context of the constitutional law of the Revolution, the question of nationality remained a secondary one. The constitutional definitions refer more, if not exclusively, to the concept of citizen than to that of national, according to today's understanding of the meaning of the word; which places greater emphasis on the right to vote.[54]

In pointing out the 'collusion' between the terms citizen and national, D. Lochak demonstrates the 'paradox' or 'the perverse effect of revolutionary ideology' which 'locked the door on the the nation-state by instituting a more watertight border than ever between the national-citizen and the foreigner non-citizen, by reserving the enjoyment of civic rights to nationals'[55] without one being able to detect any firm intention in this direction on the part of the revolutionaries.

51 E Tassin, 'Identités nationales et citoyenneté politique', *Esprit* (January 1994), p. 101.

52 I refer, once again, to M. Troper's contribution and particularly to his analysis of the Constitution of Year III, whose text introduces a very clear conceptual distinction between citizenship and nationality, even if the latter is expressed according to the only word then available: '*citoyen*' (See 'The Concept of Citizenship during the Period of the French Revolution', in this volume, pp. 53-54).

53 'la citoyenneté française, c'est la nationalité française, en ce qu'elle confère les prérogatives attachées à la qualité de citoyen': D. Lochak, 'Étrangers et citoyens au regard du droit', in C. Wihtol De Wenden (ed.), *La Citoyenneté et les changements de structure sociale et nationale de la population française*, Paris: EDILIG/Fondation Diderot (1988), p. 81.

54 B. Mirkine-Guertzevitch, 'Les sources constitutionnelles de la nationalité', in *La nationalité dans la science sociale et le droit contemporain*, Paris: Librarie du Recueil Sirey (1933), p. 76.

55 D. Lochak, 'La citoyenneté: un concept juridique flou', in Colas, Emeri, Zylberberg (eds.), *Citoyenneté et nationalité, Perspectives en France et au Québec*, Paris: PUF (1991), p. 182.

It is, to say the least, this 'conceptual short cut' which our institutions seem to have relied upon, by an extrapolation which puts the universalist dimension of citizenship between brackets, in order to retain the 'national' dimension, that is, the reflection of a nation perceived no longer in political terms, but in terms of identity. The fraternity conceived of in the 1793 Constitution is not seen again in any later constitutional text.[56] The idea of the nation gradually became more set, closing in on itself and sealing in a feeling of identity, but still remaining inseparable from citizenship.[57] The configuration of the citizens was based on belonging conceived in political terms, round the defence of a common ideal: while citizenship, be it active or passive did not rule out a differentiation between foreigners and the French, a 'belonging to the nation' was determined just as much through 'fidelity to the revolutionary ideals'. Over time, citizenship remained structurally inseparable from the idea of nationality, but the meaning of 'belonging' which characterised this nationality, evolved: national identity seems to have got the upper hand over the political ideal.

II. CITIZENSHIP AND NATIONALITY AFTER 1804: A HIERARCHIC CONCEPTUAL DISTINCTION

In the end, the *Code civil* abstracted the 'definition' of the '*qualité de Français*' from the constitutional texts, at which point the ambiguity disappeared. Up until then, the Constitutions had conceived of this 'belonging to the nation' in a fundamentally political way, while the Declaration of the Rights of Man and the Citizen was silent on the issue. The Constitution of 3 September 1791, in appearing to introduce a law of nationality which granted the status of French citizen on the basis of either *ius sanguinis a patre*, or the desire to live under French law with certain conditions, seems to be the sole exception. Constitutions later than 1791 had framed the definition of citizen in essentially political terms. From then on, it fell to the *Code civil des Français*, published in 1804 to determine the conditions of French nationality, although, at that time, French nationality was still not specifically identified as such.[58] The objective of

[56] Y. Madiot, 'Citoyenneté, un concept à facettes multiples', in G. Koubi (ed.), *De la Citoyenneté*, Paris: Litec (1995), p. 19.

[57] The error was to have projected the idea of identity onto citizenship, while citizenship remained above all a political 'act' *[agir politique]*. See, relating to the possible 'mutation' of European citizenship, Tassin, *op. cite.*, note 53, pp. 108 ff.

[58] It was necessary to wait until the middle of the 19th Century for this. Cf. Borella, *op. cite.*, note 22, pp. 211-212; C. Wihtol de Wenden, 'Citizenship and Nationality in France', in Bauböck (ed.), *From Aliens to Citizens*, Aldershot: Avebury (1994), p. 85; or, in addition, S. Bouamama, 'The Paradox of European Social and Political Ties': 'Nationalitarian' Citizenship and Identity Ambiguity', in M. Martiniello, *Migration, Citizenship and Ethno-National Identities in the European Union*, Aldershot: Avebury (1995), p. 58. According to all these authors, the term '*nationalité*' (which appears in the dictionary of the *Académie française* in 1835) was supposed to have been used for the first time by Foelix in his *Traité du droit international privé ou du conflit des lois des*

which was, above all, to establish the recognition, on the basis of equality, of the private law rights contained in the *Code civil*.[59] The need to regulate nationality thus arose out of the special status of foreigners with regard to the enjoyment of civil rights.

The *Code civil*, which three years later became the *Code Napoléon*, led to a decisive rupture by giving the *qualité de Français* a status distinct from that of citizenship which no longer referred back to a political arena. Nationality took on legal shape and became clearly distinguished from the status of citizen. It therefore left the domain of constitutional and public law and became restricted to the sphere of private law.

Thus, Article 7 of the *Code civil* distinguished between the exercise of the civil rights, determined by the Code, which was the prerogative of French nationals alone (art. 8),[60] and the status of citizen, determined by the Constitu-

différentes nations en matière de droit privé, which was published in 1843. This line of thought is clearly expressed by M. Vanel in the article, 'Place de la première moitié du XXe siècle dans l'évolution du droit de la nationalité', *op. cite.*, note 5, p. 544, note 2. M. Vanel is even more explicit in an article which appeared the following year in the *Revue critique de Droit international privé*: *'Le terme citoyen étant désormais réservé à une distinction de droit interne, comment fallait-il appeler les Français pris dans leur ensemble? Ce problème ne sera pas résolu avant le deuxième quart de XIXe siècle, dans l'oeuvre de Foelix. Iusqu'à lui, on parlera des Français, de la qualité de Français. Foelix le premier parlera de nationaux et de la nationalité'.* ['The term '*citoyen*' being at that time reserved for a distinction in internal law, what were the French, taken in their totality, to be called? This problem was not resolved until the second quarter of the 19th century, in the work of Foelix. Up until then, people had spoken of the French, and the status of being French, Foelix was the first to talk of nationals and nationality']: M. Vanel, 'La notion de nationalité, Évolution en droit interne et en droit colonial comparé (droit français - droit britannique)', Vol. 40, *Revue critique de Droit international privé* (1951), p. 20. However, in fact, an attentive reading of the *Traité du droit international privé ou du conflit des lois des différentes nations en matière de droit privé* sheds no particular light on the reasons for the passage from the *qualité de Français* to the modern idea of nationality. In the *Traité, 'nationalité'* appears already in its legal form, as an element of personal status, and is used in the context of regulating conflict of laws. Foelix does not teach us anything about the meaning of *nationalité*; he simply uses it for determining the applicable law.

59 Cf. A. N. Makarov, 'Règles générales de droit de la nationalité', *Recueil des Cours de l'Académie de Droit international* (1949) I, pp. 309-310.

60 The *Code civil*, thus, reinstated the *droit d'aubaine* which had earlier been abolished by the Constituant Assembly. For a general survey of the debate between realism and liberalism on this point, see F. Ewald (ed.), *Naissance du Code civil. La raison du législateur. Travaux préparatoires du Code civil*, rassemblés par A. Fenet, Paris: Flammarion (1989), pp. 148-168. Only the French national enjoyed the full range of civil rights; the foreigner only benefited from these if he lived in France, or on the basis of a condition of reciprocity established by an international treaty (Articles 8 & 11). Nationality of origin was based solely on *ius sanguinis* (Articles 9 & 10). The terms of Article 11 *('L'étranger jouira en France des mêmes droits civils que ceux qui sont ou seront accordés aux Français par les traités de la nation à laquelle cet étranger appartiendra'* [the foreigner enjoys the same civil rights in France as are, or would be, granted to the

tion. 'L'exercice des droits civils est indépendant de la qualité de citoyen, laquelle ne s'acquiert et ne se conserve que conformément à la loi constitutionnelle'.[61] This Article has remained unchanged since 1889 when, by the law of 26 June, *la qualité de citoyen* was replaced by *l'exercice des droits politiques*.[62] It is in this Article 7 that, it seems to me, the complete distinction between citizenship and nationality is to be found. Even if, paradoxically, the civil rights, themselves, are far from being well defined[63] the ambiguity in the notion of citizenship disappeared leaving only its political meaning. As Marcadé writes in his *Explication du Code civil*, one should not 'confuse this class of rights with *civic* or *political* rights, which come under *public law*, and are granted to diverse members of society in the exercise of public powers'.[64]

However, this does present one question, concerning the nature of this independence of citizenship vis-à-vis nationality. If, during this period, it was necessary to be French in order to enjoy civil rights, was this also a requirement for achieving the status of citizen? Article 7 does not explicitly exclude this hypothesis of a breach which signified a construction of citizenship truly independent from the concept of nationality. The constitutional law to which Article 7 refers was, at the time when Article 7 was drawn up, the Constitution of 22 Frimaire Year VIII, and it was this law which, in its 2nd and 3rd Articles, determined the necessary conditions for being a citizen[65] and also the conditions

French by treaties to which the nation to which the foreigner belongs is a party]) were tempered by doctrine and jurisprudence which finally arrived at the more satisfying formula elaborated by the *Cour de Cassation*, after a change of mind in 1948 (Civ. 27 July 1948) according to which *'il est de principe que les étrangers jouissent en France des droits qui ne leur sont pas spécialement refusés'* [the principle is that foreigners in France enjoy all those rights which are not explicitly refused them] (P. Mayer, *Droit international privé*, Paris: Montchrestien, 5th ed. (1994), § 995).

61 'The exercise of civil rights is independent from the status of citizen, which can only be acquired and retained in conformity with constitutional law'.

62 *Recueil Sirey, Lois annotées* (1889), Paris, pp. 578-579. The drawback of this substitution is, that it, doubtless, intensified the increasing disappearance of the term *citoyen* from positive law texts.

63 Maury and Lagarde, *Répertoire de Droit civil*, Dalloz (1972), section 2, pp. 4-7.

64 *'Il ne faut pas confondre cette classe de droits avec les droits civiques ou politiques, lesquels découlent du Droit public, et qui sont la part attribuée aux divers membres de la société dans l'exercice de la puissance publique'*. V. N. Marcadé, *Explication du Code civil*, Vol. 1, 7th ed., Paris: Delamotte et fils (1873), p. 92.

65 *Article 2: Tout homme né et résidant en France, qui, âgé de vingt-et-un ans accomplis, s'est fait inscrire sur le registre civique de son arrondissement communal, et qui a demeuré depuis pendant un an sur le territoire de la République, est citoyen français.*
Article 3: Un étranger devient citoyen français, lorsqu'après avoir atteint l'âge de vingt-et-un ans accomplis, et avoir déclaré l'intention de se fixer en France, il y a résidé pendant dix années consécutives.
[Article 2: Every man born and resident in France who, having reached the age of 21, has had himself inscribed on his local civic register, and who has spent more than a year in the territory of the Republic is a French citizen.
Article 3: A foreigner becomes a French citizen when, having reached the age of 21, and

leading to a loss of citizenship (Arts. 4, 5 & 6).[66] None of the later constitutional texts (the Constitutional Charters of 1814 and 1830[67]) dealt with the question of access to political rights again. Everything thus depends upon the interpretation given to the 1799 Constitution. In the Constitution of Year VIII which inaugurated the Napoleonic era, the conception of a nation composed of citizens was still in the background. Now, the later tradition which founded citizenship on nationality rested, it seems to me, on a questionable interpretation of Article 2 of the 1799 Constitution. The wording of this article does not exclude the hypothesis of an active, as opposed to passive, conception of citizenship. It did not, however, say that this posed a nationality requirement to accede to the status of citizen, which would have led, simultaneously, to two opposing definitions of nationality, one based on the *ius soli* of the Constitution, the other on the *ius sanguinis* of the *Code civil*, unless, that is, one somewhat audaciously acknowledges the idea of a tacit - and partial - derogation of Article 2 of the Constitution by the *Code civil*.[68] This is, however, the angle from which the commentators of the *Code civil* appear to have approached the question, as Marcadé, again, attests:

> *L'exercice des droits civils [...], est indépendant de la qualité de citoyen; il suffit, pour l'avoir, d'être Français [...]. C'est pour les droits civiques seulement qu'il faut avoir aussi le titre de citoyen.*[69]

having declared his intention to settle in France, he has been resident here for ten consecutive years].

As I said earlier, Article 2 is concerned with defining those French capable of exercising their rights and not defining the French in general. The same goes for Article 3. If the contrary had been the case then: 'Would the authors of the *Code civil* have felt the need to devote several articles to the 'qualité de Français'? Wouldn't at least somebody, from Cambacérès to Bonaparte himself, who took a very active role in the discussions on these articles, have pointed out that the question was, in fact, already regulated by the Constitution? *['Les rédacteurs du Code civil auraient-ils éprouvé le besoin de consacrer plusieurs articles à la "qualité de Français"? N'y aurait-il eu personne, à commencer par Cambacérès et Bonaparte lui-même, qui a pris une part très active dans la discussion de ces articles, pour faire remarquer que la question était déjà réglée par la Constitution?']*: Lefebvre-Teillard, *op. cite.*, note 13, p. 41; Cf. *supra*, note 58.

66 Cf. C. Demolombes, *Cours de Code Napoléon*, 2nd ed., Paris, A. Durand/L. Hachette (1860), Book 1, p. 156.

67 According to Article 68 and 59 of the Charters of 1814 and 1830 respectively: *'Le Code civil et les lois actuellement existantes, qui ne sont pas contraires à la présente charte, restent en vigueur iusqu'à ce qu'il y soit légalement dérogé'* [The *Code civil* and all other laws currently in existence, which are not incompatible with the present Charter, remain valid until they are legally amended'].

68 Demolombes, *op. cite.*, note 67, p. 144.

69 'The exercise of civil rights [...] is independent from the status of citizen; it is only necessary to be French to have this exercise [...]. Only for civic rights is it necessary to also be a citizen. My emphasis, see V. N. Marcadé, *op. cite.*, note 65, p. 92.

Thus, while it was at that time clearly established that it was not, or no longer, the role of the Constitution to define 'the French', the distribution of both civil and political rights functioned by reference to a condition of nationality. Presumably, and leaving it at that, the incoherence was eliminated in aid of the 'normalisation', and the organisation, of society.

Moreover, the concept of citizenship was gradually faded out in favour of nationality and the enjoyment of civil rights.[70] Changing constitutional terminology towards the end of the century and, quite obviously, under the Restoration corroborates this. It was necessary to wait until 1848 before, once again, 'la souveraineté réside dans l'universalité des citoyens français',[71] nationality clearly being a necessary condition of the electorate. Following in Tassin's footsteps, it is possible to confirm that, with the drawing up of the *Code civil:*

> *La nationalité prend corps en estompant progressivement la prévalence de la citoyenneté. Les citoyens peuvent être alors explicitement conçus comme un sous-ensemble de la communauté des nationaux dont l'identité sera définie par les différents codes de la nationalité. On passe ainsi de l'idée que la qualité de national est l'expression d'un mode d'être politique, la citoyenneté, à l'idée que la détention des droits civils et politiques ne peut être l'apanage que de ceux qu'une identité nationale désigne par ailleurs comme membres de plein droit de la communauté.*[72]

70 Cf. B. Constant's speech at the *Athénée royal* in *1819: 'Il résulte de ce que je viens d'exposer, que nous ne pouvons plus jouir de la liberté des anciens, qui se composait de la participation active et constante au pouvoir collectif. Notre liberté à nous doit se composer de la jouissance paisible de l'indépendance privée... Il s'ensuit que nous devons être bien plus attachés que les anciens à notre indépendance individuelle. Car les anciens, lorsqu'ils sacrifiaient cette indépendance aux droits politiques, sacrifiaient moins pour obtenir plus; tandis qu'en faisant le même sacrifice, nous donnerions plus pour obtenir moins... Le but des modernes est la sécurité dans les jouissances privées; et ils nomment liberté les garanties accordées par les institutions à ces jouissances'.* ['From what I have iust shown, one can conclude that we can no longer enjoy the liberty of our elders, which consisted in active and constant participation in collective authority. Our liberty must consist of the peaceful enjoyment of our private independence. It follows, then, that we must be considerably more attached to our individual independence than our elders were. Because they, in sacrificing this independence in return for political rights, were giving up less to obtain more; while were we to make the same sacrifice we would be giving more to obtain less... The aim of the moderns is to secure their private pleasures, and what they think of as 'liberty' is the guaranties that the institutions give to these pleasures'.] (*De la liberté chez les* modernes, Textes choisis, présentés et annotés par M. Gauchet, Paris: Hachette Pluriel (1980), p. 515).

71 'Sovereignty resides in the universality of *French citizens*'.

72 'Nationality took shape by gradually diminishing the prevalence of citizenship. Citizens were thus able to be percieved as a subgrouping of the community of nationals, whose identity was defined by the various laws on nationality. One thus passes from the idea that the *qualité de national* was an expression of a form of political being, that is of citizenship, to the idea that the enjoyment of civil and political rights was the sole prerogative of those whose national identity designated them as members, *de plein droit*, of the community'. Tassin, *op. cite.*, note 52, p. 102.

From a fused relationship, born during the French revolutionary period, infused with terminological ambiguity, one ended up with conceptually distinct but hierarchic meanings for the two terms. The legitimacy of this arrangement is, at its roots, suspect, to say the least.

To sum up, the criterion of nationality was not the only possible one. This historical example shows that the nature of the link between citizenship and nationality is based more on an *a priori* or a 'perverse effect' than on implacable logic. Nowhere in the *droit intermédiaire* do we find a justification for considering nationality as a necessary condition for citizenship. The problem of the legitimacy of the linkage of the two notions goes right back to their origins.

On the other hand, the interest of this example lies in its ability to bring to the fore the distinct legal categories and to dispel the ambiguity in the notion of *citoyenneté* in favour of its political meaning. Certainly, once again, the difficulties do not stop at this, in so far as the definition of political rights is far from being univocal, and positive law has very little to say on the subject. There is agreement as to the hard core of these rights - electoral rights - but their contours remain fluid.[73]

Under cover of a *lato sensu* conception of citizenship, European citizenship, in the functions assigned it by Article B of the Maastricht Treaty, ignores the distinction made in national law. In my view, the risk is then that the political element of citizenship identified above will increasingly end up in parenthesis. From that moment on, if a disassociation between nationality and citizenship seems to be the flavour of the day, it is all the more likely that the nature of European citizenship becomes estranged from the primary meaning of citizenship.

[73] In effect, positive law recognises only two concepts: nationality and civic rights. It is not easy to compare civic rights with political rights, both, nevertheless, being indisputable attributes of citizenship. Maurice Hauriou developed a distinction between the two notions. According to him, civic rights allow participation in the *fonction publique* [the public domain, the administration] but not participation in primarily political power (the latter being participation in national sovereignty). Political rights thus appear as a category of civic rights reserved exclusively to citizen-electors: M. Hauriou, *op. cite.*, note 37, pp. 654-655. See also S. Caporal, 'Citoyenneté et nationalité en droit public interne', in Koubi, *op. cite.*, note 35, p. 61.

PART II

European Citizenship and Nationality

CHAPTER VI
THE RELATIONSHIP BETWEEN THE NATIONALITY LEGISLATION OF THE MEMBER STATES OF THE EUROPEAN UNION AND EUROPEAN CITIZENSHIP*

Gerard-René de Groot

I. INTRODUCTORY REMARKS

Art. 8, para. 1 EC Treaty (as amended by the Treaty of Maastricht on the European Union[1]) states:

> Citizenship of the union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.

Regarding this provision, one has to raise the twofold question, whether the European Union, by any means, can influence the grounds of acquisition and loss of the nationality of the Member States, respectively whether the legal order of the Union has already had some consequences for the content of the nationality laws of the Member States. This would not be surprising at all given the experiences in the past of political entities consisting of several states and where - like today in the European Union - the nationalities of the latter states served as ground for the acquisition of the status of 'citizen' of the newly created entity.

If one compares the development of the European Union at the end of the twentieth century in respect of the relationship of Union citizenship and the nationality of the Member States with the development of other Unions in the past, it is very likely that the Union will try to gain some power in shaping the nationality law of the Member States, because these nationalities entitle nationals of the various Member States to obtain Union citizenship and therefore all rights attached to this latter status.

To begin with, this chapter will describe the experiences of some other Unions in respect to the relationship between Union citizenship and 'nationality' of the Member States within these Unions (Part II). Then, in Part III, some impor-

* I am indebted to Mr. Luciano Milliard, who made very useful remarks on an earlier version of this contribution.

1 *Official Journal* no. C 224, 31/08/92.

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 115-147.

tant declarations on the relationship between the citizenship of the European Union and the Member States will be described and commented upon. It is argued that despite the fact that these Declarations underline the complete autonomy of Member States in nationality matters, some doubts can arise regarding possible limitations of the power of the Member States in this field. Part IV will cover the Declarations of two Member States regarding their nationality for Community purposes, whereas difficulties regarding the determination of the personal scope of European citizenship in respect of nationals of some other Member States are discussed. In this section, some examples are given of possible limitations of the autonomy of Member States in respect of the determination of their nationality for Community purposes. In Part V, some examples are examined of rules on the acquisition and loss of nationality which conflict with the principle of free movement of persons as guaranteed by the EC Treaty. It is argued that some of these rules violate European Community law.

II. EXPERIENCES IN OTHER UNIONS

A. UNITED STATES OF AMERICA[2]

More than two hundred years ago, directly after the War of Independence, the question was raised in the United States as to whether every state of the United States could grant the citizenship of the Union by naturalisation according to their own legislation or whether the Union had the right to enact uniform legislation on naturalisation. The question was finally decided by Art. I, sect. 8, clause 4 of the Constitution of the United States:[3] 'The Congress shall have Power ... to establish an uniform Rule of Naturalization.' The right to enact rules dealing with naturalisation was given to the Union, because otherwise it would have been possible for the states of the Union to develop different policies on naturalisation and immigration. In the initial period of the United States (1776-1866) other rules on nationality law, especially rules regarding the acquisition by birth and regarding the loss of nationality were regulated by the different states and not by the Union. Only after the Fourteenth Amendment[4] came into force did the entire matter of nationality become subject to federal legislation. Section 1 of the Fourteenth Amendment reads as follows: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.'

2 For an additional discussion of the developments in the United States, see V. Lippolis, *La cittadinanza europea*, Bologna: il Mulino (1994), pp. 75-85.

3 Constitution of 17 September 1787, in force on 1 July 1789.

4 Proposed by the 39th Congress on 16 June 1866, accepted on 28 July 1868.

B. The German Empire[5]

A slightly different, but comparable development can be observed in Germany during the second part of the nineteenth century. On the initiative of Prussia, the North-German Union was created in 1867. Art. 3 of the constitution of the Union gave a right of free movement in the territory of the Union to every citizen of a member state of the Union. Because the regulations regarding acquisition and loss of citizenship of the different member states varied considerably, the right to enact legislation in the field of citizenship was given to the Union. The necessary unification was realised by the enactment of the statute on the acquisition and loss of the federal and state nationality *(Gesetz über die Erwerbung und den Verlust der Bundes- und Staatsangehörigkeit)* of 1 June 1870;[6] this statute entered into force on 1 January 1871 as a law of the North-German Union. Before the day of commencement, the German empire was created. The German empire was also a federation consisting of several member states. The statute on the federal and state citizenship was immediately copied by the German empire[7] and came in force as an imperial statute *(Reichs- und Staatsangehörigkeitsgesetz)* on 1 January 1871.[8] According this statute, the federal nationality could exclusively be acquired through the acquisition of the nationality of a Member State of the German empire. In the case of loss of the citizenship of a Member State the federal nationality was lost as well.[9]

C. The Swiss Federation

A third example is Switzerland,[10] which is also a federal state. The *Schweizer Bürgerrecht* (Swiss nationality) is acquired and lost as a consequence of the acquisition or loss of a *Kantonsbürgerrecht* (citizenship of a canton) and this *Kantonsbürgerrecht* is again linked to a *Gemeindebürgerrecht* (citizenship of a municipality). Generally speaking the cantons have the right to legislate, whereas the federation

5 For an additional discussion of the developments in Germany, see Rainer Hofmann, 'German Citizenship Law and European Citizenship: Towards a Special Kind of Dual Nationality?', in this volume.

6 *Bundesgesetzblatt (des Norddeutschen Bundes)* 1870, 335; in force on the 1st of January 1871, with exception of Bavaria *(Bayern)*, where it came into force on 13 May 1871, *Elsaß-Lothringen*, in force on 31 March 1873 and *Helgoland*, in force on 1 April 1891.

7 Protocol of Versailles of 15-11-1870, *Bundesgesetzblatt*, 1870, p. 650.

8 Some minor modifications were realized by § 9 of the statute of 22 April 1871, *Reichgesetzblat*, 87 (revocation of § 1 para. 1, 8 para. 3 and 16).

9 'Die Reichsangehörigkeit wird durch die Staatsangehörigkeit in einem Bundesstaat erworben und erlischt mit deren Verlust.'

10 For a discussion of the development of the relationship between Swiss federal nationality and the citizenship of a canton, see Gerard-René de Groot, *'De Zwitserse nationaliteit'*, in *CJHB (feestbundel Brunner)*, Deventer: Kluwer (1994), pp. 115-125; Vincenzo Lippolis, *op.cit.*, note 2, pp. 85-91.

(Bund) only has this right if the constitution grants it. According to the Constitution *(Bundesverfassung)* of 12 September 1848, the power to legislate in the field of nationality law was still mainly at the cantonal level. The cantons could enact regulations regarding the acquisition and loss of the nationality. Only the deprivation of nationality was forbidden by the constitution. The competence for legislation in the field of nationality changed when the constitution of 29 May 1874 came into force (and which is still in force, with some modifications). For the field of nationality law, Art. 44 *Bundesverfassung ('BVerfG')* has particular relevancy. In the original version of the 1874 Constitution, the first paragraph of this article stated that no canton could deprive a citizen of his citizenship. The second paragraph read:

> *Die Bedingungen für die Erteilung des Bürgerrechts an Ausländer, sowie diejenigen, unter welchen ein Schweizer zum Zwecke der Erwerbung eines ausländischen Bürgerrechts auf sein Bürgerrecht verzichten kann, werden durch die Bundesgesetzgebung geordnet.*

Furthermore, Art. 54, para. 4 *BVerfG* stated that a foreign wife of a Swiss national acquired the *Bürgerrecht* (*Gemeindebürgerrecht*, therefore *Kantonsbürgerecht* and finally, *Schweizer Bürgerrecht*) of her husband at the moment of their marriage.

Since 1874, the federation has therefore had the power to enact provisions regarding naturalisation and renunciation of nationality. Furthermore, the acquisition of nationality by way of marriage was regulated at the federal level. All other grounds for acquisition and loss of nationality with exception of 'deprivation' had to be regulated at the cantonal level.

After an unsuccessful attempt to modify Art. 44 *BVerfG* in 1922,[11] this article was finally modified in 1928.[12] The reason for this modification was an increase in the number of foreigners living in Switzerland. Art. 44 para. 1-4 *BVerfG* contains the following wording:

> *(1) Ein Schweizer Bürger darf weder aus der Schweiz noch aus seinem Heimatkanton ausgewiesen werden.*
> *(2) Die Bedingungen für die Erteilung und den Verlust des Schweizer Bürgerrechts werden durch die Bundesgesetzgebung aufgestellt.*
> *(3) Sie kann bestimmen, daß das Kind ausländischer Eltern von Geburt an Schweizer Bürger ist, wenn seine Mutter von Abstammung Schweizer Bürgerin war und die Eltern zur Zeit der Geburt in der Schweiz ihren Wohnsitz haben. Die Einbürgerung erfolgt in der früheren Heimatgemeinde der Mutter.*
> *(4) Die Bundesgesetzgebung stellt die Grundsätze für die Wiederaufnahme in das Bürgerrecht auf.*

[11] BBl. 1920 I, 515; IV 138; 1921 I 176; III 335; 1922 I 650, 654, 656, II 1, 871. Rejected by referendum of 11 June 1922.

[12] AS 44.724; BBl. 1920 V 1; 1922 III 661; 1927 II 269; 1928 I 77, 79, 81, II 153. Accepted by referendum of 20 May 1928.

As the result of this modification, the federation can exercise influence on each and every ground for acquisition and loss of Swiss nationality.[13] The constitutional provisions on nationality were finally modified in 1983.[14] Art. 44 *BVerfG* was totally revised and Art. 54, para. 4 *BVerfG* was revoked. Following this modification Art. 44 *BVerfG* reads:

> *(1) Der Bund regelt den Erwerb und den Verlust des Bürgerrechts durch Abstammung, Heirat und Adoption sowie den Verlust des Schweizer Bürgerrechts und die Wiedereinbürgerung.*
> *(2) Das Schweizer Bürgerrecht kann auch durch Einbürgerung in einen Kanton und eine Gemeinde erworben werden. Die Einbürgerung erfolgt durch die Kantone, nachdem der Bund die Einbürgerungsbewilligung erteilt hat. Der Bund erläßt Mindestvorschriften.*

The main goal of the modification of 1983 was the realisation of equal treatment of men and women in the field of nationality law, but at the same time, the power to legislate was again slightly moved from the cantonal level to the federation. The new version gives the right to legislate in this field to the federation, independent of the cantons in respect of the acquisition of nationality based on family relationships, as well as in respect of the loss of nationality and reintegration. With respect to naturalisation, the new article states clearly that the federation formulates the minimum conditions. Furthermore cantons can only naturalise a foreigner with previous consent of the federation. The power to naturalise is thus at the cantonal level, but the federation keeps an eye on the whole issue.

III. THE RELATIONSHIP BETWEEN EUROPEAN CITIZENSHIP AND NATIONALITIES OF THE MEMBER STATES

A. Declarations Regarding the Relationship

In the three federations discussed above, the opinion finally accepted was that it would not be wise to grant total freedom of movement to all citizens of the member states without - at least a limited - federal influence on the regulations concerning the grounds of acquisition and loss of nationality. It is very unlikely that this conclusion will be substantially different with regard to the European Union: because the consequence of nationality of a Member State is the entitlement to the right of free establishment in other Member States and to several (other) benefits in those other Member States, all Member States (and therefore the Union) are very interested in the rules and policies regarding the grant and

[13] It must be mentioned that the possibility created by the third paragraph to introduce an *ius sanguinis a matre* was finally utilized fifty years later, in 1978.

[14] *Bundesbeschluß* of 24 June 1983, BBl. 1983 II 703. Accepted by referendum of 4 December 1983. See BBl. 1984 I 614.

loss of the nationality of their (fellow) Member States.

Nevertheless, at first sight one has to deny the presence of any influence of the European Union on the nationality legislation of the Member States. The Representatives of the governments of the Member States obviously discussed this problem, because they added a special 'Declaration (no. 2) on the Nationality of a Member State' to the Maastricht treaty. The Declaration states as follows:

> The Conference declares that, wherever in the Treaty establishing the European Community 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. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a Declaration lodged with the Presidency and may amend any such Declaration when necessary.

Every Member State seems to be totally autonomous with regard to the regulation of the nationality of its own country. This is underlined as well in the Declaration of the Member States as a reaction to the unilateral Declarations of Denmark at the occasion of the Danish ratification of the Maastricht Treaty,[15] because the first two paragraphs of the Danish Declaration address the relationship between Danish nationality and European citizenship:

> Danish Declaration on Citizenship of the Union
>
> 1. Citizenship of the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-State. The question of Denmark participating in any such development does, therefore, not arise.
> 2. Citizenship of the Union in no way in itself gives a national of another Member State the right to obtain Danish citizenship or any of the rights, duties, privileges or advantages that are inherent in Danish citizenship by virtue of Denmark's constitutional, legal and administrative rules. Denmark will fully respect all specific rights expressly provided for in the Treaty and applying to nationals of the Member States.
> 3. ....; 4. .....

In reaction to this Danish statement, the Heads of State or Government[16] in their European Council session of 11 and 12 December 1992 again emphasised the message of the Declaration on nationality attached to the Maastricht Treaty:

[15] 'Unilateral Declarations of Denmark, to be associated with the Danish Act of Ratification of the Treaty on European Union' and of which the 11 other Member States take cognizance.

[16] 'Decision of the heads of state or government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union'. See on this decision, D. Curtin and Van Ooik, 'Denmark and the Edinburgh Summit: Maas-

> The provisions, of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. 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.

Keeping in mind the Declaration on citizenship of the Union attached to the Treaty of Maastricht, the Danish Declaration is rather surprising. The autonomy of the Member States in nationality matters was obviously already recognised. There seemed to be no reason for Denmark to hesitate about this autonomy. However, it may be, that the Danish hesitations were caused by the Danish text of Art. 8. The Danish text reads as follows:

> *Der indfores et unionsborgerskab. Unionsborgerskab har enhver, der er statsborger i en medlemsstat.*[17]

In most of the other Community languages, an obvious linguistic difference was made between the status, which indicated the 'membership' of a Member-State on one hand and the newly created European citizenship on the other hand. Compare the wording in English: 'nationality of a Member-State' versus 'citizenship of the Union'; in Netherlands: *nationaliteit* versus *burgerschap;* in French: *nationalité* versus *citoyenneté;* in German: *Staatsangehörigkeit* versus *Bürgerschaft;* and in Spanish: *nacionalidad* versus *ciudadanía.*

The double use of the word *borgerskab* was perhaps 'the oil on the fire' of the Danish fear that the creation of European citizenship could be the first step on the way to the decline of their own (Danish) nationality. I have discovered that the Italian text however, has the same feature as the Danish, using both times the same expression *cittadinanza.* Yet, similar hesitations were not expressed by Italian authorities or authors. But that can perhaps be explained by the different attitudes of Denmark and Italy with respect to drafts published by the European Commission. Denmark (like the United Kingdom) is always highly critical when it comes to details of the text of the drafts, whereas Italy tends to concentrate on the main lines of a proposal, without paying too much attention to the details.

tricht without Tears', in D. O'Keeffe and P.M. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, London: Chancery Law Publishing (1994), pp. 349-365.

17 Citizenship of the union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.

B. Doubts Regarding the Complete Autonomy of Member States in the Field of Nationality Law

The opinion formulated in Declaration no 2, in the Danish Declaration, and in the reaction of the European Council is obvious: the national autonomy in nationality matters is not affected at all by the creation of a European citizenship. Nevertheless I have some doubts as to whether the first-sight conclusion that Member States are still completely autonomous can be maintained in all circumstances. In the first place we can observe, that the relation between the first and the second sentence of the (Maastricht) Declaration on nationality is not completely clear. The first sentence gives the right to each Member State to determine who is a national of its state: the nationality of a Member State shall be determined solely by reference to the national law of that Member State and not by reference to community law. But the second sentence gives a Member State the possibility to make an additional Declaration 'for information' regarding the determination of the persons who possess the nationality of that Member State.

Is the consequence of this second sentence that a Member State is able to exclude some groups of its nationals from the rights of the EC treaty? And can a Member State grant these rights to groups of individuals who do not possess the nationality of that Member State in the sense of the regular nationality legislation? Or is the Member State only able to give an authoritative explanation of its nationality laws, if reasonable doubts arise as to who exactly is a national of that Member State?

Of course, the other Member States need information about the question, for example, whether they should only consider as German nationals for community purposes those persons who possess German nationality in the sense of the German nationality act, or if Germans in the sense of Art. 116 of the German constitution fall within this 'privileged category' as well. And of course, the other Member States want to know whether a British overseas citizen is a British citizen for Community purposes. But would it be possible, that for example, for the Netherlands to make a Declaration that all Netherlands citizens born outside the territory of the Kingdom of the Netherlands are not Netherlands citizens for Community purposes?

In a reading of the Netherlands' law of citizenship, no reasonable doubt arises as to whether children of Netherlands citizens born abroad are Netherlands. These children acquire Netherlands citizenship by birth *iure sanguinis* and therefore, a contrary Declaration addressed to the Presidency of the European Community would be rather surprising. Would such a Declaration perhaps violate the aim of Art. 8 of the Treaty? The answer to this question depends - *inter alia* - on the interpretation of the second sentence of the Additional Declaration: does this grant total freedom to make any thinkable Declaration regarding the determination of the nationals of a Member State? And, what in particular is the aim of the words, 'for information' and 'when necessary' in that second sentence?

Doubts about the total freedom of the Member States arose as well after the *Micheletti* decision of the European Court of Justice of 7 July 1992.[18] In this decision, the Court held,

> *La définition des conditions d'acquisition et de perte de la nationalité relève, conformément au droit international, de la compétence de chaque État membre, compétence qui doit être exercée dans le respect du droit communautaire.*

States are autonomous regarding the regulation of their nationality, but have to respect international law. This is an old and generally accepted rule, already codified in Art. 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws of The Hague.[19] But the essential question is why the *Micheletti* Court stressed the necessity of respect for community law. Until now, the European Union has not enacted any regulation or directive in the field of nationality law[20] and in view of the above-mentioned Declaration of the heads of government attached to the Maastricht Treaty and the Declaration of the European Council in December 1992, it is not very likely that a regulation or directive will be prepared in the near future.

It may be argued that the nationality legislation of a Member State could violate three general principles of community law:

a) the obligation of solidarity (*Gemeinschaftstreue;* Art. 5 EC Treaty). A violation of this principle would be observed if a Member State granted its nationality to an important part of the population of a non-EU country, without any previous consultation with Brussels. The same would be the case if a Member State lodged a declaration regarding the determination of nationals for Community purposes, including in it a significant part of the population of a non-EU country, without previous consultation with Brussels. This view will be elaborated in Part IV, *infra*, especially Part IV.B. and Part IV.C.
b) the right of free movement within the European Union. Such a violation could exist if the rules for loss or acquisition of the nationality conflict with the right of free movement of persons. Some examples of such rules will be examined in Part V.

18 Case 369/90, *Mario Vincente Micheletti and others* v. *Delegación del Gobierno en Cantabria*; Decision of 7 July 1992; Jurisprudentie Hof van Justitie 1992 I, 4239-4263.

19 12-4-1930: *United Nations Treaty Service*, Vol. 179, 89. 'It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.'

20 The only attempt to have some influence on nationality matters was a resolution of the European Parliament of 18 September 1981, *Official Journal* 1981 C 260/100, following a discussion regarding the British Nationality Act 1981, that a certain harmonization of nationality law should be promoted in order to avoid that persons could be born stateless on the territory of the Community.

c) the rules regarding the acquisition or loss of the nationality of a Member State cannot violate public international law, especially fundamental rights guaranteed by international law.[21] If an individual acquires the nationality of a Member State based on the application of a rule which violates international law, other Member States are entitled to treat the person involved as not possessing the nationality involved, and therefore as a non-EU citizen. This conclusion is in conformity with the general reaction regarding an attribution of a nationality under violation of international law.[22] If one loses the nationality of a Member State because of the application of a rule which violates international law, the general accepted view is that the other Member States should not regard such a withdrawal of nationality as non-existent: if the Member States would do this, the international and national rules which aim to reduce cases of statelessness would not be activated.[23] In the framework of the European Union, another more effective attitude is indicated. Other Member States and the Union must treat the person involved as still possessing European citizenship.[24]

Before examining the first two above-mentioned points some remarks should be made about the determination of the nationality of citizens of Member States for Community purposes.

IV. THE DETERMINATION OF NATIONALITY FOR COMMUNITY PURPOSES

A. The Declarations of Germany and the United Kingdom

Two Member States made special Declarations in response to the question of who must be considered as their nationals for Community purposes. Both Member States did not simply 'explain' their nationality legislation, but patently created a special, functional nationality for Community purposes. This observation is of importance for the interpretation of the words 'for information' in the

21 For a different view, see R. Kovar and D. Simon, 'La citoyenneté européenne', *Cahier de Droit européen* (1994), p. 291.

22 See Gerard René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln: Heymans (1979), pp. 17-23.

23 *Ibid.*, p. 22.

24 Compare as well, David O'Keeffe and Antonio Bavasso in their chapter in this volume, 'Fundamental rights and the European Union', where they underline that, once an individual has obtained the status of a European citizen, judicial supervision of the ECJ concerning depriving an individual of the nationality of a Member State is perfectly admissible in the light of the effects that this measure will produce on European citizenship rights. See also S. Hall, *Nationality, Migration Rights and Citizenship of the Union*, Dordrecht: Martinus Nijhoff (1995), pp. 9,10,99. I will not elaborate on this question in this chapter, but will devote a separate publication to this topic in the near future.

Declaration on nationality attached to the Maastricht Treaty. These words do not exclude the possibility that the determination of nationals for Community purposes deviates from the general definition of nationals.[25]

As far back as 1957, Germany made a Declaration that not only Germans in the sense of the German nationality statute (the *Reichs- und Staatsangehörigkeitsgesetz* of 1913, as modified, which already included all nationals of the Democratic Republic of Germany), but also Germans in the sense of Art. 116 Constitution *(Grundgesetz),* which includes ethnic Germans in Eastern Europe, e.g., the so-called 'Wolga-Germans' are considered Germans for European Community purposes.[26]

In 1973, at the occasion of the accession of the United Kingdom to the European Community, this new Member State made a Declaration on the interpretation of British nationals for Community purposes as well. This Declaration was revised following the enactment of the new British Nationality Act of 1981, which came into force on 1 January 1983. It is remarkable to observe that the redefinition of 'British for Community purposes' was a matter 'subject to discussions with the Community'.[27] Obviously, the government of the United Kingdom felt that it was not totally free regarding the determination of its nationals for EC purposes.

As a general rule, all British citizens in the sense of the new British Nationality Act are nationals for Community purposes, whereas the 'British Dependant Territories Citizen', 'British Overseas Citizens', 'British Subject without Citizenship' and 'British Protected Persons' are not. But to this general rule, some exceptions are made. Remarkable is the fact that British citizens residing on the Channel Islands or the Isle of Man are excluded from the right on free movement,[28] whereas British Dependant Territories Citizens residing in Gibraltar are included.[29] The inclusion of the Gibraltarians is an immediate consequence of

25 See also Andrew Evans' chapter, 'Union Citizenship and the Constitutionalization of Equality in EU Law', with reference to Case T 230/94 *Frederick Farrugia* v. *EC Commission.*

26 See 'Treaties establishing the European Communities', *Office for Official Publications of the European Communities* (1978), 573. Compare Albert Bleckmann, 'German Nationality Within the Meaning of the EEC Treaty', *Common Market Law Review (*1978), pp. 435-446, and also Albert Bleckmann and Ingo Erberich, in Bleckmann (ed.), *Europarecht,* 5th edition (1990), No. 2114.

27 On this point see also: Evans, *op. cit.*, note 25, for further references.

28 See in more detail Hall, *op.cit.,* note 24, p. 23.

29 See *Official Journal* (1972) L 73/196; *Bundesgesetzblatt II,* 1410; on this declaration, A.C. Evans, 'Nationality Law and the Free Movement of Persons in the EEC, with Special reference to the British Nationality Act 1981', *Yearbook of European Law* (1982), 174-189; A.C. Evans, 'European Citizenship: a Novel Concept in EEC law', *American Journal of Comparative Law* (1984), pp. 679-715; P. Oliver, 'Non-community Nationals and the Treaty of Rome', *Yearbook of European Law* (1985), p. 60; R. Plender, 'An Incipient Form of European Citizenship', in F.G. Jacobs (ed.), *European Law and the Individual,* Amsterdam: North Holland Publishing Company (1976), pp. 42-45. Compare also

Art. 227, para 4, EC Treaty: 'The provisions of this Treaty shall apply to the European Territories for whose relations a Member State is responsible.'

Writing about the right of patriality[30] in the United Kingdom Laurie Fransman concluded, 'Thus, non-patrial Gibraltarians are only minimally removed from the scope of patriality, but acquire this advantage from Brussels, and not from Westminster'.[31]

The position of the Channel Islanders and the Manxmen (citizens on the Isle of Man) is complicated. Art. 2 of Protocol 3 of the 1972 Accession Treaty *does* exclude them from the right of free movement with the words '[They] shall not benefit from Community provisions relating to the free movement of persons and services'. But unlike e.g., the Faroe Islanders (see *infra*) these two groups are not completely deprived of their status as 'nationals of a Member State for Community purposes'.[32] Art. 6 of Protocol 3 of the 1972 Accession Treaty defines the Channel Islanders and Manxmen as those persons who hold the citizenship of the United Kingdom and Colonies by virtue of having been born, adopted, naturalised or registered in one of the islands (or by virtue of one of their parents or grandparents having been born, adopted, naturalised or registered in one of the islands).

However, a Channel Islander or Manxman loses his exceptional status and gains the Community rights of a British national, 'if he has at any time been resident in the United Kingdom for five years'. Hall[33] urges that attention be paid to the position of a Channel Islander or Manxmen who manages to live 'in any place other than the United Kingdom for more than five years, especially if that place is another Member State'. Hall concludes that it would be 'anomalous' if such a person 'does not lose his exceptional status and its attendant disability from access to the Treaty's economic migration rights'. I have to admit that I hesitate about this statement of Hall. It is an anomaly indeed, if for example, a Manxman who marries an Irish national and lives as a spouse of this Irish national in Ireland would not acquire an independent status as European citizen with free movement rights after a residence of at least five years in the territory of the Community. My hesitations are fed by the reference in Art. 6 of Protocol 3 to the situation of the British citizen born abroad, but registered as British be-

Command Paper 9062, published by Her Majesty's Stationery Office.

30 '...free to live in, and to come and go into and from, the U.K. without let or hindrance, except such as may be required under and in accordance with this Act to enable their right to be established....' (Section 1, Subsection 1 Immigration Act 1971).

31 L. Fransman, *British Nationality Law and the 1981 Act*, London: Fourmat Publishing (1989), p. 23. According to Sect. 5 BNA 1981, Gibraltarians are able to acquire British citizenship by making a declaration of registration. Compare V. Bevan, *The Development of British Immigration Law*, London: Croom Helm (1986), pp. 127: 'a last-minute victory in the House of Lords'.

32 Hall, *op.cit.*, note 24, p. 23, therefore concludes, that they do benefit from the provisions of Art. 8b- 8e EC Treaty.

33 Hall, *op.cit.*, note 24, p. 29, footnote 6.

cause of the links of their parents or *grandparents* with the Channel Islands or the Isle of Man. If a residence in a third country would be enough in order to acquire full rights of free movement as a European citizen, the reference to the grandparents seems to be at the least, superfluous.

The other Member States did not protest against the German and British unilateral Declarations and are therefore in my opinion, bound by these Declarations (compare Art. 20 para 5 of the Vienna Convention on Treaties). Any hesitation about the validity of these unilateral Declarations is moot after the Declaration on nationality attached to the Treaty of Maastricht, which makes it possible to lodge Declarations similar to those made by Germany and the United Kingdom to the Presidency and to amend such Declarations, as the United Kingdom did. The example of the Declaration of the United Kingdom demonstrates that a Member State is not completely free in the unilateral determination of its nationals for Community purposes. If the United Kingdom would like to make an amended Declaration excluding the Gibraltarians, such a Declaration would perhaps violate Art. 227, para. 4 EC Treaty.

Some other Treaty provisions have consequences for the personal scope of the Treaty, and therefore for European citizenship as well. Compare the special position of the Danish nationals living on the Faroe Islands and Greenland, who are not Danish nationals for Community purposes.[34] Compare as well the position of the Finish nationals living on the Aland islands. Art. 227 (5)(a) EC Treaty (as amended in 1972, on the occasion of Denmark's accession to the Community) provided that the Treaty did not apply to the Faroe Islands, but that until the end of 1975, Denmark could make a Declaration that the Treaty applied to those islands. Denmark did not make such a Declaration and the territory of the Faroe Islands is now excluded. The Treaty of Maastricht amended Art. 227 (5)(a), which now states that the Treaty does not apply to the Faroe Islands. Art. 4 of Protocol 2 of the Accession Treaty of Denmark provided that, 'Danish nationals resident in the Faroe Islands shall be considered to be nationals of a Member State' from the date on which the Danish government made a positive Declaration on the applicability of the Treaty to the Faroe Islands. Because Denmark did not do so, the Danish nationals resident on the Faroe Islands are not European citizens, although they possess the same nationality as the Danish living in other parts of Denmark or any other part of the world.[35]

With respect to Danish residents of Greenland, the situation is even more complicated.[36] In 1973 Greenland, together with metropolitan Denmark, became part of the European Community. In 1979, Greenland obtained the status of a self-governing community within Denmark.[37] In 1982, a referendum on Greenland's withdrawal from the Community was passed; this led to the 1985 'Green-

[34] See Hall, *op.cit.* note 24, pp.23-25.
[35] So Hall, *op.cit.*, note 24, p. 23.
[36] Hall, *op.cit.*, note 24, p.24.
[37] Act 577 of 29 November 1978.

land Treaty' amending the Treaties establishing the European Communities.[38] This treaty re-classified Greenland as an Overseas Territory. Therefore, the Greenlanders are now nationals of a Member State living in an Overseas Territory, which is not territory of the Union. With regard to the position of such nationals in respect to European citizenship, see Section C, *infra.*

B. A Problem with Respect to Spanish Nationality for Community Purposes

It is remarkable that Spain did not make any Declaration in order to explain who is a Spanish citizen for Community purposes, nor does the Accession Treaty contain a provision which could help with the determination of Spanish nationals who are entitled to the benefits of the Community. Prior to the execution of the Accession Treaty, Spain had concluded several treaties on multiple citizenship with Latin American countries. Spaniards who acquire the nationality of those Latin American countries do not lose Spanish nationality, while the citizens of those Latin American countries can acquire Spanish citizenship without losing the Latin American nationality involved. These *Tratados de doble nacionalidad* constituted a problem that was discussed during the negotiations regarding the accession of Spain to the Community. This fact I conclude from a 1981 publication of Elisa Perez Vera;[39] she writes:

> *es ... un aspecto del Derecho español de nacionalidad que parece despertar serias reservas en ciertos juristas comunitarios que abogarian por su modificacion.*[40]

The goal of the publication of Elisa Perez Vera was to convince lawyers that the Spanish system of double citizenship did not constitute any danger for the other Member States of the Community. If a Spaniard acquires the nationality of a Latin American country which has concluded a *Tratado de doble nacionalidad* with Spain, he will not lose Spanish citizenship, but during the time he resides in a country outside Spain, he does not enjoy any right attached to Spanish citizenship. His Spanish nationality is *en hibernacion* (dormant) until he resides in Spain again. After having done that, his Spanish nationality awakens once more, including all the rights attached to this nationality (including - after the accession to the Community- the rights which Spaniards possess as European citizens). Obviously the Spanish government convinced Brussels with similar arguments, because Spain was not forced to make an explanatory Declaration on Spanish nationality which excluded Spaniards with a Latin American nationality from the benefits of the EC Treaty. Would Spain now be allowed to lodge a unilateral Dec-

38 *Official Journal* (1985) L 29/1.

39 'El sistema español de doble nacionalidad ante la futura adhesion de España a las Comunidades Europeas', *Revista de instituciones europeas* (1981), pp. 685-703.

40 *Ibid.*, p. 685.

laration on Spanish nationality to the Presidency of the Union including in the category 'Spanish for Community purposes' all double Spanish/Latin American citizens without any previous consultation of the European Commission? One could argue that such a Declaration would violate the obligation of solidarity (Art. 5 of the Treaty).

One should note however, that this violation may only apply to the first generation of Spaniards acquiring a Latin American nationality. This conclusion can be made from the *Micheletti* decision of the European Court of Justice: Italy and Argentina had concluded a treaty on double citizenship similar to treaties existing between Spain and several Latin American countries, *inter alia* Argentina. An Italian who acquired Argentinean citizenship did not lose Italian nationality, but could not exercise any right attached to this nationality until he resided in Italy again. Nevertheless, the Italian authorities concluded that the child (*in casu* Mario Vicente Micheletti) of an Italian national, who previously acquired Argentinean citizenship and who was born in Argentina, acquired *iure sanguinis* Italian nationality, without any restriction. In the opinion of the Italian authorities, the child could exercise all rights linked to Italian citizenship, including the rights derived from the EC Treaty such as the right of free movement within the European Union. It is not surprising that Spain was not amused with this unusual interpretation of the scope of the Italian-Argentinean treaty, as this interpretation differs considerably from the Spanish interpretation of its similar treaties with Latin American countries. Spain obviously applies the traditional principle *nemo plus iuris transferre potest quam ipse habet:*[41] a Spaniard, who cannot exercise the rights normally attached to this citizenship until he resides in Spain, can only transfer this nationality *iure sanguinis* to his children under the same restriction. In the end, the European Court of Justice accepted the Italian interpretation of the Italian-Argentinean treaty, because this right of interpretation was a domestic matter and did not violate either international law or Community law. Because of this acceptance of the 'surprising' Italian interpretation, it would not constitute a violation of Art. 5 EC Treaty if Spain would suddenly lodge a Declaration containing a corresponding interpretation of the Spanish treaties on double nationality, even if Spain probably originally assured the negotiators of the Community that its interpretation of these treaties was different.

C. Nationals of a Member State Living in non-EU Overseas Territories

A very special difficulty with respect to the determination of nationals of a Member State for Community purposes, is created by the nationals of a Member State living in non-European territories of those Member States when those terri-

[41] (Also known as *nemo dat quod non habet):* No one can transfer more rights than he himself has.

tories are not recognised territories of the European Union. One example is the Netherlands nationals living in the Netherlands Antilles or Aruba. The Kingdom of the Netherlands consists of three territories: the European part of the Kingdom (commonly known as the Netherlands), the Netherlands Antilles and Aruba. Only the territory of the European part of the Kingdom belongs to the European Union; the territories of the Caribbean islands (Netherlands Antilles and Aruba) do not belong to the Union but are territories in the sense of Art. 227 para 3 EC Treaty.[42] Each country within the Kingdom has its own constitution *(Grondwet van Nederland, Staatsregeling van de Nederlandse Antillen* and *Staatsregeling van Aruba),* to which the Charter of the Kingdom is superior (Art. 5 para 2 Charter). Art. 3, para 1, sub c of the Charter of the Kingdom states that the regulation of Netherlands nationality belongs to the legislative power of the Kingdom. The nationality of the Kingdom of the Netherlands is therefore regulated by the *Rijkswet* (a statute for the whole Kingdom of the Netherlands, including the Caribbean, non-EU territories). This Netherlands Nationality Act knows only one nationality status *(Nederlanderschap)* without making any distinction between those nationals who have a close connection with the Caribbean part of the Kingdom, and those who have an obvious link with the European part of the Netherlands. The question thus posed is, whether those Netherlands nationals who have an obvious close connection to the non-EU territories of the Kingdom of the Netherlands should enjoy the benefits guaranteed by the EC Treaty, or, in other words: are these Netherlands nationals European citizens or not?

In the opinion of Mortelmans and Temmink (in a publication in the *Tijdschrift voor Antilliaans Recht (TAR) Justicia)*[43] Netherlands nationals with a close link to the Netherlands Antilles and Aruba do not enjoy the right of free movement guaranteed by the EC Treaty.[44] Mortelmans and Temmink emphasise that Art. 135 EC Treaty prescribes that the freedom of movement within the Member States for workers from the non-European countries and territories of the Member States shall be governed by agreements to be concluded with the

[42] This position differs from that of the neighboring islands St. Martin and Guadaloupe, which have the status of French *département d'outre-mer* to which Art. 227 para 2 EC-Treaty is applicable.

[43] K.J.M. Mortelmans en H.A.G. Temmink, 'Het vrije personenverkeer tussen de Nederlandse Antillen en Aruba en de Europese Gemeenschap', in *Met het oog op Europa; De Europese Gemeenschap, De Nederlandse Antillen en Aruba, Uitgave van de Stichting Tijdschrift voor Antilliaans Recht* Willemstad, the Netherlands: Justicia (November 1991), pp.51-91, especially p. 63, 64. Hall, *op. cit.,* pp. 25-30, comes to the same conclusion.

[44] Compare as well the publications of J.M. Burgers-Vos, 'Europa '92 en het vrije verkeer van werknemers (Een studie naar de regeling van het vrije werknemersverkeer in EEG-verband, de positie van de Nederlandse Antillen en de gevolgen van Europese wetgeving terzake voor de Nederlandse Antillen)', *TAR Justicia* (1992), pp. 3-15 and R.S.J. Martha, 'Antillianen, Arubanen en het vrije verkeer van werknemers in Europa', *TAR Justicia* (1992), pp. 205-211.

unanimous approval of all the Member States.[45] The exclusion of those nationals with a close link with the overseas countries and territories is affirmed - in Mortelmans and Temmink's opinion - by Art. 42, para 3 of Regulation 1612/68: according to them, it must be determined which Netherlands nationals are excluded from the benefit of free movement within the Union.[46]

In order to determine the personal scope of the EC Treaty in this respect, Mortelmans and Temmink pay special attention to a publication of Hartley,[47] who mentions two different possibilities in order to distinguish between nationals who are European citizens and nationals who do not possess this status.[48] The first possible criterion is the ordinary or habitual residence of the persons involved. An obvious disadvantage of this criterion is that it is easy to change the residence.[49] If this criterion were to be used, a national of the Netherlands Antilles who wanted to immigrate to Spain would be able to do so merely after a stopover-stay in Amsterdam (perhaps with a short visit to the town authorities in order to enrol in the civil registry).[50] An additional problem when using this criterion is what to conclude with respect to Netherlands nationals who have a tie with the Antilles or Aruba and who want to move to a Member State of the Union, but who have had their last ordinary or habitual residence in a third country, e.g., Venezuela? Is such a residence in a third country enough to be treated as a European Netherlands national and therefore as a European citizen? And what about Netherlands nationals born in a third country which is geographically, considerably closer to the Netherlands Antilles and Aruba than to the European part of the Kingdom? Are they all European citizens, even if their parents were born on the Antilles or Aruba? All these questions show - in my opinion - that the residence criterion does not work and probably has as its only advantages, the promotion of flights to Amsterdam (preferably by Royal Netherlands Airlines) and an increased booking rate of the hotel rooms in Amsterdam.

A second criterion of Hartley which was cited by Mortelmans and Temmink relates to the grounds for acquisition of the nationality. The origin of a person (in this context, the answer to the question of whether the person involved has a

45 Hall, *op. cit.*, note 24, pp. 62, 63.

46 This criterion is used by Hall, *op. cit.*, note 24, pp. 28, 29, in order to determine who is a national with special links with an overseas country or territory.

47 T.C. Hartley, *EEC Immigration Law*, Oxford: North Holland Publishing Company (1978), pp. 77-80.

48 Hall, *op. cit.*, note 24, p. 63.

49 Compare Hall, *op. cit.*, note 24, p. 28, with reference to the words of Christopher Greenwood, 'Nationality and the limits of the Free Movement of Persons in Community Law', *Yearbook of European Law* (1987), p. 189: 'those criteria must be found in Community law not least because, with the exception of United Kingdom law, the nationality laws of the Member States do not make sufficient distinctions between nationals who are connected with overseas countries and territories and those connected with the metropolitan territory'.

50 Compare Burgers-Vos, *op. cit.*, note 44, p. 9.

closer link with the European part of the Kingdom or with the overseas non-EU territories) should be determined using the origin of the nationality of the person involved. Under this view, the origin of a person could be derived from the birth on the territory of a certain part of the Kingdom *(iure soli:* birth in Europe or in the Caribbean territories) or residence during a certain period in the European or Caribbean part of the Kingdom. It would be possible as well to give relevancy to the origin of the (Netherlands) nationality of the parents *(ius sanguinis)* or the spouse. Hartley favours this second criterion.[51] Mortelmans and Temmink hesitate and argue that using this criterion, the nationals of a third state, e.g., Venezuela, who obtain Netherlands nationality by naturalisation (after a residence of five years in the European part of the Netherlands) would be in a better position than Aruban and Antillean Netherlands nationals living in Europe.[52] Other arguments against the use of this origin-based criterion can be made. Since 1893, Netherlands nationality law has applied, as the main principle for the attribution of the nationality at birth, the *ius sanguinis* principle.[53] Only a very modest part of the population has acquired the nationality at birth based exclusively on a provision which contains some *ius soli* elements.[54] As a consequence of this minor importance of the *ius soli* principle as ground for acquisition of nationality, it will be difficult in many cases to precisely trace the geographical dimension in the grounds for the acquisition of Netherlands nationality by a certain person. In many cases, genealogical research will be necessary. Clearly, Hartley defended this origin-based criterion while bearing in mind the British nationality legislation, where the geographical element was patently present in the very recent past. For the Kingdom in the Netherlands one must conclude however, that the application of Hartley's criterion would be too complicated.

Mortelmans and Temmink propose that a combination of both of the criteria discussed by Hartley would create a useful criterion: they write that it would be possible for the Netherlands to use the Antillean and Aruban immigration regulations *(Landsverordening Toelating en Uitzetting)* in order to distinguish between Netherlands Overseas Territories Nationals and Netherlands European citizens.[55] Art. 1 of the Antillean Immigration Regulation identifies the persons to

51 Hartley, *op. cit.*, note 47, p. 77.

52 Hartley, *op. cit.*, note 47, p. 64.

53 Art. 3, para 1 of the Netherlands Nationality Act: '1. A child shall be a Netherlands national if the father or the mother is a Netherlands national at the time of its birth, or is a Netherlands national who dies before its birth.'

54 The most important provision is Art. 3, para 3 Netherlands Nationality Act: '3. A child shall be a Netherlands national if it is born to a father or mother who is residing in the Netherlands or the Netherlands Antilles at the time of its birth and who was born of a mother residing in one of these countries.' This is the so-called third-generation rule. The provision of Art. 3, para 3 does not contain a strict *ius soli* regulation. The provision does not demand that the child was born on Netherlands soil, only that the father or mother resides in the Kingdom.

55 Hall, *op. cit.*, note 24, p. 64.

whom the Immigration provisions are *not* applicable these are the Netherlands nationals born in the Netherlands Antilles or nationals born on Aruba before 1 January 1986,[56] if these persons were residing in the Netherlands Antilles on 1 January 1986, as well the children of these nationals. The Antillean (and Aruban) regulation therefore distinguishes between European and Caribbean Netherlands nationals. This distinction could, according to Mortelmans and Temmink, also be used for the determination of Netherlands nationals for Community purposes. Using that distinction, all Netherlands nationals who do not fulfil the conditions of Art. 1 of the Antillean (respectively Aruban) Immigration Regulation would qualify as European Citizens and all those who fulfil the conditions of the Antillean, respectively Aruban Immigration Regulations, do not. According to Mortelmans and Temmink, Antillean and Aruban Netherlands nationals nevertheless should acquire the right of freedom of movement after a residence of five years in the Netherlands.[57]

Several arguments can be used against this proposal of Mortelmans and Temmink. In the first place, the period of residence necessary for the conversion of a non-European Netherlands national into a European citizen is quite arbitrary. Indeed, foreigners can apply for naturalisation after five years of residence in the Netherlands, but in several cases this period is shorter: for married and unmarried partners of Netherlands nationals, and for former nationals or persons who possessed in the past the special colonial citizenship of the Netherlands. It is an unacceptable result that a Netherlands Antillean national would have to fulfil a longer residence requirement than a Surinamese or Indonesian ex-national in order to acquire the status of a European citizen. A second point against the proposal is that the Aruban Immigration Regulation does not apply to the spouses of nationals born on Aruba. The consequence of using the proposed criterion would be, that a Netherlands European Citizen would lose the status of a European Citizen by marriage with an Aruban, whereas a German who would marry an Aruban would keep the status of European citizen. Naturally, the former case would be a violation of international law. And last but not least, it is unacceptable that the authorities of a non-EU territory decide the question of who is a European citizen and who is not.

The unacceptability of the consequences of the proposed criterion can also be illustrated by looking at the regulations, which probably will be accepted, if Aruba or the Netherlands Antilles would gain independence. In that case, it would be necessary to conclude a treaty on the division of nationals between the Netherlands and the new State or States. In light of the poor demographic consequences of a similar treaty concluded between the Netherlands and Surinam in

[56] On this day, Aruba was separated from the Netherlands Antilles and received a *status aparte* within the Kingdom of the Netherlands as a 'country'.

[57] The period of five years corresponds with the residence condition of Art. 8 of the Netherlands Nationality Act, which must be fulfilled before making an application for naturalisation.

1975 (which resulted in a considerable part of the population of Surinam moving to the Netherlands in order to avoid the loss of Netherlands nationality), one can expect that in a similar treaty with the Netherlands Antilles or Aruba a system of dual citizenship will probably be created for at least a period of half a century. E.g., one can imagine the following legal construction: every Netherlands national residing in the new State keeps his or her Netherlands nationality as of the day of independence, but acquires as well the nationality of the newly created State. During the next fifty years, Netherlands nationality would still be transferred *iure sanguinis*; after that period, this possibility would expire. Such a regulation would not violate international law and would not cause immigrations flows in the days before the independence. A very surprising consequence from the perspective of European Union law would however, be that the persons involved would suddenly not be living anymore in a non-European territory of a Member State of the Union, but in a third country, and yet would undoubtedly enjoy the rights of a European citizen.

Keeping in mind all these problems, we must conclude that the nationals of Member States who live in non-European territories of these Member State are European citizens in spite of Art. 135 EC Treaty, if the Member State involved makes no distinction between the national with a close connection with the European part of the Member State and those who have a close connection to the Overseas territory.[58] Everybody who identifies himself or herself as a national of that Member State with a valid identity card or passport[59] of that Member State must be treated as a European Citizen. The Member State involved may however, lodge an unilateral Declaration excluding nationals with a genuine link with non-European Overseas territories of that State from the scope of European citizenship. Whether authorities of the Member State would need the co-operation of the non-European territories for making such a Declaration is a matter of domestic constitutional law of the Member State involved.[60]

[58] This view is in conformity with the fact that according the Commission in its draft directive on voting rights for EP elections, the determination of the entitlement to voting rights for individuals from overseas countries and territories is an exclusive competence of the Member State which has particular links to this territories because of its exclusive competence to determine nationality. See: COM (93), 0534 final. See also: C. Closa, 'Citizenship of the Union and Nationality of Member States', *Common Market Law Reports* (1995), p. 511.

[59] As prescribed by Art. 2 (1) and 6 (a) of Directive 73/148 (establishment and services) and Art. 3 (1) and 4 (3) (a) of Directive 68/360 (workers).

[60] Compare also the publication of Martha, *op.cit.*, note 44, who, via another argumentation, comes to the same conclusion.

D. Some Limitations on the Power to Determine Nationals for Community Purposes

In the preceding paragraph, some problems relating to the determination of the scope of European citizenship were discussed. It has already been concluded that particular unilateral Declarations excluding or including certain groups of persons can be problematic, from the perspective of Community law.

Unilaterally excluding the British Dependant Territories Citizens residing in Gibraltar from the definition of 'British national' for Community purposes would probably violate Art. 227, para. 4 EC Treaty, if the territory of Gibraltar would remain territory of the Community.

Unilaterally including all individuals with Spanish-Latin American citizenship within the scope of European citizenship would probably violate the obligation of solidarity *(Gemeinschaftstreue)* prescribed by Art. 5 EC Treaty.[61]

A violation of the obligation of solidarity can also occur if the attempt to include a group of persons within the scope of European citizenship is not made by lodging a unilateral Declaration on the nationality of that Member State, but instead by a special, extra-ordinary grant of the nationality of that Member State to the whole population of a non-EU State or an important part of that population, without previous consultation of the European Commission. For example, if the Netherlands were to suddenly grant to the whole population of Surinam or an important part of that population, the Netherlands nationality, it could be argued, that this would constitute a violation of the obligation of solidarity.[62] Nevertheless, much depends on the reaction or non-reaction of the other Member States and the Commission. The recent history of nationality law of the United Kingdom provides two examples: during the Falkland Islands war, an Act of Parliament was passed granting British nationality (and therefore, in my opinion, European citizenship) to all British Overseas Citizens living on the Falkland Islands (who were not European citizens before; and perhaps with the exception of those who were at the same time, Argentineans of Italian descent). No protest was made by the European Commission or other Member States. Even more recently, a part of the population of Hong Kong was granted an option right to British nationality: again, no protest was heard.

61 See Hall, *op. cit.*, note 24, pp. 64-73, who pays attention as well to the procedures, which have to be followed if duties under Art. 5 are violated.

62 This example has not been invented at my writing-table. Prime Minister Lubbers of the Netherlands suggested this as a 'political possibility' during a speech given in 1992. An advantage of such a grant of Netherlands nationality would be that Netherlands nationals with ties to Surinam would perhaps more easily re-immigrate to Surinam.

V. LIMITATIONS ON THE PERSPECTIVE OF THE RIGHT OF FREE MOVEMENT OF PERSONS

A. Introductory Remarks

Art. 8, A para. 1 EC Treaty provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and in the measures adopted to give it effect. Nevertheless, one should realise that many national rules hinder to some extent, the complete exercise of this right on free movement; in some cases, they even completely prevent the exercise of this right. The national rules on acquisition and loss of nationality can influence the exercise of the right of free movement as well: it therefore can be argued that at least some of these rules violate Community law, or at a minimum, some of these rules must be interpreted and applied in conformity with Community law in order to avoid a conflict therewith.[63] In this section, some problematic provisions of the nationality laws of some Member States will be examined from the perspective of a potential hindrance of the exercise of the right of free movement by the persons involved or by close relatives of these persons and therefore from the perspective of a potential violation of Community law.

B. Loss of Nationality due to Continuous Residence Abroad

A violation of the right of free movement within the European Union could exist, if a national of a Member State could lose his nationality (and therefore the status of a citizen of the Union) when he lives abroad in another Member State during a certain period of time. The exercise of the right of free movement guaranteed by the EC Treaty in combination with such a regulation would cause the loss of the nationality and therefore - in some cases - the loss of the status of European citizen. In my opinion, such a regulation cannot be accepted by Community law.

1. The Netherlands

Let us assume, for example, that the Netherlands would amend the provision of Art. 15, para. c of the Netherlands Nationality Act in the following sense: Netherlands nationality will be lost by any Netherlands national who also possesses another nationality and who lives (after having reached the age of majority) for a continuous period of ten years outside the Netherlands, the Netherlands Antilles or Aruba, other than in the service of the Netherlands or the Netherlands Antil-

[63] Compare S. O'Leary, 'Nationality Law and Community Citizenship: A Tale of Two Uneasy Bed-fellows', *Yearbook of European Law* (1992), pp. 353-384, especially p. 378; Hall, *op. cit.*, note 24, p.33.

les or of an international organisation at which the Kingdom is represented, or as the spouse of a person in such service. In some cases, the application of this rule would constitute a violation of Community law. That would be the case if one possessed Netherlands nationality and that of a non-EU country. After having lived for a period of ten years in e.g., Germany, the citizen would lose Netherlands nationality and thus, the status of European citizen. This result is especially unacceptable in cases where the citizen involved is not able to renounce his non-EU nationality, e.g., Venezuela, due to the domestic nationality rules of the non-EU country involved.[64]

It should be emphasised that this author did not invent this amendment of Art. 15, para. c of the Netherlands Nationality Act, but instead, simply paraphrased an amendment proposed in a bill sent by the Netherlands government to the Parliament on 25 February 1993.[65] But on 16 September 1993, the Netherlands Government modified the proposed new article: no loss of Netherlands nationality occurs if the person involved resides in a Member State, and furthermore, in many cases the loss can be prevented by having a Netherlands passport or a certificate of possession of Netherlands nationality.[66] The government

[64] One should realise that a considerable number of persons possess both Netherlands and Venezuelan nationality (the one *iure sanguinis*, the other *iure soli*), partly due to the fact that Venezuela is a neighboring country of the Carribean part of the Kingdom of the Netherlands, and partly due to the activitities of the Shell Oil Company in Venezuela.

[65] *Voorstel van Rijkswet tot wijziging van de Rijkswet op het Nederlanderschap, wetsontwerp* 23 029 (R 1461). The complete text of the proposed new Art. 15 reads:
1. Het Nederlanderschap gaat voor een meerderjarige verloren: a. door het afleggen van een verklaring van afstand; b. indien hij tevens een vreemde nationaliteit bezit en tijdens zijn meerderjarigheid gedurende een ononderbroken periode van tien jaar in het bezit van beide nationaliteiten zijn hoofdverblijf heeft in het buitenland, anders dan in een dienstverband met Nederland, de Nederlandse Antillen of Aruba dan wel met een internationaal orgaan waarin het Koninkrijk is vertegenwoordigd, of als echtgenoot van een persoon in een zodanig dienstverband. 2. Het in het eerste lid, onder b, bepaalde is niet van toepassing op de Nederlander die tijdens zijn meerderjarigheid die vreemde nationaliteit verkrijgt. 3. De in het eerste lid, onder b, bedoelde periode van tien jaar wordt geacht niet te zijn onderbroken indien de betrokkene gedurende een periode korter dan één jaar zijn hoofdverblijf in Nederland, de Nederlandse Antillen of Aruba heeft.

[66] The new proposed article reads:
1. Het Nederlanderschap gaat voor een meerderjarige verloren: a. door het afleggen van een verklaring van afstand; b. indien hij tevens een vreemde nationaliteit bezit en tijdens zijn meerderjarigheid gedurende een ononderbroken periode van tien jaar in het bezit van beide nationaliteiten zijn hoofdverblijf heeft buiten Nederland, de Nederlandse Antillen en Aruba, en buiten het grondgebied van de lid-staten van de Europese gemeenschap, anders dan in dienstverband met Nederland, de Nederlandse Antillen of Aruba dan wel met enig internationaal orgaan waarin het Koninkrijk is vertegenwoordigd, of als echtgenoot van of als ongehuwde in een duurzame relatie samenlevend met een persoon in een zodanig dienstverband. 2. Het in het eerste lid, onder b, bepaalde is niet van toepassing op de Nederlander die tijdens zijn meerderjarigheid die vreemde nationaliteit verkrijgt. 3. De in het eerste lid onder b. bedoelde periode van tien jaar wordt geacht niet te zijn onderbroken indien de betrokkene gedurende een periode korter dan één jaar zijn hoofdverblijf in Nederland, de

justified this modification of the proposed amendment on the ground that the first proposed text could violate the right of free movement within the European Union.[67] I agree with this view of the Netherlands Government, with the addition that in my opinion, an exception should be made for every Netherlands national residing in a country within the European Economic Area.

Perhaps one can even argue that the corresponding provision, which is in force at the moment, hinders the free exercise of the right of free movement. At this point in time, Art. 15, para. c provides that a person who is an adult shall lose his Netherlands nationality if, after having reached the age of majority, he has his residence for a continuous period of ten years outside the Netherlands, the Netherlands Antilles or Aruba *in the country of his birth and of which he is also a national,* other than in the service of the Netherlands or the Netherlands Antilles or of an international organisation at which the Kingdom is represented, or as the spouse of a person in such service. Because of the fact that loss of Netherlands nationality can only occur if the Netherlands citizen lives 'in the country of his birth and of which he is a the national', the situation in which the Netherlands national suddenly ceases to be a European citizen (if he resides within the European Union) will never occur. Nevertheless, one can observe at least some hindrances to the exercise of the right of free movement, because one can imagine that the Netherlands national hesitates to return to the country of his birth because of the potential future loss of his Netherlands nationality and the rights derived from that nationality.

2. *Belgium*

Loss of nationality because of a continuous residence abroad exists not only in the nationality legislation of the Netherlands, but also in other EU countries (for example, Belgium). But in my opinion, a technical detail in the corresponding Belgian law prevents the Belgian legislation from violating Community law. The relevant part of Art. 22 of the Belgian Nationality Act reads:

> § 1er. *Perdent la qualité de Belge: ....*
> 5° *le Belge né à l'étranger à l'exception des anciennes colonies belges lorsque:*
> a) *il a eu sa résidence principale et continue à l'étranger de dix-huit à vingt-huit ans;*
> b) *il n'exerce à l'étranger aucune fonction conférée par le Gouvernement Belge ou à l'intervention de celui-ci, ou n'y est pas occupé par une société ou une association de droit belge au personnel de laquelle il appartient;*

Nederlandse Antillen of Aruba, dan wel op het grondgebied van een van de lid-staten van de Europese gemeenschap heeft. 4. De in het eerste lid onder b. bedoelde periode wordt gestuit door de verstrekking van een verklaring omtrent het bezit van het Nederlanderschap dan wel van een reisdocument in de zin van de Paspoortwet. Vanaf de dag der verstrekking begint een nieuwe periode te lopen.

67 *Memorie van Antwoord*, pp. 8,9.

c) il n'a pas déclaré, avant d'atteindre l'âge de vingt-huit ans, vouloir conserver sa nationalité belge; du jour de cette déclaration, un nouveau délai de dix ans prend cours.

.....

§ 3. Le § 1er, 5° et 6°, ne s'applique pas au Belge qui, par l'effet d'une de ces dispositions, deviendrait apatride.'

As in the case of the Netherlands, it is possible that a Belgian national could lose his Belgian nationality and therefore European citizenship, while exercising the right of free movement of persons in another Member State of the European Union. But by lodging a Declaration of continuation to the Belgian authorities in due time, the loss of Belgian nationality can be avoided. Of course one can imagine cases in which the person involved simply forgets to lodge a Declaration of continuation. Nevertheless, in such cases I would not conclude that this requirement is a violation of Community law: it is not unacceptable that a citizen has to make such a declaration. Recently, in the *Factortame*[68] decision, the Court of Justice stressed (in the context of the obligation to pay compensation for damages caused by a violation of Community law) that an injured person must show reasonable diligence in order to avoid loss or damage or limit its extent and that a person must make use of all legal remedies available to him.[69] Keeping this principle in mind, one could argue in the context of nationality law that one cannot complain about a violation of Community law if one could have avoided all damages by making a simple declaration.

C. (Non)acquisition of Nationality at Birth

Most Member States of the European Union attribute their nationality to children of their nationals irrespective of whether these children are born in the country or on foreign territory and irrespective of whether the parents were born abroad. Two Member States have a different approach: the United Kingdom and Belgium. Thus, the regulations of these Member States must be examined in more detail.

1. The United Kingdom

Section 1, subsection 1 of the British Nationality Act (BNA) of 1981 provides that a person born in the United Kingdom shall be a British citizen if, at the time of his birth, his father or mother is (a) a British citizen; or (b) settled in the United Kingdom. Section 2 of the BNA states *inter alia* that a person born outside the United Kingdom shall be a British citizen if, at the time of his birth, his father or mother is a British citizen and:

[68] Decision 5 March 1996.
[69] Point 84 of the *Factortame* decision.

(a) has obtained that citizenship other than by descent; or
(b) is serving outside the United Kingdom in British service, the recruitment for that service having taken place in the United Kingdom; or
(c) is serving outside the United Kingdom in service under a Community institution, the recruitment for that service having taken place in a country which at the time of the recruitment was a Member State.

Section 3 of the BNA applies to the nationality status of - to put it briefly - the second generation born abroad. According to subsection 2 of section 3, a person born outside the United Kingdom shall be entitled, on an application for his registration as a British citizen made within the period of twelve months from the date of the birth, to be registered as a British citizen if the requirements specified in subsection (3) or, in the case of a person born stateless, the requirements specified in paragraphs (a) and (b) of that subsection, are fulfilled in the case of either that person's father or his mother ('the parent in question'). These requirements are that:

(a) the parent in question was a British citizen by descent at the time of the birth; and
(b) the father or mother of the parent in question
  (i) was a British citizen otherwise than by descent at the time of the birth of the parent in question; or
  (ii) became a British citizen otherwise than by descent at commencement, or would have become such a citizen otherwise than by descent at commencement, but for his or her death; and
(c) as regards some period of three years ending with a date not later than the date of the birth:
  (i) the parent in question was in the United Kingdom at the beginning of that period; and
  (ii) the number of days on which the parent in question was absent from the United Kingdom in that period does not exceed 270.

Subsection 4 allows for the possibility that the Secretary of State allows a later registration than within the twelve months immediately after the birth of the child by providing that 'if in the special circumstances of any particular case the Secretary of State thinks fit, he may treat subsection 2 as if the reference to twelve months were a reference to six years'.

If a person is born abroad as a child of a British parent without acquiring British citizenship, he may acquire a right to registration if the conditions of subsection 5 are fulfilled:

(5) A person born outside the United Kingdom shall be entitled, on an application for his registration as a British citizen made while he is a minor, to be registered as such a citizen if the following requirements are satisfied, namely--
  (a) that at the time of that person's birth his father or mother was a British citizen by descent; and
  (b) subject to subsection (6), that that person and his father and mother were in the United Kingdom at the beginning of the period of three years ending

> with the date of the application and that, in the case of each of them, the number of days on which the person in question was absent from the United Kingdom in that period does not exceed 270; and
> (c) subject to subsection (6), that the consent of his father and mother to the registration has been signified in the prescribed manner.[70]

As one can see, the entire regulation is extremely complicated. The aim of the described provisions is obviously to avoid the situation in which someone acquires British nationality without having any genuine link with the United Kingdom. The goal of these provisions is the same as that of Art. 15, para._c of the Netherlands Nationality Act, which was discussed above. It is not difficult to imagine cases in which the (grand)children of British nationals who reside abroad in another Member State enjoy their right to free movement guaranteed by the EC Treaty and yet do not obtain British nationality at birth and are not entitled to registration. The consequence is that children of European citizens working within the European Union under certain circumstances will not receive a right to European citizenship.[71] In my opinion, this consequence is unacceptable from the perspective of the aims of the EC Treaty. The British legislation however, opens a possibility to escape from this first-sight conclusion, because Section 3, subsection 1 of the BNA states:

> If while a person is a minor an application is made for his registration as a British citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen.

In conformity with the aims of the EC Treaty, the Secretary of State should use this opportunity of registration, if the minor involved is the child of a British parent who is exercising his right to free movement as guaranteed by Art. 8A of the Treaty. If the Secretary of State does not do so, he will be violating Community law.[72]

70 Subsection 6 reads: In the case of an application under subsection (5) for the registration of a person as a British citizen-- (a) if his father or mother died, or their marriage was terminated, on or before the date of the application, or his father and mother were legally separated on that date, the references to his father and mother in paragraph (b) of that subsection shall be read either as references to his father or as references to his mother; (b) if his father or mother died on or before that date, the reference to his father and mother in paragraph (c) of that subsection shall be read as a reference to either of them; and (c) if he was born illegitimate, all those references shall be read as references to his mother.

71 Except in cases in which the law of the country of birth confers to them the nationality of the Member State involved.

72 With regard to the British rules regarding acquisition of citizenship by descent, compare the interesting opinion of Andrew Evans' chaper, 'Union Citizenship and the Constitutionalization of Equality in EU Law'. He points out that British citizens who use their right of free movement under circumstances, only pass on to their children a 'second class' citizenship. This could be classified as exposing them to discrimination. In the

2. Belgium

Similar complications exist in Belgium. According to Art. 8 of the Belgian Nationality Act, the following persons acquire Belgian nationality:

a) every child of a Belgian parent born in Belgium; or
b) the child of a Belgian parent born abroad, if one of three conditions is fulfilled:
   1) the parent was born in Belgium or in territories under Belgian administration; or
   2) within five years after the birth of the child the Belgian parent registers the child as a Belgian national; or
   3) the child is otherwise born stateless or loses his (other) nationality before his eighteenth birthday.[73]

Reading these conditions, one can imagine cases in which a child of Belgian parents does not acquire Belgian nationality (and therefore European citizenship) whereas the parents are exercising their European citizenship right in another Member State. However, the parents are always able to register their child as a Belgian citizen and that fact distinguishes the Belgian legislation from the British provisions. There is perhaps some nuisance for the parents involved, but they are able to avoid all nationality disadvantages for their children by making a declaration for Belgian citizenship in due time (within five years after the birth of the child). Again, keeping in mind again the ruling of the European Court of Justice in the *Factortame* case, where the Court stressed that one has the obligation to avoid damages if possible, I conclude that Belgian parents cannot complain about a violation of Community law by the Belgian legislation on the acquisition of nationality at birth, if they themselves 'forget' to lodge a Declaration to the Belgian authorities.

D. Problems Caused By (Non)Access Of Non-EU Spouses Of European Citizens

If a European citizen is married to a non-EU citizen, the exercise of the right of free movement by the European citizen may be influenced by the difficulties

opinion of Evans, the application of such rules is 'problematic' where these rules - although reflecting national traditions - are employed as an instrument of immigration control and have consequences incompatable with free movement rights. Cf. as well Hall, *op. cit.*, note 24, pp. 32, 33.

73 Art. 8, para 1 reads: *1er. Sont Belges: 1. L'enfant né en Belgique d'un auteur belge, 2. L'enfant né à l'étranger: a) d'un auteur belge né en Belgique ou dans des territoires soumis à la souveraineté belge ou confiés à l'administration de la Belgique; b) d'un auteur belge ayant fait dans un délai de cinq ans à dater de la naissance une déclaration réclamant, pour son enfant, l'attribution de la nationalité belge; c) d'un auteur belge, à condition que l'enfant ne possède pas, ou ne conserve pas jusqu'à l'âge de dix-huit ans ou son émancipation avant cet âge, une autre nationalité.*

which the non-EU spouse will encounter regarding the acquisition of European citizenship, after moving to another Member State. Of course, all Member States allow the application for naturalisation after a certain period of residence. The required period of residence however varies among the Member States. Therefore, it is not difficult to imagine that a non-EU spouse of a European citizen would suffer disadvantages in fulfilling the residence requirement in a Member State, if the EU-spouse decides to enjoy the right of free movement to another Member State and expects that the non-EU spouse moves with him. This difficulty is particularly striking if the EU-spouse accepts work again in another Member State every four or five years, which is not uncommon for employees of certain multinationals. Although the spouses of some EU nationals may have lived for many years (even a decade) in the European Union, they will never be able to acquire European citizenship because their EU-spouses' Member States of origin require residence in that Member State in order to become naturalised. This proposition may be properly illustrated with some examples.

1. The United Kingdom

Section 6, subsection 2 of the British Nationality Act provides:

> If, on an application for naturalisation as a British citizen made by a person of full age and capacity who on the date of the application is married to a British citizen, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule I for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.

Schedule I contains following provisions:

> Naturalisation as a British citizen under section 6(2)
>
> 3. Subject to paragraph 4, the requirements for naturalisation as a British citizen under section 6(2) are, in the case of any person who applies for it–
>
> (a) that he was in the United Kingdom at the beginning of the period of three years ending with the date of the application, and that the number of days on which he was absent from the United Kingdom in that period does not exceed 270; and
>
> (b) that the number of days on which he was absent from the United Kingdom in the period of twelve months so ending does not exceed 90; and
>
> (c) that on the date of the application he was not subject under the immigration laws to any restriction on the period for which he might remain in the United Kingdom; and
>
> (d) that he was not at any time in the period of three years ending with the date of the application in the United Kingdom in breach of the immigration laws; and

(e) the requirement specified in paragraph 1(1)(b).[74]

The Secretary of State may make some exceptions to the conditions of Paragraph 3, based on Paragraph 4,[75] in relation to paragraph 2.[76] If this author understands it correctly, the Secretary of State may take any or all of the following actions:

(a) treat the applicant as fulfilling the requirement specified in paragraph 3(a) or paragraph 3(b), or both, although the number of days on which the applicant was absent from the United Kingdom during the period there-mentioned exceeds the number of days specified;
(b) treat the applicant as having been present in the United Kingdom for the whole or any part of any period during which he would otherwise have been treated under paragraph 9(1) as having been absent;
(c) treat the applicant as fulfilling the requirement specified in paragraph 3(d), although the applicant was in the United Kingdom in breach of the immigration laws during the period there-mentioned; and/or
(d) waive the need to fulfil any or all of the requirements specified in paragraphs 3(a) and (b) if, on the date of the application, the person to whom the applicant is married is in a service to which section 2(1)(b) applies, that person's recruitment for the service having taken place in the United Kingdom.

The Secretary of State can probably naturalise the foreign spouse of a British national living in another Member State, if he uses the possibilities created by the

74 Paragraph 1(1)(b): 'that he is of good character'.

75 Para. 4 reads: Paragraph 2 shall apply in relation to paragraph 3 with the following modifications, namely--(a) the reference to the purposes of paragraph 1 shall be read as a reference to the purposes of paragraph 3; (b) the references to paragraphs 1(2)(a), 1(2)(b) and 1(2)(d) shall be read as references to paragraphs 3(a), 3(b) and 3(d) respectively; (c) paragraph 2(c) and (e) shall be omitted; and (d) after paragraph (e) there shall be added--(f) waive the need to fulfil all or any of the requirements specified in paragraph 3(a) and (b) if on the date of the application the person to whom the applicant is married is serving in service to which section 2(1)(b) applies, that person's recruitment for that service having taken place in the United Kingdom.

76 Para. 2 reads: If in the special circumstances of any particular case the Secretary of State thinks fit, he may for the purposes of paragraph 1 do all or any of the following things, namely–(a) treat the applicant as fulfilling the requirement specified in paragraph 1(2)(a) or paragraph 1(2)(b), or both, although the number of days on which he was absent from the United Kingdom in the period there mentioned exceeds the number there mentioned; (b) treat the applicant as having been in the United Kingdom for the whole or any part of any period during which he would otherwise fall to be treated under paragraph 9(1) as having been absent; (c) disregard any such restriction as is mentioned in paragraph 1(2)(c), not being a restriction to which the applicant was subject on the date of the application; (d) treat the applicant as fulfilling the requirement specified in paragraph 1(2)(d) although he was in the United Kingdom in breach of the immigration laws in the period there mentioned; (e) waive the need to fulfil the requirement specified in paragraph 1(1)(c) if he considers that because of the applicant's age or physical or mental condition it would be unreasonable to expect him to fulfil it.

above-mentioned sections. In my opinion, the Secretary of State should do so in order to prevent the exercise of the rights guaranteed by the EC Treaty from being hindered by the disadvantages which would be suffered with respect to the access to European citizenship by the non-EU spouse.

2. The Netherlands

In the Netherlands, the difficulty for the non-EU spouse of a national living in other Member States is more hidden. Art. 8, para. 2 of the Netherlands Nationality Act states that in order to be eligible for the grant of Netherlands nationality by naturalisation, no residence requirement exists for an applicant who has been married to a Netherlands national for at least three years. Nevertheless, these applicants must fulfil the conditions of Art. 1, para. 1 d): they must be integrated in the society of the Netherlands and must have a reasonable command of the Netherlands language. It will be very difficult for the foreign spouses involved to fulfil these conditions while living abroad in other Member States of the European Union. Again, I conclude that this is very problematic from the perspective of the right of free movement within the European Union.

3. Belgium

The Belgian nationality legislation causes comparable problems. Art. 16, para. 2 of the Belgian Nationality Act states the conditions for acquisition of Belgian nationality by the foreign spouse of a Belgian national: the foreigner can make a Declaration of option for Belgian nationality, if they have lived together for at least six months in Belgium.[77] The Declaration of option can be refused,

> *si un empêchement résulte de faits personnels graves qu'il doit préciser dans les motifs de sa décision, ou s'il y a des raisons, qu'il doit également préciser, d'estimer que la volonté d'intégration du déclarant est insuffisante.*

According to the last sentence of Art. 16, para. 2, the foreign spouse can be deemed to fulfil the residence requirement in Belgium while living together with a Belgian national abroad, if real ties with Belgium are developed. This part of the provision reads as follows:

[77] Art. 16 § 2 reads as follows: *l'étranger qui contracte mariage avec un conjoint de nationalité belge ou dont le conjoint acquiert la nationalité belge au cours du mariage, peut, si les époux ont résidé ensemble en Belgique pendant au moins six mois et tant que dure la vie commune en Belgique, acquérir la nationalité belge par déclaration faite et agréée conformément à l'article 15. Le tribunal peut surseoir à statuer, pendant un temps qu'il détermine mais qui ne peut excéder deux ans, si pour des motifs propres à l'espèce, il estime que la durée de la résidence commune en Belgique est insuffisante pour lui permettre d'apprécier la volonté d'intégration du déclarant. Le refus de l'agrément ne rend pas irrecevable une déclaration ultérieure.*

Peut être assimilée à la vie commune en Belgique, la vie commune en pays étranger lorsque le déclarant prouve qu'il a acquis des attaches véritables avec la Belgique.

With regard to this provision, we must likewise conclude that the situation in which the non-EU spouse of a Belgian national lives in another Member State, exercising his right to freedom of movement, is not taken into account.

E. Loss of Nationality Because of Voluntary Service of a Foreign State

A final example of nationality provisions which can conflict with Community law can be illustrated by Art. 23-8 of the French Civil Code:

Perd la nationalité française le Français qui, occupant un emploi dans une armée ou un service public étranger ou dans une organisation internationale dont la France ne fait pas partie ou plus généralement leur apportant son concours, n'a pas résigné son emploi ou cessé son concours nonobstant l'injonction qui lui en aura été faite par le Gouvernement.

L'intéressé sera, par décret en Conseil d'État, déclaré avoir perdu la nationalité française si, dans le délai fixé par l'injonction, délai qui ne peut être inférieur à quinze jours et supérieur à deux mois, il n'a pas mis fin à son activité.

Lorsque l'avis du Conseil d'État est défavorable, la mesure prévue à l'alinéa précédent ne peut être prise que par décret en conseil des ministres.[78]

If the French authorities applied this provision to a national who is working in the service of another Member State, that would constitute a violation of Community law. The application of this provision is thus not compatible with the goals of the EC Treaty.

VI. CONCLUDING REMARKS

Although Declaration Number 2 on the nationality of Member States of the Treaty of Maastricht (as well as some other Declarations) emphasise the exclusive autonomy of Member States in the determination of their nationality for Community purposes, I have argued in this chapter that this autonomy is limited. In the first place, a certain unilateral declaration of a Member State may conflict with a provision of the Treaty regarding the personal scope of the Treaty (e.g., exclusion of the Gibraltarians) or with the obligation of solidarity (e.g., conferral of Netherlands nationality on all nationals of Surinam). Furthermore, we must realise that several provisions regarding the acquisition and loss of the nationality of a Member State frustrate the exercise of the right of free movement within the Union. Only a few examples of such rules have been given in this chapter, but

[78] This provision corresponds with Art. 96 of the previous *Code de la nationalité française.*

those examples are already enough in order to conclude, from the perspective of the ruling of the European Court of Justice in the *Micheletti* case, that the nationality legislation of the Member States can violate Community law.

CHAPTER VII
GERMAN CITIZENSHIP LAW AND EUROPEAN CITIZENSHIP: TOWARDS A SPECIAL KIND OF DUAL NATIONALITY?

Rainer Hofmann

I. INTRODUCTION

This chapter seeks to analyse the relationship between German citizenship law and European citizenship. It addresses in particular the question as to whether the introduction of the latter might be qualified as a step to establish a - special kind of - dual nationality, and whether and to what extent that introduction of European citizenship might have an impact on the future development of German citizenship law, in particular as regards the - highly controversial - issue of dual nationality under German citizenship law. However, in order to answer these questions, it seems appropriate, first, to present the basic elements of German citizenship law; second, to describe the international legal rules concerning dual nationality; and third, to summarize the basic features of European citizenship as they emerge from the relevant provisions of the EC Treaty.

II. BASIC ELEMENTS OF GERMAN CITIZENSHIP LAW

In order to better understand the potential impact of the creation of the Union citizenship on German citizenship law as regards the issue of dual nationality, it seems appropriate, first, to briefly present the basic elements of German citizenship law currently in force, and, second, to outline the contents of proposals made in order to reform that law.

A. THE LAW IN FORCE

At the outset it is important to stress that German citizenship law[1] is essentially based upon the *ius sanguinis* principle and that it is most reluctant to accept dual

[1] For an overview of German citizenship law, see for example, R. Grawert, 'Staatsvolk und Staatsangehörigkeit', in J. Isensee, P. Kirchhof (eds.), *Handbuch des Staatsrechts*,

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 149-165.

nationality in cases of naturalisation. It should be emphasized, however, that German citizenship law, as a rule, accepts dual (or multiple) nationality for children born out of bi-national marriages and for children who concurrently acquire German citizenship as a result of the (German) *ius sanguinis* principle and another state's citizenship law based upon the *ius soli* principle.

Under the legislation presently in force[2], German citizenship is acquired upon birth if one of the married parents is a German citizen, and, as regards children born out of wedlock, if the mother is a German citizen, or, if only the father is a German citizen, his fatherhood has been legally established.

As regards naturalisation, German law distinguishes between aliens who have a right to be naturalised (in particular *Aussiedler*, i.e. persons of German ethnicity who, due to this fact, have been subjected to acts of persecution,[3] and some categories of alien residents such as young aliens or aliens residing in Germany for more than 15 years[4]), aliens who benefit from privileged naturalisation conditions (e.g. spouses of German citizens[5]), and all other aliens whose applications for naturalisation are subject to administrative discretion, even if all statutory conditions are met.[6] In principle, naturalisation is made contingent upon the loss of the applicant's previous citizenship in order to prevent dual (multiple) nationality.[7] However, pursuant to § 87 Aliens Act, naturalisation authorities do not have to apply this rule if the applicant's state of nationality generally, or individually, refuses to accept such a person's renunciation of his/her nationality or request to be denationalised.[8]

In this context, it is interesting to note that the annual number of naturalisations in Germany has considerably increased in the last decade. Whereas in 1986 only 36,646 aliens were naturalised, the respective figures for some of the later

Heidelberg: C.F. Müller Verlag, Vol. I, p. 663 ff; for a commentary on the various legal norms see, for example, K. Hailbronner and G. Renner, *Staatsangehörigkeitsrecht*, Munich: C.H. Beck Verlag (1991).

2 See § 4 *Reichs- und Staatsangehörigkeitsgesetz* (Citizenship Act) of 22 July 1913, which was last amended on 30 June 1993.

3 See § 6 *Gesetz zur Regelung von Fragen der Staatsangehörigkeit* (Act Regulating Citizenship Issues) of 22 February 1955, as amended on 18 July 1979. For a discussion of the question as to whether this legislation should be modified with a view to the recent developments in the former socialist countries see A. Zimmermann, 'Rechtliche Möglichkeiten von Zuzugsbeschränkungen für Aussiedler', Vol. 24 *Zeitschrift für Rechtspolitik* (1991), pp. 85 ff.

4 See §§ 85 and 86 *Ausländergesetz* (Aliens Act) of July 1990, which was last amended on 28 October 1994; on this issue see C. Zeng, 'Die erleichterte Einbürgerung nach §§ 85, 86 AuslG', Vol. 48 *Das Standesamt* (1995), pp. 129 ff.

5 See § 9 Citizenship Act.

6 See § 8 Citizenship Act.

7 See § 5.3.1. *Einbürgerungsrichtlinien* (Directives for Naturalization) of 1 July 1977, which were last amended on 7 March 1989. These directives, which were issued by the Federal Minister of the Interior subsequent to consultations with the *Länder* Ministers of the Interior, constitute rules to be implemented by the officials deciding upon applications for naturalization.

8 See § 5.3.3. Directives for Naturalization.

years are as follows: 101,377 naturalisations in 1990, 141,630 naturalisations in 1991, 179,904 naturalisations in 1992, 199,443 naturalisations in 1993, and 259,170 naturalisations in 1994.[9] On the other hand, however, it must be stressed that, in all these years, naturalisations subject to administrative discretion, or in other words, those naturalisations which did not concern *Aussiedler* or privileged aliens, did not constitute more than a quarter of the total number of naturalisations. As regards dual nationality, it is to be noted that in 1993, some 15,000 aliens (out of approximately 50,000 persons), whose naturalisation was subject to administrative discretion, became German citizens while keeping their previous citizenship and are, thus, dual (or multiple) nationals.

B. Proposals for the Reform of German Citizenship Law

In 1995, one of the major issues of political debate in Germany concerned the question as to whether and to what extent a reform of German citizenship law was to be brought about. Several pertinent proposals have been made; they were partly a reaction to the well-known acts of violent xenophobia which occur in Germany since the early 1990s and partly a consequence to reports stating an increasing reluctance among alien residents to seek to integrate themselves into German society. As a result thereof, the issue of facilitating, first, the acquisition of German citizenship by introducing into German citizenship law elements of the *ius soli* principle, and, second, the naturalisation of alien residents by increasing the categories of aliens entitled to be naturalised, possibly linked with a further reduction in the need to renounce one's previous nationality,[10] had gained considerable importance in the public discussion in Germany. Several proposals for the reform of German citizenship law were presented as a result.

The Government[11] stated that it would prepare a bill which would provide, *inter alia*, for additional categories of persons vested with a right to be naturalised and would introduce a new legal concept (*Kinderstaatszugehörigkeit*) which

9 These figures are quoted from 'Ausländische Wohnbevölkerung in Deutschland wächst weiter', Vol. 15 *Zeitschrift für Ausländerrecht* (1995), p. 50.

10 See, for example, D. Blumenwitz, 'Territorialitätsprinzip und Mehrstaatigkeit', Vol. 13 *Zeitschrift für Ausländerrecht* (1993), pp. 151 ff.; W. Löwer, 'Abstammungsprinzip und Mehrstaatigkeit', Vol. 13 *Zeitschrift für Ausländerrecht* (1993), pp.156 ff.; H. von Mangoldt, 'Ius sanguinis- und Ius soli-Prinzip in der Entwicklung des deutschen Staatsangehörigkeitsrechts', Vol. 47 *Das Standesamt* (1994), pp. 33 ff.; G. Renner, 'Ausländerintegration, ius soli und Mehrstaatigkeit', Vol. 41 *Zeitschrift für das gesamte Familienrecht* (1994), pp. 865 ff.

11 See S. Leutheusser-Schnarrenberger, 'Liberale Rechtspolitik in der 13. Legislaturperiode', Vol. 28 *Zeitschrift für Rechtspolitik* (1995), pp. 81 ff. (at p. 85); and H. Eylmann, 'Rechtspolitische Zielsetzungen der CDU/CSU in der 13. Legislaturperiode', Vol. 28 *Zeitschrift für Rechtspolitik* (1995), pp. 161 ff. (at p. 163). It should be noted that Ms. Leutheusser-Schnarrenberger (FDP) was then Federal Minister of Justice and that Mr. Eylmann (CDU/CSU) was (and still is) Chairman of the Legal Committee of the Bundestag.

would confer German citizenship to alien children born in Germany (*ius soli* principle) if their alien parents had been born in Germany. In the latter case, dual (multiple) nationality would be accepted, only temporarily however, since such children would have to opt for either the German or their other nationality once they come of age. The Government,[12] and even more so speakers of the Christian Democrats,[13] made it clear, however, that they were not prepared to accept dual nationality on a larger scale, primarily because such dual nationality would result in serious legal and practical problems (military service, German obligations under the 1963 Council of Europe Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality) and situations of conflicting interests.

In contrast thereto, Bündis 90/die Grünen, part of the parliamentary opposition, introduced a bill[14] which, generally speaking, combines the principles of *ius sanguinis* and *ius soli*. It envisages that all children born in Germany having one parent who is a German citizen and all children born in Germany having at least one alien parent who holds a permanent residence permit, would acquire German citizenship at birth. The bill proposes, moreover, additional categories of persons to be accorded the right to be naturalised, and envisages the facilitating of naturalisation by enlarging the categories of persons with respect to whom dual (multiple) nationality should be henceforth accepted. The latter proposal aims, in particular, at overcoming the reluctance of Turkish nationals to be naturalised in Germany. This is allegedly due to the fact that such persons would, under Turkish legislation, lose a wide range of rights, such as owning real estate in Turkey, if they renounce their Turkish citizenship.

However, with a view to the present political situation in Germany, or more precisely, given the fact that the parties forming the federal coalition government do not command a majority in the second chamber, the *Bundesrat* (Federal Council), the prospects for any such proposal to be eventually enacted seemed and still seem to be rather limited. This might be the reason why the issue of reforming German citizenship law has lost its high priority status on the political agenda.

12 See the statement of Dr. Kanther (CDU), Federal Minister of the Interior, to the *Bundestag* on 9 February 1995, Plenarprotokoll 13/18, at 1217 C.

13 See Eylmann, *op. cite.*, note 11, at p. 163.

14 *Bundestags-Drucksache* 13/423; see, in this context, V. Beck, 'Bürgerrechtspolitik von Bündnis 90/ die Grünen in der 13. Legislaturperiode', Vol. 28 *Zeitschrift für Rechtspolitik* (1995), pp. 281 ff. (at p. 282 f.); Mr. Beck was (and still is) spokesman of the parliamentary group Bündnis 90/ die Grünen on legal affairs. A similar bill (*Bundestags-Drucksache* 12/4533) had been previously introduced by the Socialdemocrats (SPD) and was announced to be re-introduced, see H. Däubler-Gmelin, 'Schwerpunkte der Rechtspolitik der SPD 1995-1998', Vol. 28 *Zeitschrift für Rechtspolitik* (1995), pp. 121 ff. (at p. 123); Dr. Däubler-Gmelin was then Vice-President of the SPD and (still is) chairwoman of its Commission on Legal Affairs. Only the PDS does not seem to consider the reform of German citizenship law as one of its important political goals, see U.J. Heuer, 'Die Rechtspolitik der Partei des Demokratischen Sozialismus im 13. Deutschen Bundestag', Vol. 28 *Zeitschrift für Rechtspolitik* (1995), pp. 165 ff.

III. DUAL NATIONALITY IN INTERNATIONAL LAW

Dual (or multiple) nationality[15] is a result of the fundamental freedom of states to choose the criteria for the conferment of their citizenship. In practical terms, it occurs as a consequence of a simultaneous application of *ius sanguinis* and *ius soli* rules, most often in cases of children born of bi-national marriages, or if a new nationality is added to the original one acquired upon birth by means of naturalisation, marriage, adoption, etc. The existence of dual (multiple) nationality is not contrary to general customary international law. Since it is considered to be a source of serious practical problems as regards, for example, military service, fiscal matters and the conflicting exercise of diplomatic protection, attempts by treaty law have been made to avoid or to reduce cases of multiple nationality or to resolve the conflicts arising therefrom.[16] Moreover, the nationality laws of many states seek to reduce the number of cases of multiple nationality, in particular, by making naturalisation contingent upon the prior loss of the former nationality, or providing for denationalisation when another nationality is acquired.

As regards diplomatic protection on behalf of individuals with multiple nationality, a distinction must be made between such protection in relation to the states of which the individual is a national, and diplomatic protection against a third state. According to the *principle of equality*, a state may not afford diplomatic protection to one of its nationals in relation to another state whose nationality such a person also possesses. According to the *principle of effective nationality*, the third state shall exclusively recognise either the nationality of the country in which such a person habitually resides, or the nationality of the country with which such a person seems to be most closely connected.[17] The relevant practice of states and international tribunals seem to indicate that these principles may be considered as constituting customary international law.[18]

15 See, for example, A. Randelzhofer, 'Nationality', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam: North Holland Publishing Company, Instalment 8 (1985), pp. 416 ff. (at p. 422 f.); and P. Weis, *Nationality and Statelessness in International Law*, 2nd ed., Aalphen a.d.Rh.: Sijthoff & Noordhoff (1979), pp. 169 ff.; for general treatises on this issue see also N. Bar-Yaacov, *Dual Nationality*, London: Stevens (1961); J. Aznar sanchez, *La doble nacionalidad*, Madrid: Ed. Montecorvo (1977); and K. Kammann, *Probleme mehrfacher Staatsangehörigkeit*, Frankfurt a.M.: Peter Lang Verlag (1985).

16 The 1930 Protocol Relating to Military Obligations in Certain Cases of Double Nationality (179 LNTS 227) and the 1963 Council of Europe Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (ETS No. 43) might be mentioned as examples of such multilateral treaties. For discussions of these and a number of other bilateral treaties see, for example, R. Donner, *The Regulation of Nationality in International Law*, 2nd ed., Irvington: Transnational Publishers (1994), pp. 201 ff.; and Weis, *op. cite.*, note 15, pp. 190 ff.

17 See, for example, Articles 4 and 5 of the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws.

18 See, for example, Donner, *op. cite.*, note 16, pp. 204 ff.; and Weis, *op. cite.*, note 15, pp.

IV. BASIC FEATURES OF EUROPEAN CITIZENSHIP

The introduction, by the Maastricht Treaty, of Articles 8 - 8e into the EC Treaty as Part Two of that Treaty can be seen as a further step towards the disassociation of EC law of persons from its original economic focus in favour of a wider notion of the individual's position in society. This development was, to some extent, anticipated by the jurisprudence of the European Court of Justice concerning the provisions of the EC Treaty on freedom of workers, freedom of establishment and free movement of services[19] and in several legislative acts of the Communities that granted certain rights of residence to migrating Community nationals.[20]

Now, Article 8 (1) of the EC Treaty establishes a citizenship of the Union and provides that 'every person holding the nationality of a Member State shall be citizen of the Union'. According to Article 8 (2), all such Union citizens enjoy the rights conferred and are subject to the duties imposed by the EC Treaty. Such rights encompass freedom of movement as granted by Article 8a; political rights such as the right of every Union citizen to vote and to stand for elections at the municipal level under the same conditions as apply to nationals of that Member State and a similar right in respect of elections to the European Parliament (Article 8b); the right to petition the European Parliament and the Ombudsman (Article 8d) in accordance with Articles 138d and 138e respectively; and certain rights to diplomatic and consular protection as provided for by Article 8c.

As however, the purpose of this chapter is not to analyse the substantive rights conferred to Union citizens by these provisions, but to discuss the question as to whether the concurrent holding of Union citizenship and German citizenship results in - a special kind of - dual nationality, it seems necessary briefly to recall the general aspects of the legal relationship between Union citizenship and the citizenship laws of the various Member States.

At the outset, it is important to stress that the Member States have not entrusted the Union with the legislative power to determine which persons are under which conditions to be considered as Union citizens. In other words: the Member States have not been prepared to transfer to the Union that part of their sovereign rights which is considered, both in international and in domestic law, as belonging to the core of a state's sovereignty, namely the right freely - admittedly within the limits set by international law - to determine the rules according to which persons acquire and lose a state's citizenship. Obviously, this absence of a most essential component of statehood is an important argument in support of the - apparently generally accepted - view that the Union does not (yet) constitute a state but may be considered, with a view to the dynamism characterising

193 ff. Of particular interest are some of the decisions of the Iran - United States Claims Tribunal as discussed by R. Donner, *ibid.*, pp. 89 ff.

19 See, in particular, Case 293/83 *Gravier* v *City of Liège* [1985] ECR 593.

20 See, in particular, Directives 90/364, 90/365, and 93/96.

the process of European integration, as a *Staatenverbund* to use the terminology of the German Federal Constitutional Court in its famous decision on the Maastricht Treaty of 12 October 1993.[21]

The firm opposition of Member States to confer to the Union any powers relating to the determination of the personal scope of the Union citizenship found additional expression in the well-known Declaration on Nationality of a Member State that was jointly adopted upon the signing of the Maastricht Treaty;[22] its essence was, again, affirmed in the Edinburgh Declaration on Citizenship.[23] In particular, these declarations stress that the question as to whether a person possesses the nationality of a Member State is to be settled solely by reference to the national law of the Member State concerned. At first sight, it would, thus, seem that the question as to whether a person possesses Union citizenship may be answered by a simple reference to the nationality laws of the Member States.

It must be stressed, however, that this reference is not unqualified. First, notwithstanding the fact that the Community, as a subject of international law, is bound to abide by the general international law rule to respect, in principle, a state's power freely to determine the individuals who are citizens of that state,[24]

21 BVerfGE 89, 155; for discussions of this judgment see, for example, J.A. Frowein, 'Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit', Vol. 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1994), pp. 1 ff.; M. Herdegen, 'Maastricht and the German Constitutional Court: Constitutional Restraints for an 'ever closer union', Vol. 31 *Common Market Law Review* (1994), p. 235; D. König, 'Das Urteil des Bundesverfassungsgerichts - ein Stolperstein auf dem Weg in die europäische Integration', Vol. 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1994), pp. 17 ff.; T. Stein, 'La sentencia del Tribunal Constitucional Alemán sobre el Tratado de Maastricht', Vol. 21 *Revista de Instituciones Europeas* (1994), pp. 745 ff.; H. Steinberger, 'Die Europäische Union im Lichte der Entscheidung des Bundesverfassungsgerichts vom 12. Oktober 1993', in: U. Beyerlin/ M. Bothe/ R. Hofmann/ E.U. Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt*, Berlin et al.: Springer Verlag (1995), p. 1317 ff.; C. Tomuschat, 'Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts', Vol. 20 *Europäische Grundrechte Zeitschrift* (1993), pp. 489 ff.

22 This Declaration reads: 'The European Conference declares that, wherever in the Treaty establishing the European Community 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. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary'. See the Final Act of the Intergovernmental Conferences on Political Union and on Economic and Monetary Union.

23 This Declaration reads: 'The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. 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'. See OJ C 348/2 of 31 December 1992.

24 This rule has been consistently emphasized by the European Court of Justice; see, in particular, case C-369/90 *Micheletti* v. *Delegación del Gobierno en Cantabria* [1992]

the Community, as a subject of international law, is also bound to respect the pertinent international law rules pertaining to acquisition and loss of nationality: this means that, although the Community has not been granted, by the Member States, the power to confer citizenship of the Union, it may not give effect, within the spheres of the competences conferred to it by the Member States, to provisions of the nationality laws of the Member States (and applications thereof) that constitute violations of the pertinent international law rules since, otherwise, the Community would contribute to the perpetuation of a breach of international law committed by a Member State and would, thus, commit itself a violation of international law. Second, it must be borne in mind that Member States are bound by Article 5 of the EC Treaty imposing upon them duties of solidarity towards the Community and the other Member States.[25] Therefore, Member States may not enact nationality provisions that violate fundamental principles of Community law or apply those provisions in such a way as to violate Community law.[26]

These qualifications of the general rule according to which the personal scope of Union citizenship is to be determined solely by reference to the nationality laws of the Member States, result in a considerable number of practical consequences.[27] Thus, by virtue of the first mentioned qualification, conferments of nationality that are not based upon an application of the *ius sanguinis* or *ius soli* principles or any other principle accepted under international law may not be given effect by the Community organs when exercising their competences;[28] the same consideration applies to denationalisations that deprive persons or groups

ECR-I 4329.

25 See, for example, S. O'Leary, 'Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows', Vol. 12 *Yearbook of European Law* (1992), pp. 353 ff. (at p. 378).

26 This has been stressed in the decisison of the European Court of Justice in the *Micheletti* case, *supra* note 24, at p. 4254, where the Court held: 'La définition des conditions d'acquisition et de perte de la nationalité relève, conformément au droit international, de la compétence de chaque État membre, compétence qui doit être exercée dans le respect du droit communautaire'.

27 For the following see, for example, S. Hall, *Nationality, Migration Rights and Citizenship of the Union*, Dordrecht/Boston/London: Martinus Nijhoff Publishers (1995), pp. 14 ff.

28 Since all of the citizenship laws of the Member States currently in force are, as regards acquisition of citizenship upon birth, based upon either the principle of *ius sanguinis* or *ius soli* or a combination thereof, the practical relevance of this qualification seems to concern only cases of naturalisation. In this context, it must be stressed that the voluntary act of applying for conferment of nationality, i.e., the deliberate will of an individual to associate himself with a state, constitutes, under general international law, a sufficient link with that state; this opinion is not in contradiction with the famous decision of the International Court of Justice in the *Nottebohm* Case (ICJ Reports [1955] 4). As this decision does not deal with the conferment of nationality in general, nor with the conferment of nationality by naturalisation, but only with diplomatic protection in cases of multiple nationality; thus, the so-called *genuine link* - requirement as such does not apply to every conferment of nationality by naturalisation; see, for example, Randelzhofer, *op. cite.*, note 15, p. 421.

of persons of their nationality on racial or religious grounds.[29] By virtue of the second qualification, Member States may not enact or apply nationality provisions that constitute violations of fundamental human rights as form part of the legal order of the Community such as, for example, the prohibition of arbitrary discrimination on the basis of sex, or religion,[30] or that involve a different treatment, in matters of nationality law, with regard to nationals of other Member States,[31], or that result in the non-recognition of an individual holding a valid identity card or passport issued by another Member State as a national of that Member State.[32]

Thus, it seems justified to state that the introduction of the Union (or European) citizenship into the EC Treaty reflects two developments: first, it establishes some kind of a direct legal relationship between the holders of that citizenship and the Union (or, more precisely, with the European Community) by means of granting to all nationals of the Member States a, however limited, set of rights to be exercised, irrespective of their domicile, in their relation with either organs of the Community or the Member States; second, while the relevant provisions re-affirm the, in principle, exclusive power of the Member States to determine the personal scope of their nationals, that power is, however, to be exercised with due respect to the basic principles of Community law. The question as to whether and to what extent these developments justify considering the relationship between the citizenship of a Member State and the European citizenship as a special kind of dual nationality will be dealt with in the subsequent section of this chapter.

V. EUROPEAN CITIZENSHIP - A SPECIAL KIND OF DUAL NATIONALITY?

At the outset, it must be stressed that, since neither the European Union nor the European Community constitute a state, the concurrent holding of the European citizenship and that of a Member State cannot be considered as resulting in the existence of a dual nationality in the 'traditional' legal sense. In order to determine whether the introduction of the European citizenship implies the crea-

29 See, for example, R. Hofmann, 'Denationalization and Forced Exile', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam: North Holland Publishing Company, Vol. II (1992), pp. 1001 ff. (at p. 1007).

30 For an opposite view see, for example, A. Zimmermann, 'Europäisches Gemeinschaftsrecht und Staatsangehörigkeitsrecht der Mitgliedstaaten unter besonderer Berücksichtigung der Probleme mehrfacher Staatsangehörigkeit', Vol. 30 *Europarecht* (1995), pp. 54 ff. (at pp. 61 ff.)

31 For an opposite view see, for example, A. Zimmermann, *ibid.*, p. 61.

32 This follows *a fortiori* from the decision of the European Court of Justice in the *Micheletti* case, *supra* note 24, where the Court held (at p. 4262) that a dual national holding the nationality of a Member State (Italy) and of a non-Member State (Argentina) must be treated by a third Member State (Spain), for purposes of Community law, as a national of the Member State (Italy).

tion of a *special kind* of dual nationality, it seems appropriate to examine whether and to what extent the legal relationship between the European Union (Community) and the persons holding the European citizenship shows the essential aspects that characterize the legal relationship between a state and its nationals. Since this chapter concerns, primarily, the question as to whether the legal relationship between German citizenship and European citizenship may be qualified as a special kind of dual nationality, it seems justified to base this analysis upon those criteria that, under German citizenship law doctrine,[33] are commonly considered as essential elements of citizenship: immediateness (*Unmittelbarkeit*), personal jurisdiction (*Personalhoheit*), continuity (*Beständigkeit*), exclusiveness (*Ausschließlichkeit*), and effectiveness (*Effektivität*).[34]

A. Criteria of Citizenship

The notion of immediateness (*Unmittelbarkeit*) means that the legal relationship between the individual (citizen) and his state is an 'immediate' (or direct) one and not contingent upon another status held by the individual such as, for example, his membership in a guild or in an estate as in the medieval state or his subjection to a sovereign ruler as in the absolutist state.[35] Since Article 8 (1) of the EC Treaty clearly shows that the European citizenship is not based upon an immediate (or direct) legal bond between the Union and 'its' citizens, but that the status of holding European citizenship depends upon the - concurrent - holding of the citizenship of a Member State, European citizenship obviously lacks the criterion of 'immediateness'. This holds true notwithstanding the *Micheletti* decision since it only qualifies - to some extent - the exclusive power of the Member States to regulate acquisition and loss of their nationalities and, thus, affirms the role of the Member States to act as an intermediary as regards acquisition and loss of the European citizenship. In other words: the *Micheletti* decision does not relate to the basic precondition of holding European citizenship, i.e. the concurrent holding of the citizenship of a Member State.

As regards 'personal jurisdiction' (*Personalhoheit*)[36] it follows from Article 8 (1) of the EC Treaty that every individual continues to be subject to the personal jurisdiction of the Member State of which he/she is a national. Although it is true that the Member States have transferred some aspects of their sovereign personal jurisdiction to the Community, in particular as regards freedom of movement, and have, thus, provided the Community with a - limited - personal jurisdiction of its own,[37] Article 8c of the EC Treaty that reserves the right to exercise

[33] See, in particular, R. Grawert, *Staat und Staatsangehörigkeitsrecht*, Berlin: Duncker & Humblot (1973), pp. 213 ff.

[34] For the following see also S. Hobe, 'Die Unionsbürgerschaft nach dem Vertrag von Maastricht', Vol. 32 *Der Staat* (1993), pp. 245 ff. (at p. 254 ff.)

[35] See Grawert, *op. cite.*, note 33, pp. 216 ff.

[36] See Grawert, *ibid.*, p. 218 ff.

[37] See already A. Bleckmann, 'The Personal Jurisdiction of the European Communities',

diplomatic (and consular) protection on behalf of Union citizens to the Member States, clearly indicates that there does not - as yet - exist any full and comprehensive personal jurisdiction of the Community. Thus, European citizenship lacks also the criterion of such *full* personal jurisdiction.

Originally, 'continuity' (*Beständigkeit*) meant that an individual's legal bond to a territory and its sovereign ruler could not be dissolved by a unilateral act of the individual, i.e. without the consent of the sovereign ruler; today, it implies that the legal effects of citizenship do not depend, in principle, upon the individual's presence on the territory of the state of which he/she is a citizen and to which territory he/she is linked by that citizenship.[38] Since, as is stated in Article 8a (1) of the EC Treaty, there is no territory of the Union (nor the Community) but only that of the Member States, there is, therefore, no legal bond between a Union citizen and a 'Union territory'. However, since Article 8a (1) of the EC Treaty grants a right 'to move and reside freely within the territory of the Member States', it seems justified to state that Union citizens enjoy some - lesser - kind of legal bond to the territory of any Member State in which they (wish to) reside and not only to that of the state of which they are nationals. Thus, the process of assimilating European citizenship to a state's citizenship has gained considerable ground as regards this aspect of 'continuity', although European citizenship is still not linked to any 'Union territory'.

Originally, the notion of 'exclusiveness' (*Ausschließlichkeit*)[39] meant that, from the point of view of domestic (German) law, a person can only hold one citizenship in order to avoid unsolvable problems of conflicting loyalties and identities. Obviously, this concept as such does not reflect reality since all states (have to) recognise, at least in the sphere of their international law relations, the existence of multiple nationality. Therefore, 'exclusiveness' should be understood so as to mean that a person holding two (or more) citizenships may not invoke his/her 'other' citizenship in the context of his/her legal relationship with a state of which he/she is a national; in this sense, the notion of 'exclusiveness' is compatible with the current state of international law as regards multiple nationality. As concerns, however, the legal relationship between European citizenship and citizenship of a Member State, it clearly results from Article 8 (1) of the EC Treaty that the former is not construed as implying such an 'exclusiveness' since it explicitly depends upon the concurrent holding of the latter. Thus, European citizenship also lacks the criterion of 'exclusiveness'.

The notion of 'effectiveness' (*Effektivität*)[40] is mainly used to determine, in cases of multiple nationality, which of the different nationalities held by an individual is to respected by a third state and, consequently, which of the states of which the person concerned is a national is entitled, under international law, to exercise its right of diplomatic (and consular) protection on behalf of the person

Vol. 17 *Common Market Law Review* (1980), pp. 467 ff.

38 See Grawert, *op. cite.*, note 33, pp. 232 ff.

39 See Grawert, *ibid.*, pp. 235 ff.

40 See Grawert, *ibid.*, pp. 244 f.

concerned with respect to that third state. Since Article 8c of the EC Treaty clearly reserves this right to exercise such diplomatic (and consular) protection to the Member States, European citizenship also lacks the criterion of 'effectiveness'.

By way of conclusion, it must, therefore, be stated that the European citizenship differs, also as regards the substantive elements essential for the qualification of a legal status as 'citizenship', most considerably from what is understood, in German citizenship law doctrine, as citizenship in the traditional legal sense. Consequently, that the concurrent holding of the citizenship of a Member State and of the citizenship of the Union constitutes - not only because the Union (and the Community) cannot be considered as a 'state' and because it lacks the power to regulate acquisition and loss of 'its' citizenship, but also with a view to the substantive elements of that citizenship - at the most a 'special kind' of dual nationality. This leads to the question of the legal nature of this European citizenship.

B. The Legal Nature of European Citizenship

The question of the legal nature of the European citizenship has been the subject of considerable scholarly discussion in Germany. With a view to the fundamental differences between European citizenship and citizenships in the 'traditional' legal sense, it is no surprise that only very few authors came to the conclusion that the European citizenship may be qualified as a genuine (*echte*) citizenship.[41] Thus, German doctrine tends to look for (historic) examples in order to clarify the legal nature of the European citizenship; in this context, the legal status of a citizen of the British Commonwealth of Nations and the so-called *Indigénat* of the 1867 Constitution of the North German Federation (*Norddeutscher Bund*) and of the 1871 Constitution of the German Empire (*Reichsverfassung*) have particularly attracted scholarly attention.

1) Some authors emphasized the similarities between the legal status of a citizen of the Union and a citizen of the British Commonwealth of Nations.[42] However, although it is true that both status are similar insofar as being a citizen of the Union or the Commonwealth of Nations presupposes the concurrent holding of the citizenship of a Member State of either the Union or the Commonwealth, it seems that the legal bond between a citizen of the Union and the Union is considerably closer than that currently existing between a Commonwealth citizen and the Commonwealth: whereas the former, as a citizen of the Union and by virtue of the EC Treaty, is granted a right to take up residence in any of the

41 See, in particular, A. Bleckmann, 'Der Vertrag über die Europäische Union', Vol. 107 *Deutsches Verwaltungsblatt* (1992), pp. 335 ff. (at p. 336).

42 See, for example, G. Ress, 'Die Europäische Union und die neue juristische Qualität der Beziehungen zu den Europäischen Gemeinschaften', Vol. 32 *Juristische Schulung* (1992), pp. 985 ff. (at p. 987).

Member States of the Union, is entitled to diplomatic protection in a third state by another Member State if the Member State of which he/she is a national is lacking consular or diplomatic representation in that third state, and has the right to vote in and to stand for elections at the municipal level in the Member State where he/she resides, the latter does not have such rights or, if such rights should be accorded in a Member State of the Commonwealth, they may be altered or repealed by a unilateral act of that state.

There is, moreover, another factor of a more political character that results in a most fundamental difference between the citizenship of the Union and the citizenship of the Commonwealth of Nations: the former should be seen in the context of the Union's eminent goal of 'creating an ever closer union among the peoples of Europe' and, therefore, as an important aspect of the process of European integration which, eventually, may result in overcoming - or at least reducing the importance of - the nation-states of Europe; thus, the citizenship of the Union constitutes an element of a dynamic process towards the reduction of the legal relevance of the citizenship status of the respective Member States. In contrast thereto, the creation of the British Commonwealth of Nations and, consequently, the status of a Commonwealth citizen reflect the political will to maintain some kind of 'integration' and corresponding individual rights in the context of the disintegration of the (colonial) British Empire; thus, the citizenship of the Commonwealth was (and is) not an element of a dynamic process, but should rather be seen as being of a static nature.

These considerations might explain why German scholars tend to examine whether and to what extent an analysis of the development of the process of the unification of Germany, i.e. from confederation (*Deutscher Bund*) to federation (*Deutsches Reich*) and its repercussions on citizenship law in Germany in the 19th century[43] might contribute to the understanding of the legal nature of the European citizenship.

2) Since the modern concept of citizenship as a legal status embracing a set of mutual rights and obligations between citizen (*citoyen*) and state is connected with the French Revolution of 1789 and subsequent developments such as the Constitution of 3 September 1791 and the enactment of the Code Civil with its pertinent provisions, the legal order of the Holy Roman Empire *(Heilige Römische Reich Deutscher Nation*), that was dissolved in 1806, could not and did not know that concept: the individual was considered as a subject (*Untertan*) of the sovereign ruler of the various territories forming the Empire and, consequently, there was only an indirect (*mittelbare*) *Reichsuntertänigkeit* that ceased to exist with the dissolution of the Empire itself.

The foundation of the *Deutsche Bund* in 1815 as a confederation (*Staatenbund*) of its Member States did not result in the creation of a *Bundesuntertänigkeit*: since the *Deutsche Bund* was a mere *Staatenbund*, there were no legal bonds be-

[43] For the following see, in particular, Grawert, *op. cite.*, note 33, pp. 193 ff; see also Hobe, *op. cite.*, note 34, pp. 252 ff.

tween the individuals and the *Bund*; consequently, Art. XVIII of the *Deutsche Bundesakte* of 8 May 1815 refers only to the subjects of the confederate states ('Untertanen der deutschen Bundesstaaten').[44]

Between 1815 and 1867, most German states enacted 'nationality' laws that differed considerably as to the regulation of acquisition and loss of the respective 'citizenships' and the legal rights and obligations connected with that status.[45] The decisive step was taken with the foundation of the *Norddeutsche Bund* in 1867: Article 3 (1) of its Constitution of 16 April 1867[46] (which was later introduced as Article 3 of the *Reichsverfassung* of 16 April 1871) establishes an *Indigénat* of all persons holding the 'citizenship' of any of the component states (*Bundesstaaten*). It provided for the right of any such 'citizen' to be treated, as regards the rights embraced by the *Indigénat*, in any other component state of the *Norddeutsche Bund* as a 'citizen' of that state. On the one hand, it is important to stress that this *Indigénat* did not constitute a genuine 'citizenship of the *Bund*', since its holding depended upon the concurrent holding of the 'citizenship' of one of the component states the regulation of which fell into their exclusive competences. On the other hand, it is likewise important to underline that this *Indigénat* established a direct legal bond between the *Bund* and the individuals insofar as these were subjected to the laws enacted by the *Bund* in accordance with the powers conferred to it by its component states, and, moreover, entitled to diplomatic protection to be exercised on their behalf by the competent organs of the *Bund*.[47]

A uniform 'citizenship of the Bund' (*Bundesangehörigkeit*) was created as a result of the enactment of the Act on the Acquisition and Loss of the Citizenship of the Bund and the States (*Gesetz über die Erwerbung und den Verlust der Bundes- und Staatsangehörigkeit*) of 1 June 1870.[48] It provided for a uniform regulation of the grounds pertaining to acquisition and loss of the 'citizenship' (*Staatsangehörigkeit*) of the various *Bundesstaaten* and stipulated in its § 1 that every person holding such *Staatsangehörigkeit* was to be considered as *Bundesangehöriger*. Subsequent to the foundation of the *Reich*, this Act entered into force in all its com-

[44] For details see J.L. Klüber, *Öffentliches Recht des Deutschen Bundes und der Bundesstaaten*, 4th ed., Frankfurt a.M.: Andreae (1840), p. 239; and H.A. Zachariä, *Deutsches Staats- und Bundesrecht*, Part I, 3rd ed., Göttingen: Vandenhoeck & Rupprecht, (1867), pp. 435 ff.

[45] See Grawert, *op. cite.*, note 33, pp. 173 ff.

[46] This provision reads: *Für den ganzen Umfang des Bundesgebietes besteht ein gemeinsames Indigénat mit der Wirkung, daß die Angehörigen (Unterthan, Staatsbürger) eines jeden Bundesstaates in jedem anderen Bundesstaate als Inländer zu behandeln und demgemäß zum festen Wohnsitz, zum Gewerbebetriebe, zu öffentlichen Ämtern, zur Erwerbung von Grundstücken, zur Erlangung des Staatsbürgerrechts und zum Genusse aller sonstigen bürgerlichen Rechte unter denselben Voraussetzungen wie der Einheimische zuzulassen, auch in Betreff der Rechtsverfolgung und des Rechtsschutzes demselben gleich zu behandeln ist.* See *(Norddeutsches) Bundesgesetzblatt 1867*, p. 2; reproduced in E.R. Huber, *Dokumente zur deutschen Verfassungsgeschichte*, Vol. 2, Stuttgart: Kohlhammer (1964), pp. 227.

[47] See Grawert, *op. cite.*, note 33, pp. 200 ff.; and Hobe, *op. cite.*, note 34, pp. 252 ff.

[48] See *(Norddeutsches) Bundesgesetzblatt* 1870, p. 360.

ponent states: the *Bundesangehörigkeit* changed into a *Reichsangehörigkeit* which, however, was still contingent upon the concurrent holding of the *Staatsangehörigkeit* of one of the component states. This situation did not change until the enactment of the Citizenship Act (*Reichs- und Staatsangehörigkeitsgesetz*) of 22 July 1913[49] that introduced, in addition to the previous *Reichsangehörigkeit* by virtue of the concurrent holding of the *Staatsangehörigkeit* of one of the component states, a new category: a direct (*unmittelbare*) *Reichsangehörigkeit* that could be acquired without the concurrent holding of such *Staatsangehörigkeit*. This legal situation prevailed until 1934 when the Nazi government dissolved the *Länder*; henceforth, German citizenship was (and is) not contingent upon the concurrent holding of the citizenship of a component state since the *Grundgesetz* did not re-introduce the previous concept of such an 'indirect citizenship'.

3) A comparison of the essential elements of the European citizenship and of the *Indigénat* of the *Norddeutsche Bund* as existed between 1867 and 1870 shows some striking similarities: both legal statuses depend upon the concurrent holding of the citizenship of one of the 'Member States'[50] that are still vested with the exclusive power to determine the grounds for acquiring and losing their citizenship, i.e., there is no harmonisation of the provisions of the Citizenship Acts of the 'Member States'. Even more important is the fact that both legal statuses provide for a right to take up residence on the territory of all the 'Member States' and to be treated there, as regards most economic rights, as if they were citizens of that 'Member State'. There are, however, some considerable differences as regards, for example, the regulation of the exercise of diplomatic protection and the existence of a military service.

Thus, it seems justified to state that, unless one chooses to consider an *Indigénat* as a special kind of dual nationality, the European citizenship (or citizenship of the Union) does not constitute a special kind of dual nationality but a special kind of an *Indigénat*, a 'European *Indigénat*'.[51] Moreover, this understanding seems to better reflect the dynamic process of integration that characterises the European Union: whereas the legal rules applying to the phenomenon of dual (or multiple) nationality seek to regulate and reduce the problems connected with the - admittedly varying degree of - exclusiveness inherent in any citizenship of a nation-state, the legal concept of *Indigénat* seeks to provide for solutions to the problems necessarily arising in a system of 'graded integration' (*abgestufte Integration*) in which the participating states wish to maintain their 'individual' citizenships but are prepared to grant to the nationals of the other participating states a legal status that - in as many aspects as they choose to agree

[49] See *Reichsgesetzblatt* 1912, p. 583.

[50] It should be stressed that this notion is used notwithstanding the obvious fact that the European Union is - as yet - not characterized by the same degree of integration as the *Norddeutsche Bund*.

[51] In this sense, also K. Hailbronner, 'Einleitung', Hailbronner and Renner, *op. cite.*, note 1, p. 81; and Hobe, *op. cite.*, note 34, p. 259.

upon - is similar or equal to that held by their own nationals. Thus, an *Indigénat* is an open-ended concept: it may result in the total abandonment of the 'individual' nationalities of the states participating in that process of integration as happened eventually in the case of Germany; or it may, however, result 'only' in a further assimilation between the legal status of the individuals holding the citizenship of the state in which they reside, and that of those who are nationals of other states participating in that process of integration. With a view to the (still) 'open-ended' character of the process of European integration, the concept of a *European Indigénat* seems to offer a viable solution to the citizenship-linked problems arising from and connected with that process.

VI. CONCLUDING REMARKS

Having thus answered in the negative the first question to be dealt with in this chapter, i.e., whether the European citizenship might be considered as a special kind of dual nationality, there remains the second question, i.e. whether and to what extent the introduction of the European citizenship might have an impact on the future regulation of German citizenship law with regard to a wider acceptance of dual nationality.

One of the major reasons for the profound reluctance of many German scholars, politicians - and citizens - to accept a much larger number of dual nationals is the understanding that such a status inevitably results in conflicting loyalties. However, with a view to the steadily and most considerably increasing number of dual nationals also in Germany and the even faster growing number of persons who, due to their long-time residence in Germany, almost necessarily will establish at least mental bonds with two (or more) states, the sheer number of persons - allegedly or potentially or actually - suffering from such conflicting loyalties will also increase.

To solve this problem by taking recourse to the traditional concept of an 'exclusive' citizenship does not seem to properly reflect the current patterns of migration movements in Europe: in contrast to previous migration movements that were characterised by their permanent nature, present migration movements are more often of only a temporary nature - or at least so intended to be. In other words, whereas the 'traditional' migrant could not and did not expect to be able to return to his country of origin and was, therefore, forced and better prepared to integrate himself into his 'new' country also as regards citizenship, the 'modern' migrant can expect to be able to return to his country of origin, and be it only as a tourist, and, thus, does not feel any need to sever his citizenship ties with that country. Such persons can - and it is suggested, will as a rule - develop dual loyalties without necessarily feeling this situation as one of conflicting loyalties. Just as most persons feel some kind of loyalty both to their hometown and to their home region or country, more and more persons will, quite naturally, feel a similar kind of loyalty to different states. Thus, it seems that, in order to respect the present social realities in Europe, it is better to facilitate dual nationality

than to hold on to the traditional concept of a single, exclusive citizenship.

It is suggested that, in this context, the introduction of the European citizenship - notwithstanding the above finding that it may not be considered as a special kind of dual nationality - might play an important psychological role in the present and future debate concerning German (and possibly other) citizenship law. The simple fact that large numbers of 'European citizens' living permanently or temporarily in states, the nationality of which they do not hold, without experiencing conflicting loyalties, might not only contribute to the growth of a 'European identity', but also to a reduction of the reluctance to accept larger numbers of dual nationals out of fear of such conflicting loyalties.

Whether and when there will be a genuine 'European citizenship' not based upon the concurrent holding of the citizenship of one Member State, but upon a common 'allegiance' to common cultural values in the widest sense of the word, still remains an open question. It seems, however, useful to examine whether there could concurrently exist two kinds of European citizenship: a kind of 'indirect' citizenship held by all citizens of all Member States, and a kind of 'direct' citizenship accorded to nationals of non - Member States who show that profound degree of 'allegiance' to the basic values of the European Union. Thus, the Union could develop into some kind of an 'open republic'.[52]

[52] In this context, see J. Delbrück, 'Das Staatsvolk und die 'Offene Republik' - Staatstheoretische, völker- und staatsrechtliche Aspekte', in Beyerlin, Bothe, Hofmann, Petersmann, *op. cite.*, note 24, pp. 777 ff.

CHAPTER VIII
A DUAL CITIZENSHIP IN THE MAKING: THE CITIZENSHIP OF THE EUROPEAN UNION AND ITS REFORM

Jörg Monar

I. INTRODUCTION

In one of Franz Kafka's lesser-known short stories, 'The Imperial Message', an emperor on his deathbed wants to send for the first time a message to one of his subjects. He takes great care to instruct his messenger who immediately sets out on his journey. Yet the messenger has to cleave his way first through the many rows of the princes of the empire, than through legions and legions of courtiers and officials. He has to pass through the endless rooms of a first set of palace buildings, then a second one, then a third one, and so without end. Everywhere he has to pave his way through anonymous courtiers and servants, and as the story goes on it becomes apparent that despite all his authority and strength he will never get out of the premises of the imperial palaces and administration and will never get the imperial message through to the individual whom the emperor wants to reach with his message. The last sentence makes clear that this individual is not a specific person but you and I waiting for this message:

> But you sit at your window when evening falls and dream this message to yourself.

The European Union is not an empire and - although some may wish for it - it is not yet on its deathbed. Yet in some respect the scenario of Kafka's story draws a parallel to the unresolved problems of the Union's relation with its individual citizens. While citizens may not actually be 'dreaming' of messages from the EU institutions, there can be no doubt that most have the feeling of an enormous distance that separates them from the political system of the European Union. Tabloids in all EU countries - not just in Britain - can count on striking a chord with most of their readers if they present the Union as a kind of distant political monster which makes decisions affecting citizens' daily lives without having any direct relations with them. The odd thing is that there is actually a lot of truth in this simplistic view. Similar to Kafka's story, the system of public authority that is the European Union is separated from its citizens by a whole range of administrative and political bodies, ranging from the local, over the regional and the national, up to the Union level itself, all of which intervene

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 167-183.

directly or indirectly in the process of making or implementing Union policies. Citizens may sooner or later learn that something which is of relevance to them has been decided 'over there' in Brussels, but only a very few will have been in communication with the 'other end of the line' or ever get to know how and why that particular decision was made.

But the parallel to Kafka's story doesn't end there. Like Kafka's emperor, the Union has brought a message on the way to its individual citizen destined to establish for the first time some sort of a direct relationship between itself and the citizen: the 'Citizenship of the European Union' as introduced by the Maastricht Treaty on European Union. As in Kafka's story, this 'message' has been a late one: it is well known that the political discourse about a 'Europe of the citizens' in general and specific rights of European citizens in particular, began in the 1970s. Yet, it took the Heads of State and Government until the Maastricht Summit of December 1991 to agree on what is now the EU citizenship.

The controversies surrounding this new concept of citizenship are familiar. Supporters of the integration process have welcomed it as a major step forward in the construction of a true European polity, yet at the same time, quite a number of them have also criticised the present Treaty provisions for being too vague and too limited in scope, some calling it even a 'pie in the sky' or an 'empty balloon'. On the other side defenders of the concept of a Europe of the nation-states - and not only in the United Kingdom - have described European citizenship as an unjustifiable and artificial concept which, while bringing no real benefits to the citizens, threatens national identities and traditions. These divergent opinions are now clashing again in the framework of the current Intergovernmental Conference. The Report of the Reflection Group has strongly emphasised the need for the European Union to make itself more 'relevant to the citizen' and to place the latter at 'the centre of the European venture', yet deep divisions persist as regards the role of EU citizenship in achieving these goals.

This article will first address the question of whether there is a legitimate place for an EU citizenship along-side national citizenship, then briefly consider to what extent the present provisions on EU citizenship in the Maastricht Treaty can already be regarded as elements of a dual citizenship. Lastly, this article looks at the possibilities as to how EU citizenship could be further developed, in the framework of the present Intergovernmental Conference or thereafter.

II. THE QUESTION OF THE LEGITIMACY OF AN EU CITIZENSHIP

The question of the legitimacy of a 'Citizenship of the European Union' is by all means a very sensible one because traditionally the notion of citizenship has always been linked to nation-states only. To be a citizen of something other than a nation-state polity - and the Union is clearly not a nation-state - seems to contradict all inherited notions of political order as it has emerged from the development of political theory over the last few centuries. Yet, it is precisely in

the political thinking which prepared the ground for the modern Western democracies that the most valid reason for an EU citizenship is to be found. A brief look at the historical development of the notion of citizenship may clarify this.

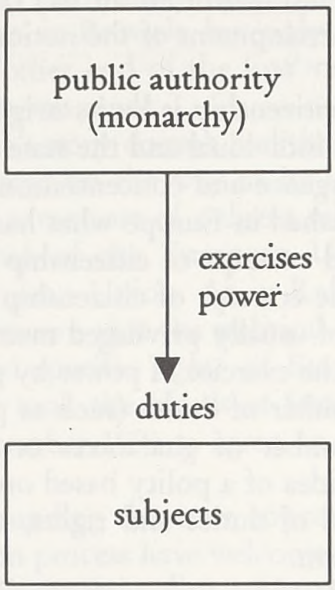
The modern concept of citizenship is by its origins very much a reaction to the relationship between the individual and the state which prevailed during the age of absolutism. The emergence and concentration of royal power during the age of absolutism largely crushed in Europe what had been left over - mainly in the old cities - from the old concept of citizenship inherited from Greek and Roman antiquity. This classic concept of citizenship had been essentially based on the idea that a category of usually privileged men - adults, taxpayers, owners of property - accepted both the exercise of power by political authorities in their community, as well as a number of duties (such as paying taxes and respecting laws) in exchange for a number of guarantees or rights and possibilities of political participation. This idea of a polity based on a sort of a *quid pro quo* of power and participation and of duties and rights, was incompatible with the political ideology of absolutism.

Absolutism claimed total submission of the individual to royal power, not only by divine right but also because this was presented as the only way to ensure the functioning of the state and its survival in an age which was deeply marked by the enormous external and internal political threats of the wars of religion of the 16th and 17th centuries. Instead of being based on a mutual relationship of rights and duties, the exercise of power by the supreme political authority found its legitimacy in divine rights and the *raison d'état* of absolute power.

Although some authors in the 16th and early 17th centuries (such as Jean Bodin) claimed that royal authority had the duty to respect certain natural rights of the individual, the effective guarantee of these rights was not seen as a legitimating element of royal power. In practice, individuals often enjoyed a certain degree of protection and even certain rights, but all this was granted as an act of grace by the ruler, not as a legitimate right of the individual. Individuals were in the full sense of the word, 'subject' to royal authority and its exercise of power: they were 'subjects', not 'citizens'.

Put into a simple graphic presentation, the 'subject' relationship between the individual and the public authority exercising power looks as follows:

Figure I

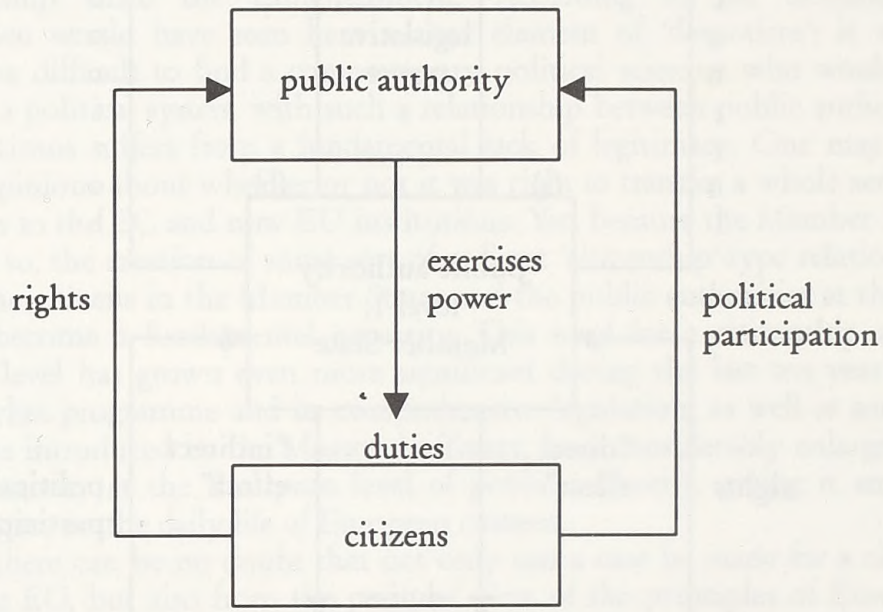


The reaction of the Enlightenment against absolutist power and doctrine which culminated in the 18th century, put this view of the individual's position versus the state into question. Influenced by the example of the 'Glorious Revolution' (1688) in England with its formal establishment of the supremacy of Parliament and the acceptance of the Declaration of Rights by the English crown (1689), philosophers of the Enlightenment gradually developed a concept of the state which was based on a relationship of mutual duties between the individual and the authorities of the state. In his *De l'Esprit des Lois* of 1748, Montesquieu argued that the exercise of power by state authorities needed legitimation through the effective guarantee of certain rights of individuals living under their authority. According to Montesquieu, it is this acceptance of the duties of the state towards its citizens, the effective guarantee of rights of the citizens, which distinguishes a political system from 'despotism' and makes all the difference between mere 'subjects' and 'citizens'. A number of other authors of the Enlightenment, in particular Rousseau, put a similar emphasis on the mutual rights and duties relationship between public authority and citizen, but added a strong dimension of political participation by insisting on the need for citizens to have effective means of influence over the exercise of power by their public authorities.

In Europe, this new political concept of citizenship was put into practice for the first time in the huge laboratory that was the French Revolution of 1789: The rights of duties of the citizen (the *citoyen*) and his political participation became not only central political issues but also the foundations of the legitimacy of the state. The concept of citizenship was central to the three major constitutions of 1791, 1793 and 1795, and through these and the general influence of the French Revolution on Europe and the constitutional struggles of the

19th century, this concept of citizenship became part of the foundations of the political and constitutional systems of all modern European democratic states. All the constitutional systems of the Member States of the European Union provide for the three basic elements of citizenship as they have been inherited from the Enlightenment: rights of citizens, duties of citizens and political participation of citizens, in a sort of constitutional equilibrium (Figure II).

Figure II

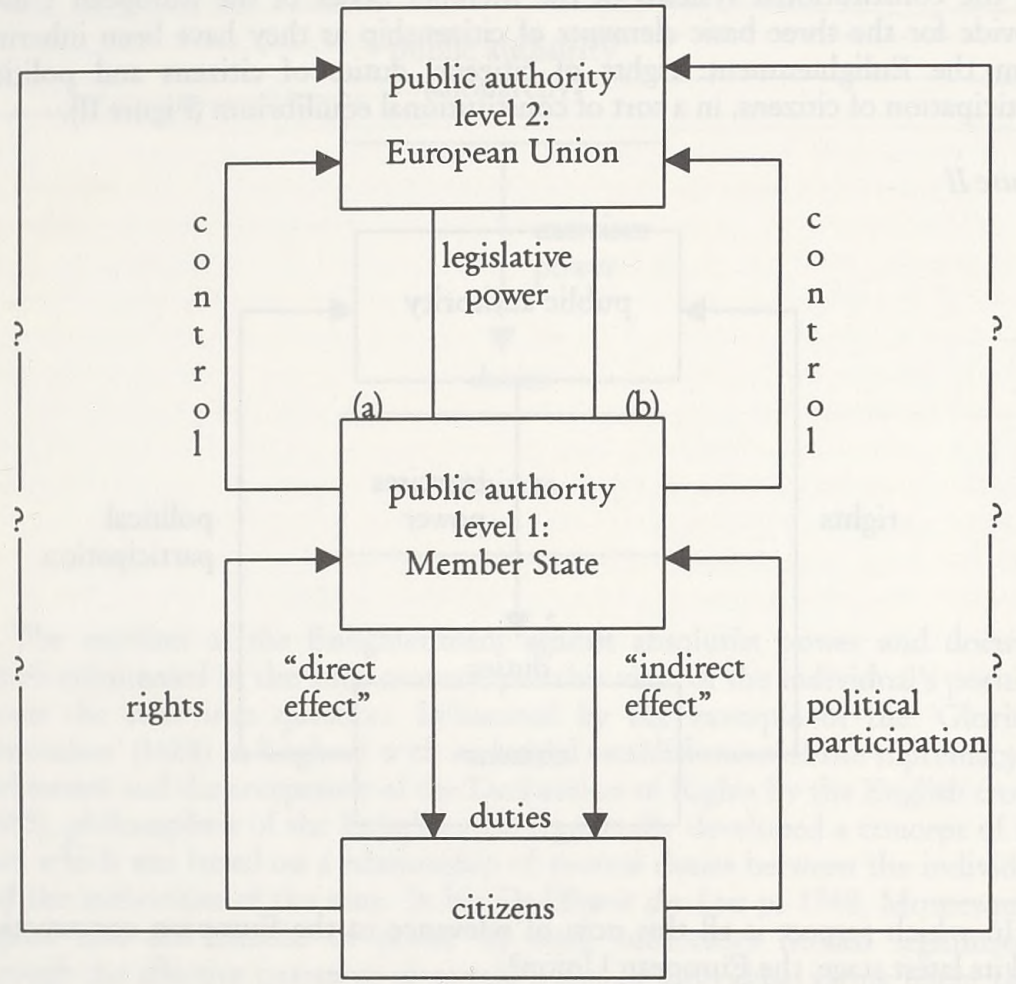


In which respect is all this now of relevance to the European construction and its latest stage, the European Union?

Through the founding Treaties of the EC and various subsequent acts, the Member States have transferred real powers to the European level. As a result an additional 'Union' level of public authority has been created above the level of the Member States. This 'Union' level exercises real power, not only by making decisions binding the Member States (creating 'duties' for the Member States), but also by adopting legislative acts which affect the lives of the citizens in the Member States. Broadly speaking (and simplifying to the extreme a number of complex legal issues) it does so in two ways:

(1) by legislation which needs no implementing legislation in the Member States and therefore has a 'direct effect' on individuals (marked with arrow (a) passing 'through' the Member States' level in Figure III); and
(2) by legislation which needs to be implemented by legislation in the Member States and which therefore has an 'indirect effect' on individuals (marked with arrow (b) 'interrupted' by the member States' level in Figure III).

Figure III



In the exercise of these real powers, the Union institutions are under tight control by the Member States: final decision-making power rests with the representatives of the Member States in the Council of Ministers, and there are hundreds of committees composed mainly of Member States' officials which supervise the preparation and the implementation of each piece of legislation. Thus, so far so good for the relationship between the Member States and the Union.

Yet what sort of relationship is there between the citizens and this 'upper' Union level of public authority which exercises powers over them that were traditionally reserved to the public authorities of the Member States? The answer to this major political and constitutional question is that until the entry into force of the Maastricht Treaty, this type of relationship did not exist. If any relationship existed at all it was - from a constitutional point of view - rather of the type of 'subject' relationship which Europe knew in the age of absolutism:

European citizens had no rights as such and had only a very restricted degree of political participation through the limited powers of the European Parliament. Yet at the same time, European citizens had - in the form of EC legislation - quite a number of 'duties', although they were not presented as such. Citizens were subject to the exercise of power by a level of public authority without any substantial counterpart in terms of rights and participation (lines with question marks in Figure III).

A situation like this unquestionably contradicts the entire European tradition of citizenship since the Enlightenment. According to his terminology, Montesquieu would have seen here a clear element of 'despotism'; it would certainly be difficult to find a contemporary political scientist who would not agree that a political system with such a relationship between public authorities and the citizens suffers from a fundamental lack of legitimacy. One may have different opinions about whether or not it was right to transfer a whole series of real powers to the EC and now EU institutions. Yet, because the Member States have done so, the creation of some sort of a direct 'citizenship'-type relationship between the citizens in the Member States and the public authorities at the EU level has become a fundamental necessity. This need for a citizenship at the European level has grown even more significant during the last ten years: the Single Market programme and its comprehensive legislation, as well as some of the reforms introduced by the Maastricht Treaty, have considerably enlarged the scope of activity at the European level of public authority, giving it an even greater impact on the daily life of European citizens.

Thus, there can be no doubt that not only can a case be made for a citizenship of the EU, but also from the point of view of the principles of European democratic traditions and political philosophy, such a European citizenship is as legitimate as is national citizenship. Where public authorities exercise real power over citizens - as the EU institutions do - a counterpart must be established in the form of citizens' rights and political participation, which is what citizenship is all about.

III. THE CASE FOR A DUAL CITIZENSHIP

The conclusion however, that a citizenship of the EU has its legitimate place does not help us with an argument that is frequently employed by some fervent federalists and most of the defenders of the nation-state concept: that there can be only one citizenship, and that as a result, citizenship only makes sense as either a fully national or a fully European citizenship. As sensible as this argument may at first seem, it is actually the result of a sort of ideological trap laid by the French Revolution and further developed and refined by 19th century nationalism.

The ideology of the French Revolution - especially in its Jacobin elements - regarded state and nation as a unitary and indivisible entity in which all legitimacy and power was to be concentrated *(La République/Nation une et*

indivisible). The citizen-type relationship of the individual with the state was seen as crucial, but at the same time also exclusive and unitary: the citizen could and should only have one citizenship relationship and this was the one with the central authorities of the nation-state republic.

This exclusive and unitary view of the relationship between the citizen and state however, was not the only consequence of the experiment of 1789. Another resulted from the total equation of state and nation for which the French Revolution set a model which became dominant in Europe during the 19th century and still continues to cast its shadow over politics and even constitutional theory in the EU Member States. If state and nation are one and the same and if citizenship means an exclusive relationship between the citizen and this state, then citizenship becomes necessarily exclusive in still another sense because it needs then to be defined in terms of belonging to that presumed ethno-cultural identity that is the nation. Here as well, the French set a model in form of the sharp political and legal dividing line between *citoyens* and *étrangers* which was established under the impact of the Wars of Revolution from 1792 onwards. It was however, left to the nationalism of the 19th century and the totalitarian experiments of the 20th century to bring this distinction to extremes which made the example of 1789 look rather innocent.

If one accepts the unitary and centralised view of nation-state organisation as inherited from the French Revolution as the only possible one, then there is obviously no room for more than one citizenship-type relationship which is exclusive both with regard to its link with only one central public authority level and in terms of its link to only one nationality. Yet, this is not the only view: reaction to the unitary nation-state ideology of the French Revolution and of the 19th century political philosophy in Britain, in particular, has produced many arguments in favour of a more pluralistic understanding of the individual's position in its community. From Edmund Burke, via Harold Laski to Thomas H. Marshall - to name only a few - one can trace a line of thought which sees the citizen as being part of various overlapping communities and their authorities at different levels of political and social organisation rather than being exclusively absorbed by his relation with his (nation-)state.

Political and social reality seems to support such a pluralistic understanding: citizens enjoy rights, fulfil duties and know forms of participation not only in relation to their nation-state but also at local and regional government levels. In many countries, especially in those with a federal system like Germany, Belgium and Switzerland, quite a number of social rights are effectively guaranteed and implemented by sub-national levels of government. In many cases citizens also have specific duties at the sub-national level, mainly in the form of local taxes (e.g., the British 'Council tax'). There are likewise comprehensive mechanisms of political participation at the sub-national level, mechanisms which - because they are 'closer' to the citizen - quite often lead to a higher degree of active political participation than at the national level. This is reflected by a sometimes quite considerable political feeling of belonging to the local and/or the regional level. From a study carried out by the 'European Value Systems Study Group'

(1990/91) it resulted that 39% of European citizens have a primary feeling of belonging to their local community, 17% to their region and only 26% to their country.

It seems fair to say therefore, that in practice citizenship as a combination of rights, duties and political participation appears as a pluralistic phenomenon which is far from being limited to the exclusive nature of traditional national(-state) citizenship. Various degrees of citizenship related to different levels of public authority and government already exist; this interaction occurs without putting into question the organisation of state and society. As a result, it seems perfectly possible to have an EU citizenship co-existing with national citizenship. Both parts of this 'dual citizenship' are to be related to different levels of public authority and each fulfils the function of establishing and maintaining a relationship of rights, duties and political participation.

Such a dual citizenship at the national and the European level is not only a possibility, it is also a necessity. As long as there are two different levels of public authority in the European Union which exercise real powers over European citizens, each of the levels must have its own citizenship-type relationship with the citizens, if the legitimacy and public support for the entire construction is not going to be put at risk. Accordingly, there is a need to arrive at some sort of a balance between national and EU citizenship which reflects the division of powers between the national and the EU level. The development of EU citizenship should run parallel to the development of the division of power between the Member States and the European Union system. An excessive restriction of national citizenship in favour of EU citizenship at this stage of the integration process (which still leaves most of the real power in the hands of Member States) would be no less (and potentially more) detrimental to the legitimacy and political credibility of the European construction than a complete absence of an EU citizenship.

IV. THE PRESENT PROVISIONS OF ARTICLES 8 THROUGH 8E OF THE MAASTRICHT TREATY

There has been no lack of critical judgements on the 'Citizenship' of the European Union, and its classification by one expert as a 'symbolic plaything without substantive content' has not even been among the harshest. This is not the place to proceed with a detailed assessment of these provisions. Instead we will consider to what extent Articles 8 through 8e of the Maastricht Treaty mark a progress towards dual citizenship.

The first aspect of the Citizenship of the Union which needs to be mentioned here is its relationship with nationality of the Member States: Article 8 of the EC Treaty states that every person holding the nationality of a Member State 'shall be a citizen of the Union'. Present EU citizenship does not therefore in any way replace the nationality-bound citizenship of the Member States. On the contrary, it is a status based upon and dependent on nationality which is best

described as a complement to the latter one.

Both this complementary character of EU citizenship and its foundation on the quality of being a national of the Member States, raises the question whether it can already be regarded as a one part of real 'dual citizenship'. Again, the answer depends on the concept of citizenship one applies.

If, in the tradition of the French Revolution, one regards citizenship as a status necessarily based on the belonging to one nation and its formal recognition as 'nationality', then the answer must be obviously negative. EU citizenship lacks such a basis, as there is neither an 'EU nation' nor an 'EU nationality' and consequently, EU citizenship comes in no way near the second necessary element of a system of dual citizenship. Yet as we have seen, it is also possible to define citizenship as a combination of rights, duties and political participation which links citizens with a system of public authority vested with real powers. If one applies this definition of citizenship to Article 8, nationality appears as a mere criterion for determining the beneficiaries of the EU citizenship status and does not say anything about the legitimate existence or non-existence of this 'second' citizenship. Under this concept, a citizenship relationship exists whenever citizens are linked to a system of public authority by rights, duties and political participation. To see whether EU citizenship fulfils this requirement one has to look to whether the Union system already provides for such rights, duties and political participation:

Until now the Treaty provides for five explicit rights of EU citizens:

(1) the right to move and to reside freely within the territory of the Member States (Art. 8a);
(2) the right to vote and to stand as a candidate at municipal elections and at elections to the European Parliament in the Member State of residence (Art. 8b);
(3) the right to protection in third countries by the diplomatic or consular authorities of any Member State on the same conditions as the nationals of that State (Art. 8c);
(4) the right to petition the European Parliament (Art. 8d(1); and
(5) the right to apply to the Ombudsman of the European Union (Art. 8d(2).

It is true that all of these rights are affected by different problems: the right to free movement and free residence is not yet fully implemented; Luxembourg has obtained a derogation from the provisions on the right to vote; there are problems with uniform standards as regards the right to diplomatic protection; and the right to petition to the European Parliament and to apply to the Ombudsman are certainly far from constituting powerful means of participation for citizens and have been little used by them until now. Yet despite these and other shortcomings, there can be no doubt that these are rights which individuals enjoy as citizens of the European Union and which also clearly go beyond the rights normally guaranteed by their national authorities. They go beyond the latter in two respects: first, because they enjoy these rights as citizens of the European Union in the territory of other Member States (with the exception of the special case of diplomatic protection), and second, because the authorities

they can call upon are those of other Member States or of the European Union.

The rights listed in Articles 8a and 8b are sometimes dismissed as being of marginal importance only. In a sense this is certainly true: the rights under Articles 8a and 8b are limited to those citizens travelling to or residing in other Member States of the EU, which is a rather small minority; the right to diplomatic protection applies as well to only a rather small number of people; the rights under Article 8d may actually may well be described as having more symbolic importance than substance. Yet all are 'rights' which citizens can claim from national or European authorities respectively, and at least one of them marks a deep irruption into the domain of national citizenship: the right to vote and to stand as a candidate at elections has traditionally been seen as one of the essential and most exclusive rights of national citizens.

By extending this right to nationals of other EU Member States for municipal elections and for elections to the European Parliament, this automatic and exclusive link of voting rights with national citizenship has been broken up in favour of nationals of other countries on the grounds of their citizenship in the European Union. It is true that some of the Members States already permitted non-nationals to vote in municipal elections before the entry into force of the Maastricht Treaty, but it is only with the establishment of the Citizenship of the Union that this right has been extended to all Member States and explicitly linked with the status of a citizen of the Union. Even if one takes into account the fact that this right does not extend to national elections, the constitutional significance of this provision of the Maastricht Treaty can hardly be overestimated: an essential right of national citizens has been opened to other nationals on the grounds of the introduction of EU citizenship.

Thus, there can be no doubt that citizens of the Union enjoy rights which are specific to their status under EU citizenship. Yet, one should note that these rights remain incomplete - not primarily because they are much less comprehensive than rights under national citizenship or because they are not fully implemented - this is a 'quantitative' rather than a 'qualitative' aspect, but because they are still to a large extent guaranteed and implemented by the national rather than the European level of public authority. The full implementation of the right to freedom of movement and residence remains dependent on measures to be agreed upon by the Member States. Moreover, the possibility of national public policy exemptions, the right to vote and stand in municipal and European elections is governed by national implementing legislation and subject to a number of derogations designed to protect the traditional political balance in Member States having a large resident population of nationals from other Member States. Lastly, the responsibility for implementing the right to diplomatic protection lies entirely with the respective authorities of the Member States and their administrative regulations. As a result, these explicit rights of EU citizens do not establish a clear and direct link with the EU level of public authority such as that which EU citizens normally have with their Member State level of public authority. Only the rights to petition the European Parliament and to apply to the Ombudsman establish such a link, but, as noted

above, these are certainly not the most important of the present group of rights.

As regards the duties of EU citizens, the Treaty is not much of a help: Article 8 provides that citizens of the Union 'shall enjoy the rights conferred by this Treaty and subject to the duties imposed thereby', but the following articles do not provide for a single duty. Does this then mean that the dimension of duties which as we have seen, is an essential one in any understanding of citizenship, is totally absent in the case of the Union? The reality in the Union is - as usual - more complex than in the Treaty. Although there are no explicit duties provided for, it can be argued that citizens of the Union are already subject to at least two duties vis-à-vis the Union: one is that they have to obey Community legislation and the other is that they must pay part of their taxes to the benefit of the Community budget. Both the respect of law and the payment of taxes have been traditionally viewed as two of the most essential duties of citizens. Although in the Union's case the duties are fulfilled 'indirectly' in the sense that the fulfilment is ensured at the level of the Member States, the duties are sufficiently established to be regarded as EU citizens' duties *avant la lettre.*

The final element which needs to be ascertained is that of the possibilities of political participation by EU citizens at the Union level. That the European Union suffers from a serious democracy deficit is not even disputed by British Eurosceptics, who oppose any extension of the role of the European Parliament. Yet, there can also be no doubt that the Parliament, which is elected by the citizens of the Union, does have at least some real powers of control and co-decision. The Parliament plays a major role in the appointment of the Commission (Article 158) and it can bring down the Commission by a motion of censure (Article 144). Further, by employing the assent, co-operation, co-decision and budgetary procedures the Parliament has to a varying degree a genuine impact on decision-making at the Union level. Here again, the deficits and shortcomings are manifold; they range from the Parliament's limited powers over the lack of a uniform voting procedure and the problem of national seat allocations to a lack of an appropriate democratic political culture at the Union level. Nonetheless, as a Parliament elected in direct and general elections and vested with genuine powers of control and legislation, the European Parliament certainly constitutes a means of political participation which links EU citizens directly with the European level of public authority.

It appears from the above discussion that the question of whether in the Union framework, citizens are linked to the European level of public authority by a combination of rights, duties and possibilities of political participation, can be answered in an affirmative sense. All three constituent elements are already present in EU citizenship as introduced by the Maastricht Treaty, although the rights remain rather incomplete, the duties 'indirect', and the political participation limited by a number of factors. This means that on the basis of a non-nationality based concept of citizenship, we can already speak about a second citizenship existing alongside the national one of the Member States, however rudimentary it may be.

V. POSSIBILITIES TO FURTHER DEVELOP THE CITIZENSHIP OF THE UNION ACCORDING TO THE RATIONALE OF 'DUAL CITIZENSHIP'

If one looks at the enormous body of EC legislation and the whole range of policy areas already covered by the activities of the Union institutions it becomes evident that there is a considerable imbalance between the huge scope of the exercise of public power at the Union level and the still very limited state of development of the rights, duties and possibilities of political participation, which link European citizens to the Union level and constitute the central elements of citizenship. It seems clear that if, as the Reflection Group's report says, the citizen is to be placed 'at the centre of the European venture', the present EU citizenship will need to be developed much further during the current Intergovernmental Conference and afterwards.

Inasmuch as the Union system will most likely continue to be based on a constitutional division of powers between the Member States and the Union, any further development of European citizenship will have to follow the rationale of 'dual citizenship' in the sense that it should reflect as much as possible the relative weight of both levels of public authority (that of the Member States and that of the Union) in the exercise of real powers over citizens without aiming at a replacement of national citizenship. There are basically two main lines of possible reform along which such progress could take place in the next few years, it being understood that progress on one line will never exclude simultaneous progress on the other.

A. Further Development of Elements of EU Citizenship

This line of reform would improve the rights and possibilities of participation already provided for by the Maastricht Treaty without introducing any fundamentally new elements. Although this might appear as a rather conservative approach, even such changes 'within the system' offer some scope for substantial improvements as a few examples will demonstrate.

According to Article 8a(2), the present right to freedom of movement and residence remains subject to both limitations and conditions laid down in the Treaty and to related secondary legislation which means that it is basically limited to what had already been achieved for workers and self-employed persons in the EC framework. This right should be transformed into an unrestricted right for all citizens and should have direct effect under the EC legal order. Considering the fact that the abolition of internal border controls and the provision of comprehensive social security cover for EU citizens travelling or residing in another Member States are essential elements of such an unrestricted right, conditions should be made for their full implementation, possibly according to a timetable. Such a step would no doubt be very difficult politically, but arriving at the full implementation of freedom of movement and residence is

a central question of credibility for the Citizenship of the Union.

The right to vote and stand in elections, presently limited to municipal elections, could be developed further by gradually extending it to all local and regional authorities (the German *Länder* parliaments, for instance). This could effectively prepare the ground for a later extension to national elections. One of the weaknesses of the present right to diplomatic protection in non-EU countries is that the extent of protection is left to the legislation and the administrative practice of the respective Member State. A sensible way to develop this right would be to define a Union standard of protection, incorporating for instance, a right to repatriation and a comprehensive range of consular protection (issuance of significant administrative certificates on behalf of other Member States, legal assistance, etc.).

The right to petition the European Parliament could be further developed, particularly in the area of the follow-up of petitions. EU citizens could be granted a formal right to receive a response within a fixed time period. The status of petitions signed by a larger number of EU citizens could be upgraded to the effect that the Parliament would have to hold a plenary debate with vote on it.

The scope of the right to apply to the Ombudsman mainly finds its limitations at present in the restrictions imposed on the Ombudsman's position and activities. The right could be strengthened, in particular by extending the Ombudsman's mandate to inquiries of mal-administration of EC legal acts and EC programmes by national authorities, and by establishing a formal obligation for both the Union institutions and the Member States to support the Ombudsman in his inquiries.

The introduction of duties for the EU citizen would clearly go beyond a strategy of gradual improvements of the existing provisions. Yet in the area of political participation, gradual development on the basis of the existing duties again makes sense. The input and powers of scrutiny of the European Parliament could be increased, for instance, by extending the co-decision procedure (Article 189b) to a number of other areas of legislative decision-making. The Commission and Council could also be placed under an obligation to formally deliberate and respond to legislative proposals submitted by the Parliament on the basis of Article 138b. Lastly, the powers of the Parliament's committees of enquiry (Article 138c) could be extended.

B. Going Beyond Existing Elements of EU Citizenship

The other major line of reform would be to go beyond existing provisions by inserting fundamentally new rights, duties and possibilities of participation, thus significantly changing the existing citizenship relation of individuals with the EU level. For such a 'system changing' strategy of reform to succeed, it would certainly require a more favourable political context then presently exists; however, some elements may even have a chance in the 1996/97 Intergovernmental Conference.

In the area of citizens' rights a 'system changing' reform strategy should aim at a comprehensive guarantee of the protection of fundamental rights at the Union level. The present reference in Article F(2) to the European Convention for the Protection of Human Rights (ECHR) and to fundamental rights resulting from the 'constitutional traditions common to the Member States' is an important affirmation of what the Court of Justice has been establishing through its case-law; however, this article is vague in its content and is not enforceable before the Court. A citizenship relationship under which citizens have to rely on fragmentary case-law and non-enforceable principles will always remain seriously deficient. Fundamental progress could be achieved either in the form of an adhesion of the Union to the ECHR or by the introduction of a separate EU charter of fundamental rights and freedoms. From the point of view of the development of EU citizenship, the latter solution is by far more preferable not only because of its enormous symbolic dimension but also because it would give the Union the chance to define its own scope and level of protection of fundamental rights, the ECHR being after all, only a 'minimum' standard of protection agreed upon almost half a century ago.

Substantial progress could as well be achieved by expanding the access of EU citizens to judicial remedies before the European Court of Justice. Giving citizens unlimited access to the Court would probably neither be necessary nor practically feasible. Yet, one could imagine for instance, giving citizens an explicit right to appeal to the Commission in case of a complaint against EC law or a failure of national authorities to apply or fully implement EC law. The Commission could be placed under an obligation to respond, and if justified, to launch an action before the Court under Article 169 or 173. One could also envisage a strengthening of the position of citizens under the preliminary ruling procedure (Article 177): more and more often, citizens have invoked EC law before national courts, yet there have been quite a number of cases in which national courts have refused to ask the Court of Justice for a preliminary ruling on the interpretation of relevant EC law. In such cases, citizens should have the right to appeal to the Court directly. Such improvements of the access to judicial remedies could be combined with a right of EU citizens to free legal assistance in cases relating to EC law.

Another new right which should be introduced under a more ambitious agenda of reform, would be an explicit right of EU citizens to information and transparency. Placing each citizen in a position to develop a basic understanding of the functioning of a political system and of decision-making on major issues is a basic condition of political participation of citizens and one may argue, even of its overall democratic legitimacy. The Union's deficits in this respect are hardly less important than its deficits in the field of democratic control and accountability. The Union institutions could be placed under an obligation to provide citizens with comprehensive and timely information on legislative acts planned; to explain the reasons for the adoption of measures; and to respond within given time limits to citizens' queries. One could also think about the introduction of a formal right to education on EU affairs for all citizens. This

would enable the Union to design and adopt programmes for European education modules at the primary and secondary school level, where the European dimension is still notoriously underdeveloped.

Clearly, under a 'system changing' strategy a whole range of other rights could be envisaged, especially in the socio-economic sphere (social security, rights at the working place, etc.), which cannot all be addressed in this chapter. It should be mentioned here that Article 8e offers a possibility to add to the rights laid down in the Citizenship section without the need to engage in a formal treaty revision procedure. Yet, this possibility has not been used so far and it is unclear as to what extent it would allow for the introduction of genuine 'new rights'.

A 'system changing' strategy of reform could also envisage to enter the difficult territory of EU citizens' duties. One possibility would be to formally establish a duty for a citizen to contribute (directly or indirectly) to the Community budget and to disclose to him in his tax forms how much of his total tax contributions is actually going to the Community budget. In practice, Union citizens are already 'European taxpayers' in all but the name, and such a formal acknowledgement would both create a clear counterpart of 'duty' to the rights EU citizens are enjoying and increase the transparency of the Union system. Sadly, up until now, few EU citizens have had any precise idea of how much the Union actually 'costs' them.

With regard to the present state of development of the Union's Common Foreign and Security Policy, it seems difficult to imagine anything similar to an obligatory military service, which is another major duty of citizens in some of the Member States. Yet one could think of the introduction of a voluntary European civil service that could be chosen by young Europeans instead of national military or civil service.

As regards political participation, a major increase of the European Parliament's role would be the most obvious solution, although any such increase would require a fundamental and therefore politically very difficult change of the whole institutional balance. Yet there are other ways to increase citizens' political participation. One could envisage, for instance, introducing a public referendum procedure under which a number of citizens could call for a referendum either to launch initiatives for new legislation or to abrogate pieces of existing EC law. The legal effects to be given to such initiatives would, of course, need careful consideration. One could also think of consulting EU citizens on major Treaty revisions or also political issues (enlargement, for instance). If all this would still be a step too far, one could envisage introducing a procedure of consultation of citizens in regions affected by major projects financed by the European Union (e.g., in the field of transport infrastructure); this is a more modest form of citizens' participation but one which could show that citizens' interests are taken seriously in 'distant Brussels'.

V. OUTLOOK

The first months of the Intergovernmental Conference of 1996 have shown that the Member States are having considerable difficulties in agreeing on how to develop the Citizenship section of the Maastricht Treaty. Whereas some seem mainly concerned about making it clear that EU citizenship is additional to and not a substitute for national citizenship, and show little enthusiasm for any further development, a majority seems to aim at substantial progress, but is divided over the areas in which this should be achieved. A broad range of possible additional rights have been discussed, ranging from civic rights (such as the right of free expression) to socio-economic rights (such as the rights to equal opportunities and to health protection) to the rights of information and to access to universal services. In the area of possible 'duties' a proposal on a voluntary European humanitarian service has at least been promised. There is little indication so far that the Member States are willing to go significantly beyond the status quo in the area of democratic participation.

As yet, the outcome of the Intergovernmental Conference as regards EU citizenship is still very open. Much will depend on the final political 'package deals' typical at this level of EU decision-making. Yet some progress on the Citizenship of the Union is clearly needed - if the European Union wants to avoid the fate of the dying emperor in Kafka's story, whose message never reached the citizen waiting for it.

CHAPTER IX
THE POSITION OF RESIDENT THIRD-COUNTRY NATIONALS: IS IT TOO EARLY TO GRANT THEM UNION CITIZENSHIP?

Álvaro Castro Oliveira

The relationship between Union Citizenship and nationality is not only interesting from the point of view of those who are nationals of Member States. It is an issue of particular interest when analysed from the point of view of those persons residing in the European Union who do not have the nationality of a Member State. I am referring here to so-called 'third-country nationals'.[1] The main topic of general discussion of this issue seems to center around the possibility of extending Union Citizenship to third-country nationals. Would such an extension be a good idea?

Before trying to give an answer to this question, it is helpful to have a clear idea of the current situation of resident third-country nationals under European Union Law. The first part of this chapter addresses this point. This first section starts by briefly tracing the relationship of resident third-country nationals to Union Citizenship and the rights which Union Citizenship imparts, and then goes on to examine the rights and duties third-country nationals have under European Community Law. Finally, it gives an overview of the features of a developing European Immigration Policy - which has been carried out under an intergovernmental cooperation procedure, now within the 'third pillar' of the Union. The second part of the chapter addresses the prospects for evolution of the present situation and examines the appropriateness of directly granting Union citizenship to third-country nationals.

[1] In the absence of indications to the contrary, this expression should be understood as comprising three categories of persons who live in a Member State of the European Union: first, nationals of a third-country who have immigrated into a Member State; second, persons born in a Member State but who have the nationality of a third-country, and lastly, stateless persons as well.

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 185-199.

I. THE PRESENT SITUATION - EUROPEAN UNION LAW AND THIRD-COUNTRY NATIONALS[2]

A. Union Citizenship And Third-Country Nationals

There is no doubt that Union Citizenship is an exclusive privilege of nationals of a Member State of the European Union. There is no rule which foresees the possibility that a person who is not a national of a Member State may acquire Union Citizenship. Article 8 of the EC Treaty, introduced by the Treaty on European Union, provides only that:

> Every person holding the nationality of a Member State shall be a citizen of the Union.[3]

In this manner, Union Citizenship is granted indirectly, through reference to the respective nationality law of the Member State.[4] Third-country nationals, even if legally resident in the Community for a long time, have no chance of directly acquiring Union Citizenship. They must first acquire nationality of a Member State.

The indirect attribution of Union Citizenship may raise some problems from the point of view of the loss of nationality and consequent loss of Community Law rights.[5] Furthermore, this indirect attribution may also be questioned from the point of view of acquisition of Member State nationality and, consequently, of Community Law rights. It could well be argued that to refer to the nationality laws of each Member State is not a good way to define who is or is not to be a beneficiary of Community Law rights. This allows each Member State the possibility of defining differently who may be the beneficiaries of Community Law rights.[6] It would seem more appropriate to have a common and direct definition

2 This section of the chapter is a sort of short abstract of chapters 4 and 8 of my Ph.D. thesis, 'Third-Country Nationals and European Union Law', Florence: European University Institute (1996).

3 Second phrase of the first paragraph of Article 8 of the EC Treaty.

4 Note that on the conclusion of the Maastricht Treaty, the Intergovernmental Conference adopted a declaration (latter referred as declaration No. 2) stating that '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'.

5 As was recently recalled by S. Hall, in 'Loss of Union Citizenship in Breach of Fundamental Rights', Vol. 21, *European Law Review* (1996), No. 2, pp.129-144. One may even imagine, for example, that the loss of a Member State nationality, by entailing the loss of the right to reside in another Member State, may, in certain circumstances, be in contravention of the right to family life as protected by Article 8 of the European Convention of Human Rights.

6 This contrasts with what the Court of Justice ruled in a somewhat similar situation found in the *Hoekstra* and *Levin* cases - case 75/63, *Hoekstra, born Unger* [1964] ECR 177, and case 53/81, *Levin* v. *Staatssecretaris van Justitie* [1982] ECR 1035. In the latter, the Court stated that the term 'worker' and 'activity as an employed person' [used in Community legislation] may not be defined by reference to the national laws of the

of who those beneficiaries are to be.

As far as the content of Union Citizenship is concerned, it may be noted that some of the rights enjoyed by Union citizens may also be enjoyed by resident third-country nationals. This is the case of the right to address a petition to the European Parliament and the right to make complaints to the Community Ombudsman,[7] which are extended to resident third-country nationals regardless of the fact that they are not Union citizens. The problem is that these rights are not substantive, but mere procedural rights. They allow third-country nationals to seek protection and promotion of their substantive rights, on which the Treaty on European Union did not introduce anything novel.

The core of the rights that constitute Union Citizenship is granted by Article 8 of the EC Treaty to Union citizens only. That provision accords only to Union citizens the right to move and reside freely within the territory of the Member States. Only a Union citizen has the right to vote or to stand as a candidate for municipal or European Parliament elections, in the Member State where he or she resides. Finally, only a Union citizen has the right to diplomatic protection from any Member State authority, in a third-country in which his/her own Member State is not represented.

B. Rights Enjoyed By Third-Country Nationals In EC Law

1. Rights Related to Freedom of Movement

One of the most important areas of Community Law relates to free movement between Member States. For third-country nationals there is a clear contrast between the rights they enjoy which are related to freedom of movement of persons and those that they enjoy which are related to other types of freedom of movement.

As far as free movement of goods and capital is concerned,[8] third-country nationals are in a legal position similar to that of nationals of a Member State.

Member States but have a Community meaning. If that were not the case, the Community rules on free movement of workers would be frustrated, as the meaning of those terms could be fixed and modified unilaterally, without any control by the Community institutions, by the national laws which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty. *Idem*, paragraph 11. In these cases no Member State nationality law was involved, but this ruling may be used to sustain the need for an uniform definition of the beneficiaries of Community Law rights.

7 Articles 138D and 138E, introduced by the Maastricht Treaty, define the beneficiaries of those rights as: 'any citizen of the Union or any natural or legal person residing or having his registered office in a Member State'.

8 See the general rule of Article 73B of the EC Treaty, as far as movement of capital is concerned. As far as movement of goods is concerned, see Articles 12 to 37 of the EC Treaty and cases 2 & 3/69, *Sociaal Fonds voor de Diamantarbeiders* v. *Brachfeld and Cougal* [1969] ECR 211, at 223, where the Court of Justice ruled that '[t]he Treaty prohibits any pecuniary charge on imports and exports between Member States, irrespective of the nationality of the traders who might be placed at a disadvantage by such measures.'

However, when it comes to the free movement of persons, third-country nationals residing in Member States have no independent rights. All rights they have in this area depend on a family relationship with a migrant national of a Member State or on their working for an EC enterprise providing services in another Member State.

a. The Case of the Interpretation of the Personal Scope of Article 48 of the EC Treaty. There is one main legal reason for the lack of independent rights of freedom of movement of persons for third-country nationals. This relies on the interpretation made by the Court of Justice of Article 48 of the EC Treaty, which guarantees 'freedom of movement of workers (...) within the Community', including the abolition of some types of 'discrimination based on nationality between workers of the Member States'. The Court of Justice has interpreted this provision as applying to nationals of Member States only,[9] thereby excluding third-country nationals from an independent right to move as workers from one Member State to another. The Court did not put forward any argument for this interpretation and, therefore, did not contribute to the substantial discussion on this issue. The Court decided the issue simply by virtue of its power, not its arguments.[10]

This is an important point because several arguments have been presented to sustain that Article 48, establishing freedom of movement of workers, should be interpreted as applying also to third-country nationals.[11] It has been noted, for

9 Case 238/83, *Caisse d'Allocations Familiales de la Région Parisienne* v. *Mr. and Mrs. Richard Meade* [1984] ECR 2631, paragraph 7.

10 It is submitted that perhaps the Court should be persuasive, or at least try to be so. Moreover, the restrictive interpretation of Article 48 by the European Court of Justice contrasts with its decisions in other matters, where the Court adopted a more liberal interpretation of rules on free movement of workers. Such liberal interpretation occurred, for example, with regard to Article 48(4), which establishes that the free movement of workers does 'not apply to employment in the public service'. The Court restricted this reservation to 'posts which involve direct and indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities'. See case 149/79, *Commission* v. *Belgium* [1980] ECR 3881, at 3900. Clearly, as a matter of judicial policy, it was easier for the Court to extend the material scope of the free movement of workers to the public service, than to extend its personal scope to third-country nationals.

11 In favour of the position that Article 48 does not preclude persons other than nationals of the Member States from benefiting from the free movement of workers, see, for example, W.R. Böhning, *The Migration of Workers in the United Kingdom and the European Community*, London: Oxford University Press for the Institute for Race Relations (1972) p. 136; A. Campbell, *Common Market Law*, London: Longman (1969) Supplement 2 (1971), p. 226; and R. Plender, *International Migration Law*, 2nd. ed., Dordrecht: Martinus Nijhoff (1988), pp. 197-8. For an overview of discussions on the matter, including on the proposals for the application of Article 48 to third-country nationals residing in the Union, see M.-P. Lanfranchi, *Droit communautaire et travailleurs migrants des états tiers - Entrée et circulation dans la communauté européenne*, Paris: Economica (1994), pp.20-41.

example, that the Treaties on the ECSC and the EAEC explicitly reserve freedom of movement of workers for nationals of Member States. The same is also the case under the EC Treaty itself for natural person beneficiaries of the freedom of establishment and of free movement of services - according to its Articles 52 and 59, respectively.[12] All these rules contrast with Article 48, in that they clearly make a distinction between nationals of Member States and third-country nationals - excluding the latter from their scope.[13] We may think it is not just a casual difference that the other provisions establish an explicit delimitation of their personal scopes whilst Article 48 does not. It could be that in Article 48, it was not the intention to establish any distinction between persons working in the Member States.[14] In this view, the expression 'workers of the Member States' would contain no reference to their nationality and would simply mean workers within the economies of the Member States, i.e., in their labour markets.[15] Moreover, it could be that 'the draftsmen wished to leave open, in 1957, the possibility that the Community might develop a common market in labour corresponding with the common market in goods', accompanied by a common external policy dealing with labour from third countries and freedom of movement within the Community for established immigrants.[16] Finally, it should not be forgotten that the rules on freedom of establishment and on free movement of services also apply to legal persons. The Treaty authors could have wanted the scope of these particular rules to be more limited, as far as third-country nationals are concerned, than the scope of Article 48.[17]

The conclusion is simple: the interpretation of Article 48 that it does not apply to third-country nationals, was only one of the possibilities open to the Court of Justice. The Court had sufficient legal basis to adopt arguably the best solution: to rule that Article 48 could also apply to third-country nationals, thereby granting them independent rights of free movement of workers.[18]

12 Article 59(2) even makes explicit mention of the possibility of extending rules on free provisions of services to third-country nationals established within the Community. However, no such measures have yet been adopted. Free movement of services only exists now in relation to nationals of a Member State.

13 Except in Article 59(2).

14 Böhning, Campbell, and Plender, *op. cite.*, note 11, and also W.R. Böhning, 'The Scope of the E.E.C. System of the Free Movement of Workers: A Rejoinder', Vol. 10 *Common Market Law Review* (1973), No.1, p. 81, at p. 83.

15 R. Plender, 'An Incipient Form of European Citizenship', in *European Law and the Individual*, F.G. Jacobs (ed.), Amsterdam: North Holland (1976), p. 43.

16 Plender, *International Migration Law*, *op. cite.*, note 11, p. 197.

17 A.C. Evans, 'Nationality Law and the Free Movement of Persons in the E.E.C.: with Special reference to the British Nationality Act 1981', Vol. 2 *YEL* (1982), pp. 173-189, at p. 177.

18 The best solution seems to be the adoption of a legislative programme extending progressively free movement of workers to resident third-country nationals. In the lack of such legislation, my specific proposal in this respect is that the Court of Justice should interpret Article 48 as applying to third-country nationals permanently residing in the European Union - i.e., those having a positive right of permanent residence in one

b. The Case of EC Social Security Rights. It may also be pointed out that the present exclusion of third-country nationals from the personal scope of EC rules on free movement of persons entails a certain number of inconsistencies and odd situations within EC Law. One of the most striking examples of such situations[19] relates to Regulation 1408/71, which regulates the application of social security schemes to workers and their relatives moving within the Community.[20] This Regulation forbids discrimination on the grounds of nationality against these persons and arranges for the aggregation for social security purposes of periods of insurance, residence and employment. The Regulation applies to workers who are nationals of a Member State and the members of their families, even if the latter are third-country nationals. Furthermore, this Regulation also benefits the surviving family of a third-country national worker, provided that the members of that family are nationals of a Member State. After the death of the worker, these persons will be protected to the same degree as if the deceased worker had been a national of a Member State. This appears to be quite a sensible rule in itself.

Yet, the limits of the Regulation, together with the limits of the system in general, could lead to some peculiar situations. First, not only do those (third-country national) workers have to die in order for their families to fully benefit from their work, but their families will benefit from their work in a way in which they themselves could never have benefited. For example, third-country national workers themselves cannot benefit from the Regulation by asking for an aggregation of periods of insurance to obtain old-age benefits. In the case of a worker's permanent incapacity to work, neither the relatives of the third-country national worker, nor the worker him/herself is protected by the Regulation.

The foregoing scenario seems to be a surrealistic situation. First of all, the family is legally protected only if the worker dies, not otherwise - no matter what the physical, mental, or financial condition of such workers (or their relatives) may be. Secondly, the application of the nationality criterion to the protection of relatives of the worker following his or her death is no less disturbing. The protection of a national of a Member State who is the spouse of a third-country national worker contrasts sharply with that of a spouse who is a national of a third-country. The latter cannot benefit from the Regulation. The children of a third-country national worker are in an equally incomprehensible situation. Here, the nationals of a Member State may benefit from the work of their deceased father or mother, while third-country national children may not,

Member State, or those having resided in the Union for more than 10 consecutive years.

19 Other examples are the difference of treatment, for free movement purposes, of natural persons who are nationals of a third-country and legal persons (undertakings) founded and controlled by third-country nationals; and the fact that third-country nationals residing in a Member State are not entitled to provide services in another Member State, except as employees of a Member State enterprise.

20 *Official Journal* L 149/2 of 05/07/71; latest consolidated version in *Official Journal* C 325/1, of 10/12/92.

simply because of their nationality!

This is clearly a highly deplorable rule. It is unfair to the persons concerned and unjustified in the context of current European integration. It seems clear that in these cases not only is there differential treatment, but there is indeed discrimination. The differential treatment, it is submitted, is not legitimate. It does not respect the principle of equality, a principle of Public International Law. According to this principle, equal situations should be treated in an equal manner. The relevant elements of the situation seem to be exactly the same whether the relatives of the dead worker are or are not nationals of a Member State. Clearly, the work which the dead worker performed, the taxes that he or she paid and the Social Security contributions he or she made, did not differ according to the nationality of his or her relatives. Moreover, if this Regulation were applied to the worker who is a national of a third-country, where that worker has no entitlement to the freedom of movement within the Community and he or she could work in different Member States only as far as national governments specifically allow, and still he or she would not be entitled to ask for a coordination of social security schemes. This situation may prevent him or her from moving within the Community, even if there would be a situation when, indisputably, such a move would be in the interest of the Member States concerned and of the Community as a whole.

2. *Rights in the Areas of Social Policy and Educational Matters*

Third-country nationals residing in the Union are considered to be excluded from the personal scope of EC legislation on the free movement of persons. However, they are included in the personal scope of most EC legislation on social[21] and educational matters.[22] In some cases, EC legislation on these matters explicitly states that it also applies to third-country nationals.[23] However, most of such legislation states that it applies to categories of persons defined or referred to only in generic terms, with no reference to their nationality.[24] Usually, such legis-

[21] I am referring here to legislation such as that on the rights of workers (including on health and safety at work), on the European Social Fund, and on the protection of specific groups of persons - such as disabled, elderly, young or poor people.

[22] Including the EC legislation on vocational training.

[23] See, for example, the Community programme on human capital and mobility. The decision establishing the programme provides that '[t]he individual fellowship recipients [of the scholarships established by the programme] must be nationals of the Community Member States or natural persons resident in the European Community.' See Point I (1) of Annex III of Council Decision 92/217/EEC of 16 March 1992 on a specific research and technological development programme in the field of human capital and mobility (1990 to 1994), *Official Journal* L 107/1 of 24/4/92.

[24] This legislation uses expressions such as 'worker' or 'every paid employee' (as in Article 1 of the Council Directive 91/533 of 14/10/1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, *Official Journal* L 228/32 of 18/10/91), without further delimitation of the persons involved - at least not as far as nationality is concerned.

lation appears not to have any contextual elements against application to third-country nationals. Moreover, the purposes of such legislation are coherent with,[25] or, at least not contradicted by, this application. It seems reasonable, therefore, to consider that such legislation may also apply to resident third-country nationals.[26]

The application to third-country nationals of Community rules on social and educational matters supplies further support for the extension of EC Law on free movement of persons to third-country nationals permanently residing in the Union. In addition to substantial reasons,[27] a greater coherence of Community Law would also be achieved.

The fact that most Community legislation applies to nationals of Member States and third-country nationals residing there alike, shows that both groups of persons are considered to be part of the European society.[28] On the one hand, it is recognized that third-country nationals require attention at the European level through the relevant Community legislation. They are included in its personal scope. They come under that scope not in their capacity of nationals of third countries, but as workers, disabled, young or poor people, social assistance beneficiaries, students, or researchers. In other words, as persons living in the European Union. On the other hand, third-country nationals are basically excluded from the scope of the Community rules on free movement of persons. This seems to fundamentally contradict the fact that third-country nationals residing in the European Union are part of European society.

C. Content of the Developing European Immigration Policy

It is clear that third-country nationals residing in the European Union do not benefit from independent EC rights of free movement of persons between Member States. Meanwhile, their exclusion from enjoying EC rights in this area,

25 As in, for instance, the case of EC legislation on health and safety at work. Often the purpose of this legislation requires that it be applied to all persons involved in a given situation, regardless of whether or not they are nationals of a Member State.

26 In addition, it is also important to note that the application of Community legislation to third-country nationals is not exclusive to the social and educational areas. Most EC legislation on health or consumer protection, for example, is applicable to nationals of Member States and third-country nationals alike.

27 Such as the respect of the principle of equality and material justice, as well as the promotion of the integration of resident third-country nationals.

28 Official support for this idea seems to come from the Declaration Against Racism and Xenophobia, adopted in 1986 by the European Parliament, the Council and the Commission, together with the representatives of the Member States within the Council, *Official Journal* C 158/1 of 25/6/86. That declaration affirms their resolve to protect, and declares that they are determined to pursue the endeavours already made to 'protect the inviduality and dignity of *every member of society* and to reject any form of segregation of foreigners' - points 2 and 4 of the mentioned declaration (emphasis added). Note that the declaration refers explicitly to third-country nationals.

is more the exception than the rule within Community Law as a whole. As we have seen, third-country nationals residing in the Union do often enjoy rights granted by EC legislation, such as that pertaining to social and educational matters.

In any case, to make an accurate assessment of the rules and activities developed at European level concerning third-country nationals, one has to go beyond Community Law. In the last few years, the legal situation of immigrants in the European Union has been the object of much activity within the intergovernmental cooperation procedure. This cooperation has been pursued both on an *ad hoc* basis before the Treaty on European Union and under Title VI of that Treaty since its entry into force. This cooperation has dealt with several matters related to immigration and third-country nationals. The aggregate of activities developed and measures adopted could be called a developing European Immigration Policy.

This 'Policy' has two main features. First it is currently in a stage of formation. It has been developed rather slowly and is still in a preparatory embryonic stage. Institutional and practical arrangements are yet not fully operational, as with Europol, or are not operational at all, as in the European Information System. Moreover, there are few important binding rules at the present stage.[29]

Secondly, the overriding concern of this Policy is to restrict immigration into the Union. Following developments on the national level,[30] considerable effort has been made at an European level to prevent immigrants from third countries from coming to and settling in the Member States. This objective prevails in the draft External Frontiers Convention, in the resolutions on admission of third-country nationals to Member States and on action against illegal immigration. The objective of restricting immigration can be questioned in itself. Moreover, such an effort is often developed in a highly politicised manner which is less than reasonable, appropriate, or coherent.

At the same time, in comparative terms, little effort has been made to improve the situation of third-country nationals already living in the Union. An illuminating example of this is the Council 'resolution' of 4 March 1996 on the status of third-country nationals residing on a long-term basis in the territory of the Member States.[31] This document applies to third-country nationals who are long-term legal residents in the Member State, i.e., residents for more than 10 years. This resolution has set standards which aims at stabilising the right of residence of these persons, by granting them residence permits for long periods and by limiting the possibility for them to be expelled. A principle of 'no less favour-

29 Although, on some occasions, binding rules have been seen as not to be indispensable for a *de facto* harmonisation to be achieved.

30 The same development has also occurred in the cooperation developed among some but not all Member States of the European Union, such as in the Schengen System. Cooperation under Schengen System is relevant for the European Union because it has been the 'laboratory' for solutions which may in the future be adopted by the European Union as a whole.

31 *Official Journal* C 80/2, of 18/3/1996.

able treatment' is also to be applied to third-country nationals with regard to working conditions, trade union membership, public housing, emergency health care, compulsory schooling, and social security and non-contributory benefits - the two latter in accordance with national legislation.

The problem with this so-called 'resolution' is that, in practice, it is no more than a simple recommendation, with no legally binding force. In its first point, the resolution states that the Council merely 'calls upon the Member States to take account' of the principles mentioned in the resolution 'in their policies on integration' of third-country nationals. Furthermore, these very principles are often defined in a rather weak manner, and are restricted in their practical content by several clauses.

A final point to be made here relates to a rather curious fact from an institutional point of view, one that has seldom been highlighted. Supporters of the rights of third-country nationals (including myself) have for years sustained that EC legislation should be adopted to protect those rights. Thus, the Community should be given greater competence in immigrant issues. With the Treaty on European Union, the competence on immigrants of European institutions was indeed explicitly expanded, notably through the so-called third pillar - i.e. the 'Cooperation in the Fields of Justice and Home Affairs', established in Title VI of that Treaty. However, this functioned fundamentally to the disadvantage of third-country nationals, contrary to the intentions of most of those who called for more European competence in this field.

II. PROSPECTS FOR EVOLUTION OF THE PRESENT SITUATION

The first part of this chapter outlined the present situation of European Union Law regarding third-country nationals. It is against this background that we may view the prospects for evolution of the present state of legal affairs, notably concerning Union Citizenship. At the present time, analysis of these prospects is inevitably related to the revision of the Treaties within the framework of the Intergovernmental Conference.

A. The Most Likely Possibility: A Restrictive Immigration Policy Accompanied By Some Improvements in the Rights of Third-Country Nationals

From the present discussions surrounding the IGC, it seems possible to draw some indications of the likely evolution of European Union rules on third-country nationals. On the positive, or at least, the most active, side, it appears probable that a general non-discrimination clause will be inscribed in some way in a present or future treaty of the European Union. This would allow, for example, the enactment of legislation against racial discrimination, possibly with EC-style legally-binding force. However, on the negative, or most passive, side, it

is unlikely that the IGC will grant Union Citizenship to any group of third-country nationals. It may be noted that even the European Parliament, an institution with a long record of support for third-country national rights, has not put forward any proposal in this regard. In its recent resolution on the 1996 Intergovernmental Conference,[32] the European Parliament simply stressed that:

> Third-country nationals legally resident in the Union should be given guarantees regarding respect for human rights, equality of treatment and non-discrimination with regard to social, economic and cultural rights and the right to vote in local elections (...).[33]

It is always a tricky business to foresee the future, with or without crystal balls. Furthermore, it seems hard to sustain the likelihood of the IGC adopting rules which will go much beyond this EP proposal as far as the rights of third-country nationals are concerned.

Nevertheless, it is conceivable that some amendments to the third pillar structure would be decided at this IGC, namely to facilitate the adoption of decisions on immigration. Following the trend seen over the last few years in intergovernmental cooperation activities, this could open the way to a development and reinforcement of the present restrictive EU immigration policy. In the most pessimistic scenario, an incipient improvement of the rights of third-country nationals could be used as a political instrument to disguise gradual construction of a strongly restrictive European immigration policy.

[32] Adopted on 13 March 1996, *Agence Europe - Europe Documents*, No. 1982, of 13/4/1996.

[33] *Idem*, point 4.16. This may be compared to what the European Parliament proposed during the preparation of what would be become the Maastricht Treaty. The Parliament proposed that, 'under conditions laid down by a Union law', a wide range of rights be granted to third-country nationals resident in a Member State. Those rights would include not only 'the right to move and reside freely throughout the Union' and 'to exercise any professional or economic activity without discrimination', but even 'the right to exercise any lawful activity on the same terms as citizens of the Member States concerned'. Accordingly, the Union would have 'to remove legal obstacles to the effective exercise of that freedom and would conduct a policy aimed at removing other existing obstacles.' The Parliament proposal envisaged a common definition of the 'notion of persons resident in the Union', which would also include third-country nationals. This definition would be adopted by the Council, acting unanimously, on a proposal from the Commission and with the assent of the European Parliament. Then, instruments would be adopted defining 'the criteria for admitting resident aliens to economic and professional activities in the Union as a whole'. For persons satisfying that criteria, legislation would provide for equal treatment with Union citizens, 'including the same conditions of employment'. Finally, it would also 'determine the political rights of aliens'. See the proposal No. 1(i) of the Resolution of the European Parliament of 21/11/1991 on Union Citizenship, *Official Journal* C 326/205 of 16/12/91.

B. An Ambitious Possibility: Direct Attribution of European Citizenship To Long-Term Resident Third-Country Nationals

1. Advantages Within the Framework of a European Immigration Policy

One can also consider the ambitious possibility that the IGC might extend Union Citizenship to some categories of long-term resident third-country nationals. This would undoubtedly be a major move by the European Union in favour of the social integration of these persons, even if the substantial content of Union Citizenship would not change in the future. Such a move would also be important for the European Union itself, as it would contribute to social harmony within it.

As we have seen in the first part of this chapter, third-country nationals are not recognised as having independent EC rights to free movement of persons. Thus, the acquisition of Union Citizenship by third-country nationals would mean that they could move to work in a Member State other than that of their initial residence.[34] Moreover, they would be considerably protected from expulsion from the European Union, as they would also be protected against expulsion from that Member State into which they went to work. Furthermore, they would enjoy labour and social status equal to that of nationals of the Member State of residence. Finally, they would have political rights, even though limited to European and local, but not national, elections.

However, such legal protection of third-country nationals would contradict the present trend in the developing European Immigration Policy. As seen above, this 'Policy' works mainly to the disadvantage of third-country nationals, as it concentrates on restricting the entry of immigrants from third countries, without achieving significant improvement of the situation of those already residing in Member States.

2. Problematic Consequences

a. Implications for the Legal Concept of Union Citizenship. The extension of Union Citizenship to resident third-country nationals would also have some more far-reaching consequences, going well beyond the rights of third-country nationals. One such consequence relates to the present concept of Union Citizenship. It has been pointed out that one of the main characteristics of Union Citizenship is its additionality (notably to national rights and citizenship), from which stems an indirect relationship of the individual to the Union.[35] The extension of Union Citizenship would change this state of affairs by establishing a direct relationship

[34] Naturally, I presume here that in the event of Union Citizenship being extended to some resident third-country nationals, the technical obstacle of having EC legislation on free movement of persons applicable to nationals of a Member State only would be abolished.

[35] C. Closa, 'The Concept of Citizenship in the Treaty on European Union', Vol. 29 *Common Market Law Review* (1992), no. 6, pp. 1137-1169, at p. 1160.

between the Union and some of the individuals residing in it - the third-country nationals to whom Union Citizenship would be granted. This would be the first time that the Union itself would define who has political rights and rights of residence. Thus, we could perhaps venture to say that the extension of Union Citizenship would be the embryo of a Law on European Nationality. This would entail potentially enormous repercussions for the general development of European political integration, which would probably not be readily accepted.[36]

b. Implications for Harmony in the Process of European Political Integration. On the other hand, can we expect to improve Union Citizenship only in one aspect? Could Union Citizenship be extended to third-country nationals, while maintaining the present substantive content of that Citizenship, and the present characteristics of the European political system (if such a system exists)?

I do not think so. I think that the call for extension of European Citizenship necessarily entails, albeit indirectly, a call for deepening and enlarging Union Citizenship and for further progress in the development of a true European political system. Otherwise, I fear that Union Citizenship might be seen as strange creature, with one leg bigger than the other, unable to walk properly.

At the present time, Union Citizenship is relatively incipient; we do not have a European Constitution or catalogue of fundamental rights of the European citizen; the European Parliament (our directly-elected representative institution) has fewer legislative powers than the Council, and Union institutions do not work with enough transparency. In more general terms, we still have a long road to travel before reaching a true European political sphere and a true European political system.

My point is that we have to accept, and perhaps even contribute to, substantial progress in these areas if we want to successfully support the extension of Union Citizenship to third-country nationals.

III. CONCLUSION: IS IT TOO EARLY TO BE *REALISTIC*?

The title of this chapter asks whether it is too early to extend Union Citizenship to third-country nationals. However, in true academic fashion, my purpose is

[36] Note that, as Fischer & Neff recall, '[n]ot until the adoption of the Fourteen Amendment, in 1868, did [US law] articulate a clear constitutional concept of national citizenship. Before that there had been only a network of state citizenships, coupled with a constitutional duty of reciprocal recognition by each state of the other state citizenships and a duty on each state's part to accord its 'privileges and immunities' to the citizens of other states as well as to its own (analogous to the non-discrimination norm of Article 6 of the Treaty of Rome).' See T.C. Fischer and S.C. Neff, 'Some Thoughts About European 'Federalism'', Vol. 44 *ICLQ* (1995), no. 4, pp. 904-915, at p. 913. Naturally, one can ask whether, in the current situation that Europe now faces, it can wait as long as the United States did to have the political integration required for a 'clear constitutional concept' of European 'national citizenship'.

not to answer this with a yes or a no.

I have no doubt that it would be an appropriate move for the European Union to grant Union Citizenship to long-term resident third-country nationals. As recalled above, this would be an important boost for their social integration and for social harmony within the Union. In my view, these are objectives whose attainment cannot be postponed.

However, I recognise that there are also important implications of the extension of Union Citizenship and considerable obstacles on the way to it. By highlighting these obstacles, I sought to stress their significance, and thereby contribute to overcoming them. With regard to Union Citizenship and European political integration in more general terms, in sustaining the extension of this Citizenship to third-country nationals, one may have to be prepared to accept and indeed call for, a deepening of the material content of this Citizenship and for further development of European political integration. Some harmony between development on the one side, of the personal scope of Union Citizenship, and on the other side, of the substantial content of that Citizenship and of the European polity, seems inevitable.

Meanwhile, I stress that this support of the extension of Union Citizenship to long-term resident third-country nationals has to be integrated with a call for a coherent and global policy regarding these persons, which should be embodied in certain fundamental legal proposals. Among such proposals would be: the quick enactment of effective legislation against racial discrimination; the guarantee of stability of residency status for long-term third-country nationals and of equality status in social rights. Furthermore, I propose that the Council should draw up, within the third pillar, two Conventions to be adopted by national Parliaments. The first would grant to long-term resident third-country nationals political rights at all political levels (local and regional, national, and European). The second Convention would harmonise Member State legislation so that third-country nationals residing in a Member State for more than a set number of years could, in principle, have access to that Member State nationality.

We should not allow repetition of what has happened in the case of racism and racial discrimination. Over the past two decades, racist attitudes and attacks have been allowed to reach a deplorable level in Europe. It took a series of fatal events in Germany for the European Union to start earnest policy co-operation in this field and to think seriously about enacting EC legislation against racial discrimination. This was and continues to be, too slow and limited an answer to such an European-wide social problem. Inaction has a high social cost in these matters. As far as the political and social integration of third-country nationals is concerned, it is certainly not too early to act quickly, notably through the extension to them of Union Citizenship.

It is never too early to be realistic, even when we seem to 'ask for the impossible', as long as we remain aware of the potential implications and difficulties of being realistic in advance of the majority of our current fellow 'citizens'.

POSTSCRIPT - AUGUST 1997

As this volume goes to press, the Intergovernmental Conference has been concluded and the 'Amsterdam Treaty' has been agreed upon. The ambitious possibility of directly attributing European Citizenship to long-term resident third-country nationals did not materialise. It was more the above-mentioned 'most likely' scenario that occurred.

On the one hand, most of the activities on immigrants and immigration (currently developed under Title VI of the Treaty on European Union) will be addressed by a new Title of the EC Treaty. This is certainly a positive point to be welcomed. However, to some extent, the change is more apparent than real, given for example, the general continuation of the unanimity rule, and the worrying limits on the jurisdiction of the ECJ on immigration matters.

Meanwhile, a new Article of the EC Treaty will give the Council the competence to take action to combat discrimination which is based, *inter alia*, on 'racial or ethnic origin'. It is not too clear what the practical value of this provision will be. First, the competence is said to be limited to 'the powers conferred by [the EC Treaty] upon the Community'. Second, common action to be taken under the new Title VI of the Treaty on European Union will also handle the prevention and combat of racism and xenophobia, along with police and judicial co-operation in criminal matters.

The fight against racism and racial discrimination must be a fundamental part of a European Immigration Policy. A message has to be sent that resident immigrants are fundamentally equal to all European citizens, even though they are not being given Union citizenship.

Binding legislation against racial discrimination should be quickly adopted by the European Union. Unless this is done, initiatives such as the European Year Against Racism run the risk of being the 'beautiful mask on the ugly face of Europe'.

CHAPTER X
EQUAL CITIZENSHIP AND THE DIFFERENCE THAT RESIDENCE MAKES*

Rut Rubio Marín

I. LABOUR MIGRATION AND THE SPLIT BETWEEN THE SOCIETAL AND POLITICAL MEMBERSHIP

Post-war labour migration to affluent and industrialised countries has generated some social realities that need to be questioned if the commitment of these societies to liberal democracy is to remain alive. One could say that such a commitment currently ties membership in the political community to the enjoyment of equal freedom in the political sphere, or, in other words, to the idea of coexistence in civic equality.[1] Both in Western Europe and in North America increasing numbers of non-nationals - who have by now, consolidated their residence and made the new country of residence the center of their economic, professional and personal existence - remain nevertheless, excluded from the status of equal citizenship.[2] The latter binds democratic membership and has thus far been generally reserved to national citizens. Resident aliens' vulnerability, and hence, the democratic legitimation concerns, derives from the fact that this population does not share in the space of civic equality, lacking predominantly but not only, the most important political rights. All of these problems place the sector of non-national population in a disadvantaged position when trying to develop freely and fully their individuality by relying on the necessary means and protection to do so.[3]

* This paper is based partly on my Ph.D. thesis at the European University Institute, 'Stranger in Your Own Home. The incorporation of immigrants into the political community of the state of residence: theory and constitutional practice in Germany and the United States'.

1 I will use the term 'civic equality' to refer to the sharing in a space in which political equality is to be preserved by the equal recognition of rights to political participation as well as of those other rights, e.g., civil and social, recognised as relevant for the that same purpose.

2 By equal citizenship, I mean the membership status that results from sharing in the space of civic equality regardless of whether that status is or is not achieved directly, through the equal entitlement of rights, or indirectly, through another membership status, such as that of national citizenship.

3 Although in liberal democracies the right to be treated with equal respect and concern is recognised as encompassing a right to participate in the process of collective decision

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 201-227.

Needless to say, the degrees and kinds of exclusion differ largely from country to country, as do the exclusionary mechanisms. In Western European countries, a large fraction of the non-national resident population is formed by the immigrants recruited during the economic expansion of the 1950s and 1960s and by the descendants of these immigrants. Many of the first-generation immigrants have by now consolidated a rather satisfactory legal status with the recognition of almost the same civil and social rights that citizens have, as well as a legally protected and stable residential status. Thus, their exclusion from equal citizenship rests mainly on their lack of political rights (e.g., exercise of public offices and voting rights, at least at the national level).[4] In some countries, such as Germany, reliance on descent (*ius sanguinis*) as the sole criterion for ascriptive citizenship at birth and restrictive naturalisation practice have brought about second and third generation 'immigrants', greatly deepening the gap between societal and political membership. Peculiar to the European experience is also the consolidation of an area of economic integration, which enables nationals of the EU Member States to settle indefinitely in other EU countries without gaining at the same time a full share in their spheres of civic equality.

In North America, where regional economic integration has not reached such an advanced stage, the main source of non-national population is still immigrants. Unlike in Europe, labour migration in North America has not, as a general rule, been conceived as temporary in nature. Rather, immigration has been seen as the first step in a process that was to lead, with little more than the accumulation of a certain residence (and as a matter of right, and not of administrative discretion) to equal citizenship through naturalisation.[5] Moreover, the widespread use of ascriptive nationality following the criterion of the place of birth (*ius soli*) has cut off from the beginning the possibility of anything similar to second and third generation immigrants. Nevertheless, the fact that some groups of immigrants exclude themselves by declining naturalisation leads again to large sectors of the population which remain outside of the country's political life.[6] But political rights are not the only thing at stake, as proven by the current

making, as well as a right to have one's interests equally weighted in it, the reason as to why the exclusion of non-national residents has thus far not been paid more specific attention in modern studies on political justice seems to be the assumption of closed societies from which many of these studies depart. Such an assumption appears less and less adequate to confront the contemporary realities of mobile societies. See for example, J. Rawls, *Political Liberalism*, New York: Columbia University Press (1993).

4 T. Hammar, *Democracy and the Nation State*, Aldershot: Avebury (1990), p. 21.

5 Notice however, that this has not always been so. Prior to 1952, racial discrimination played a major role in U.S. naturalisation policy. Between 1790 and 1870, only 'free white persons' were eligible for statutory naturalisation; in 1870 eligibility was extended to persons of African descent, but most Asians remained ineligible. The last racial exclusions were gradually repealed between 1943 and 1952.

6 A study conducted by the Immigration and Naturalisation Service in the US involving the 1977 cohort of immigrants, using a conservative methodology, found that 37.4% had naturalised by 1990. See: U.S. Immigration and Naturalisation Service, *Statistical Yearbook of the INS 1991* (1992), p. 142. On the other hand, there seem to be significant dif-

political proposals to cut back sharply on resident aliens' eligibility for welfare benefits.[7]

Furthermore, mostly in North America but increasingly in Europe, international labour migration is functioning through illegal channels. And although illegal immigrants are usually granted some legal protection,[8] their absolutely precarious residential and working status - more than their disenfranchisement - places them in a vulnerable and exploitable position. From this position, even the enjoyment of those rights and guarantees theoretically granted to them often becomes practically inoperable. Fortunately, in the U.S., where the phenomenon has thus far reached its largest dimensions, the children of illegal immigrants who are born on American soil, acquire American citizenship through constitutional mandate.[9] This mechanism of incorporation has prevented the emergence of a hereditarily subordinated class of non-citizens in the resident population.

II. DEFINING THE BOUNDARIES OF THE POLITY AS A DEMOCRATIC CONCERN

A. The Democratic 'Self'

Although it is hard to deny the split between the societal and the political communities in many Member States, there is no agreement as to whether this can be said to be, strictly speaking, democratically relevant. For instance, in the recent German scholarly debates on alien suffrage and on the Maastricht Treaty, it is not uncommon to find the thesis that only the body of national citizens con-

ferences in the naturalisation rates of different immigration groups and countries. Canada for instance, has significantly higher rates of naturalisation than the United States. And within the United States the difference among immigration groups is striking. Thus, while 57.2% of the immigrants from mainland China had naturalised by 1990, only 15% of the immigrants from Mexico had done so. Hammar estimates an annual naturalisation rate of 3% for the U.S. (see Hammar, *op. cite.*, note 4, p. 77).

7 Some scholars argue that the fact that U.S. law gives immigrants too few incentives to naturalise accounts largely for their low naturalisation rates. See for example, P.H. Schuck, 'Membership in the Liberal Polity: The Devaluation of American Citizenship' in R. Brubaker (ed.), *Immigration and the Politics of Citizenship in Europe and North America*, New York: University Press of America (1989) p. 10. This might explain why, along with the welfare restrictionist discussions, naturalisation demands are reaching unprecedented rates.

8 In some cases, illegal immigrants have enjoyed significant legal protection. Thus, in the U.S., illegal immigrants have traditionally enjoyed many social benefits, and their children's right to public education has even been constitutionally sanctioned (see *Plyler* v. *Doe*, 457 U.S. 202 (1982)). However, some states have followed a different path: in November 1994, California's Proposition 187 was passed: this initiative bans the access of illegal immigrants to most social benefits. Congress is currently discussing the enactment of similar measures at the federal level.

9 The Fourteenth Amendment's Citizenship Clause reads: 'All persons born or naturalised in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside'.

stitutes the *demos*.[10] Accordingly, national citizenship closes the circle of the democratically relevant sphere of political accountability, and hence, of what I have called the sphere of civic equality. Similarly, in the U.S., in the context of the debates on illegal immigration, Schuck and Smith's polemical thesis in *Citizenship without Consent* was precisely that the automatic incorporation of the children of illegal immigrants born on American soil, far from being required in a liberal democratic polity, was a violation of the community's right to 'self-determination' in a matter as central as membership, a thesis that necessarily presupposes the democratic 'self' or the *demos*.[11]

Underlying this perspective is the assumption that the question of the criteria for belonging to the community is logically postponed until the creation of the community. Thus, there is no political commitment that foundationally compels a certain degree of inclusiveness. The differences in the degrees and modes of inclusion in the different countries are therefore, primarily explainable in terms of differing conceptions of the national interest, and result from the community's exercise of self-determination and self-definition.[12]

Against this statement, the normative assumption underlying the position that views the split between societal and political membership as a threat to the liberal democratic order is that according to which, all those who permanently reside in a liberal democratic state ought to be recognised as equal citizens, meaning that they should all share in the sphere of civic equality that characterises democratic membership. Whatever the national specificities resulting from the community's own perception of itself, equal citizenship is ultimately required. Far from denying the community's right to collective self-definition on the matter of membership, the commitment to a liberal democratic order helps to set the limits to the legitimate range of options. The claim here is that the ultimate exclusion of permanent resident aliens is one of the options that falls outside of that legitimate range.

Setting this task for liberal democracy is only conceivable if one holds something more than what Bauböck has called a 'minimalist notion of democracy', as referring to a procedure of aggregating individual preferences to make collective binding decisions.[13] For if we do, as this author recognises, there is no way to democratically influence the issue of membership. Who ought to be included in the *demos*, but also, who cannot be excluded from it in any event, is something that will depend on whatever the outcome in the political process is, and hence,

10 See, for example, H. Quaritsch, 'Staatsangehörigkeit und Wahlrecht', *Die öffentliche Verwaltung*, no. 1, (January 1983), pp. 8-9, and J. Isensee, 'Europa - die politische Erfindung eines Erdteils', in J. Isensee (ed.), *Europa als politische Idee und als rechtliche Form*, Berlin: Duncker & Humblot (1993), p. 133.

11 See P.H. Schuck and R.M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity*, New Haven: Yale University Press (1985).

12 See for example, K. Hailbronner, 'Citizenship and Nationhood in Germany', in R. Brubaker (ed.), *Immigration and the Politics of Citizenship in Europe and North America*, New York: University Press of America (1989) p. 75.

13 R. Bauböck, *Transnational Citizenship*, Aldershot: Edward Elgar (1994), p. 179.

on the result of what the recognised majority at any given moment decides. Needless to say that the ultimate consequences of such a view would be that even an aristocracy, an oligarchy or a despotism could claim to be democratic - democratic to a *demos* that, in itself, is not, nor needs to be, democratically defined.[14]

B. Residence and Subjection to the Laws

Even if one agrees that somewhere there must be a limit to the exclusions that can be made in a democratic order, the normative position defended here still needs to justify what it is that makes permanent residence qualify as a sufficient condition for claiming equal citizenship. In *Democracy and Its Critics,* Dahl confronts the question of how to define the *demos* in a democracy. He seems to suggest the subjection to the laws as the relevant criterion.[15] Indeed, such a criterion finds strong support in modern egalitarian liberalism. Grounded on the idea of equal moral autonomy and freedom of the individual,[16] egalitarian liberalism cannot accept one's right to rule over others based on an intrinsic superior qualification. Political equality is essential to it, meaning that everyone's interests are to be attributed the same intrinsic value and everyone is in principle to be treated as being best qualified to judge his own interests.

Dahl qualifies his criterion with the exclusion of transients who, just like tourists, are likely to leave the community before the political decisions and the laws that their participation might have helped to create can affect them. He also recognises that this exclusion remains always a potential source of ambiguities.[17] However, Dahl's criterion of permanent subjection to the laws still has a strong intuitive appeal. Clearly, not all the laws of a country will necessarily affect all of its residents and some of these laws may greatly affect transients, tourists or even non-residents. However, it seems that territorial sovereignty, still a basic instrument of political organisation in a world of nation-states, frames geographical, institutional and regulatory spheres of jurisdiction defining the global conditions for human interaction in political freedom in particular societies. Therefore, one could expect that individuals permanently living in these societies will share common concerns in that they will be more often and more pervasively affected by the collective binding decisions taken in them.

[14] This is Dahl's main objection against Schumpeter's claim that 'we must leave it to every populus to define itself...what has been thought and legally held to constitute a 'people' has varied enormously among 'democratic' countries'. See R. Dahl, in *Democracy and its critics*, New Haven: Yale University Press (1989) p. 121, quoting J.A. Schumpeter, in *Capitalism, Socialism and Democracy* (2d ed.), London: Allen & Unwin (1965).

[15] Dahl, *op. cite.,* note 14, pp. 121-122.

[16] See Rawls, *op. cite.,* note 3, p. 29.

[17] Dahl, *op. cite.,* note 14, pp. 128, fn. 11 - 129.

C. Residence and Societal Integration

But surely, if only the long-term and pervasive subjection of non-national residents to the laws is what generates the democratic legitimation concern, allowing for non-nationals to remove themselves from the sphere of territorial sovereignty could be said to be a sufficient remedy. Since this is something non-nationals have a right to do, in the sense that there is a corresponding obligation of another state to accept them back (assuming that they are not stateless), one could say that in fact the legitimation gap, if there is any, arises only from their individual will to place themselves there where they know they will not enjoy equal citizenship. The legitimising consent of the individual is still at the root of the situation, although differently expressed.[18]

However, having a right to go somewhere else, and thus to 'evade' subjection to the national laws, is not equivalent to having a right to participate in their elaboration.[19] Looking for an explanation as to why long-term residence should be judged as relevant for defining the boundaries of a liberal democratic community, I suggest that this is so because residence, and the social integration that normally comes with it, helps to define the relevant referential political community for legitimation purposes. The residential habitat usually provides the individual with a context for the conception of meaningful life options. Thus, if a liberal society is to remain loyal to its commitment to conceive of individuals as capable of having equally worthy conceptions of the good life which they can question and redefine in the light of new experiences and information,[20] then it should accord permanent resident aliens the possibility to rely on an opportunity, equal to that of any other societal member, to redefine their life projects in the light of their local experience. Further, the aliens should be able to do so not only in abstract terms, but also through the preservation of whatever attachments and ties they might have developed and within these bonds' proper cul-

[18] This link between the territory of the state and the political community is useful to understand why sometimes in the past, rather than proceeding to massive expulsions from its territory, the state has first deprived ostracised groups of citizens of their status of citizenship. Referring to the experience of German Jews under the Nazi regime, see R. Brubaker, *Citizenship and Nationhood in France and Germany*, London: Harvard University Press (1992).

[19] Notice that this duality also underlies one of the most common arguments made for political inclusion, namely, the argument of 'no taxation without representation'. After all, the duty to abide by the taxation laws is generally linked to alien's residence within the country. Together with financial duties, the alien generally derives a whole set of advantages which are also linked to his residence in the country, including the access to public services and the sharing in public goods such social security or public health benefits. By leaving, the alien would cease to be affected by both the benefits and the burdens that he bears and enjoys as a resident.

[20] See W. Kymlicka, *Multicultural Citizenship*, Oxford: Claredon Press (1995) p. 81. See also Rawls, *op. cite.*, note 3, p. 19, including among the features which define the citizen in a liberal polity, that of having a capacity for a conception of the good which he can not only form, but also revise and pursue.

tural context, a context which one can reasonably expect to be, at least to a sufficiently significant extent, precisely the society in which they have been formed. It would go against this liberal conception to view a fraction of the population as not 'independent from and not identified with any particular conception'[21] but rather, permanently and essentially attached to a predefined set of purposes, be they of economic or any other nature.

There are two ways in which the right to preserve one's ties and attachments requires the possibility to remain in the social community in which this right has been conceived. The first is when the ties are simply not removable in a physical sense. Some ties are simply not easy to 'take away'. A family may be more mobile than a piece of land or a house. The ties to a school system, to associations, and to neighbours and friends can easily be counted among these ties. Even if family life might be led in different ways, the very option to have a family may - to a greater or lesser extent - depend on the broader circumstances of the community in which one lives. Some life options simply seem to require long-term commitments and our lifetime is limited.[22]

The second way in which ties, attachments and, more generally, life projects can be said to be socially linked, has to do with the fact that, along with a material and geographical space, social spaces often correspond to cultural spaces. These cultural spaces often provide us with the tools to interpret the worthiness of our life options.[23] Thus, if one should always keep the freedom to question the value of one's commitments and attachments, it appears that one ought not to be forced to abandon them nor to lose the socio-cultural framework which feeds their meaningfulness.[24]

It is in this deeper and more complex way that the stake of long-term residents in the residential community needs to be conceived. Direct subjection to the laws founds a stake in participation in the process that generates them. De-

21 See Rawls, *op. cite.*, note 3, p. 30.

22 Of course, one may argue that such ties and attachments simply should not have been made to start with, especially if the resident alien knew that he could not rely on the right to either establish them or to preserve them for the future. But the relevant question is still whether one can legitimately expect people to go indefinitely attached to a certain set of aims and purposes and ignore the fact that, in a way, to allow for long-term residence is to allow the emergence of these ties and attachments and new perceptions of the good life.

23 Stressing the relevance of a certain cultural context to perceive the meaning of life options, see Kymlicka, *op. cite.*, note 20, pp. 84 ff. For the same reason that the option to leave our societies does not appear to us to be the expression of free consent to its laws (namely, because we do not just value freedom and equality in abstract terms, but rather within our cultural context), the effects that long-term exposure to a new socio-cultural context may have in the immigrant's sense of meaningful alternatives should not be neglected.

24 Stressing long-lasting residence as generating social processes of relearning, re-evaluation and generating ties and attachments, see T. Hammar, 'Legal Time of Residence and The Status of Immigrants', in R. Bauböck (ed.), *Redefining the Status of Immigrants in Europe,* Aldershot: Avebury (1994), p. 196.

pendency on the social and/or cultural environment in the way described above firmly establishes a stake in the overall society and hence in the political system, shaping and defining its present and future functioning.

D. Some Cautionary Remarks

Some remarks about the nature of societal integration are needed. To start with, the social acculturation on which the present account rests, does not necessarily imply the alien's complete abandonment of his old culture, nor his assimilation into the dominant culture of the receiving society. The cultural experiences that non-national residents will have will in fact differ from case to case; their overall impact will probably depend upon the degree of difference in the society or origin. In some cases, the cultural experiences will be more directly related to the fact of having being exposed to the dominant culture (as is likely in the case of second generations), while in other cases, the cultural experience might be much more connected with experiences in endogenous immigrant communities, as is often the case of first generations. The degree of social mobility in each society is just as likely to have a significant impact on the process of acculturation. What is suggested here is that, whatever the concrete experiences, long-term residence and social integration will expose the individual to new social practices and new cultural contexts which may alter in sufficiently significant ways the perception of himself and the value of his ends.[25] Preserving the links with the society which has offered the context of reinterpretation might be strongly linked to the very possibility of leading what has been redefined as a meaningful life project.

It is just as important to stress that the supported thesis does not rest on the assumption that after a certain residence period, well-settled aliens will only be able to carry out a meaningful existence in the society of residence. Experience shows that many emigrants, even after a long time abroad, choose not to give up their original nationality to take up a new one and this may prove that many of their ties and loyalties remain attached to the society of origin. It seems that their original society often serves as a context of interpretation even for some of the experiences and ties acquired in the country of residence. Nevertheless, the point here is that, due to their specific life histories, the referential social framework might have become broader so as to encompass - in different degrees and in different ways - both the society of origin and that of residence.[26] This is why cut-

[25] Neuman argues that although some immigrants may be eager to divest themselves of ties to their former countries, while others never feel comfortable with American society, almost all incorporate their experiences and associations in the United States deeply into their identities, alongside and not in place of their former associations. See G.L. Neuman, 'Justifying U.S. Naturalization Policies', Vol. 35 *Virginia Journal of International Law* (1994), p. 277.

[26] Hammar stresses the fact that both dual identities and dual attachments are likely to develop with the settlement of immigrants in the countries of residence. Thus, he claims, 'they come to identify more and more with both states and both nations, although

ting off the links with the country of origin should not be required (*e.g.* by asking for renunciation of previous citizenship) as a condition for the inclusion within the realm of civic equality.

One could still argue that occasionally, some long-term immigrants conceive of their immigrant experience as just a bracketed experience which only has meaning for them with reference to life projects shaped in the societies of origin.[27] The relevant question though, is whether the receiving society should expect this to be so and act accordingly. The claim here is that people cannot simply be expected to go indefinitely without developing ties and attachments; without engaging in long-term commitments which may come to be essential for them; or without taking from the cultural and social context in which they live, the necessary tools for interpreting their meaningfulness.

To sum up, the main thrust of the argument is that a liberal democratic society should look at all of its permanent residents as if they were potential citizens - equally dependent on the society for the protection of their rights and the development of their persons - rather than relegate some of the residents indefinitely to a specific function or set of purposes, such as that of being indefinite workers. This implies recognising permanent resident aliens as equally entitled to aspire to whatever life-options the society generally allows for and presents as meaningful. Whether these aliens actually start to conceive of the country of residence as the relevant framework in which to measure their status of political equality will partly depend on their self-perception which will in its turn, be largely influenced by their perception of the country of residence as a new social and cultural space.

III. CONSTITUTIONAL MEMBERSHIP: RESIDENTS VERSUS NATIONAL CITIZENS

We shall focus now on two Western countries, Germany and the United States, to evaluate the gap between the normative claims advanced above and the reality of the non-national population living in both of them. This section concentrates on the constitutional status of such a population, assuming that the constitutional order is the part of the legal system that embodies the countries' commitments to the foundational principles of liberal democracy. Briefly, the question to be answered concerns the extent to which the condition of resident in the common geo-political space of the state has triggered equal constitutional protec-

maybe in different ways. They speak two languages more or less well and they learn perhaps also how to function in two cultures. They have economic interest, own property or may expect to inherit in both countries. They have friends and relatives in both and regularly travel between them.' See Hammar, *op. cite.*, note 4, p. 205.

27 Referring to Mexican immigrants in the United States, see G.P. Lopez, 'Undocumented Mexican Migration: in Search of a Just Immigration Law and Policy', Vol. 28 *University of California at Los Angeles Law Review* (1981), pp. 676-678.

tion, either indirectly - through the access to national citizenship - or directly, through the access to an equal status of rights regardless of nationality.[28]

A. The German Case

1. The German Basic Law and Resident Aliens' Access to National Citizenship

The general legal mechanisms of civic incorporation in Germany have been quite restrictively defined. The 1913 Nationality Act (*Reichs- und Staatsangehörigkeitsgesetz*) determines the acquisition of German citizenship at birth following the criterion of descent (*ius sanguinis*). Also, naturalisation in Germany has traditionally been conceived of as a discretionary act of the state in which the public interest prevails over the individual interests at stake. As reformed in 1990, naturalisation has lost part of its discretionary nature for certain categories of cases but is still very demanding in terms of the period of residence and other naturalisation requirements, such as the renunciation of the previous citizenship. This may explain why, in spite of the reforms undertaken naturalisation rates have not increased as much as was expected. The possibilities to facilitate naturalisation even further and to include some *ius soli* elements in the definition of ascriptive citizenship are currently being discussed by the different political forces.

However, the German Basic Law *('Grundgesetz')* offers little support. In principle, the Federal Constitutional Court *('BVerfG')* has not held that the regulation of citizenship is something left completely to the discretion of the political branches.[29] On one occasion, the *BVerfG* even pointed out the need to take into account the change in the composition of the population of the Federal Republic in the regulation of citizenship.[30] However, some more specific constitutional clauses have been taken to oppose, rather than favour, advancing in this direction.

To begin with, the *BVerfG* has expressly approved in dictum, the *ius sanguinis* principle. In its 1974 decision, the *BVerfG* held that the principle of descent ensured that the attachment to the state was guaranteed and mediated through the attachment to the family. Being a part of the manifold close relations between parents and children, the attachment to a common state community contributes

[28] Notice that it is not necessary that the reason behind the recognition of partial or global constitutional equality between resident aliens and national-citizens be the former's societal membership. The claim here is not that long-term residence should be a *necessary* condition for inclusion, but rather that, ultimately, it should be a *sufficient* condition for equal citizenship.

[29] Thus in 1974, the *BVerfG* struck down, on the basis of gender discrimination, a statutory provision holding that only the legitimate children of German fathers, but not those of German mothers, acquired German citizenship at birth. See BVerfGE 37, 217 (1974).

[30] The Court was precisely referring to the legitimation gap that would result otherwise given that only nationals can be enfranchised. See BVerfGE 83, 37 II, at 52 (1990).

also to strengthening the cohesiveness of the family.[31] Most significant to this discussion has also been Art. 116.1.2 of the Basic Law, according to which Germans, as the recognised holders of all the fundamental rights of the *Grundgesetz*, are not only German citizens, as defined by the legislator but also 'German nationals' (*Volkszugehörige*), also called 'Status-Germans'. In principle, the significance of Art. 116.1.2 should be rather limited. Included among the transitional provisions of the Basic Law, was an intent to regulate the treatment of a large category of refugees and expellees who were already within Germany at the time the Basic Law was enacted (and thus, territorially limited). In actuality, Art. 116.1.2 and the legislation implementing it have become the basis for a statutory right for aliens of German ancestry to migrate from Eastern Europe and the Soviet Union.[32] Moreover, the very existence of a German people (*Volk*), not identifiable with the people of any state, has been interpreted as giving constitutional legitimation to the notion of ethnic - rather than to that of political - 'German people'.

Especially relevant is the fact that Art. 116.1.2 has not been removed after the German unification. Prior to unification, the idea of a pre-political German people served to support West Germany's claim to eventual union with East Germany. In fact, Art. 116.1 was interpreted as recognising a single citizenship for East and West Germans.[33] Now that the there is a single German state, the preservation of the category of Status-Germans has allowed for some scholars (who do not however, represent the prevailing opinion) to interpret both the old Preamble's declaration of the goal of achieving national unity for the German people and the Status-Germans clause, as constitutionally sanctioning the understanding of German nationhood. In the 1980s, many of these scholars defended the need to preserve a German nationality law and naturalisation policy guided by the substantive criteria for membership in the German people, and hence, contrary to *ius soli* influence.[34]

Finally, the *BVerfG* has also had an occasion to discuss multiple nationality, something which would increase if naturalisation was further facilitated by

31 See BVerfGE 37, 217, 246 (1974).

32 Notice however, that this not a *ius sanguinis* rule of nationality. Remote German ancestry gives ethnic Germans a preferred role in migration policy, but does not automatically make them German nationals. If this was so, their right to enter Germany could not be subject to legislative limitations, as it currently is. In fact, the criteria and procedures for the reception of Status-Germans have been recently tightened and an annual quota has been imposed. According to the Act for the Regulation of Questions of Nationality of 22 February 1955, Status-Germans have a statutory right to naturalisation, subject only to the exclusion of those who present a threat to the internal or external security of the state.

33 See BVerfGE 36, 1 (16) (1973).

34 Among the referred principles are those of 'national homogeneity' (H. Quaristch, 'Einbürgerung als Ausländerpolitik?' Vol. 27 *Der Staat* (1988)); 'cultural nation' *(Kulturnation)* (A. Bleckman, 'Das Nationalprinzip im Grundgesetz', Vol. 41 *Die öffentliche Verwaltung* (1988)) and 'descent' (O. Uhlitz, 'Deutsches Volk oder 'Multikulturelle Gesellschaft', *Recht und Politik* (1986)).

abandoning of the requirement of renunciation to previous citizenship and the regulation of German citizenship, modified by incorporating *ius soli* elements into it. Thus, in its 1974 decision, the *BVerfG* sanctioned the so-called *Übel-Doktrin* which has since been increasingly considered obsolete: multiple or dual nationality is to be regarded, both domestically and internationally, as an evil that should be avoided or eliminated both in the interest of nation-states as well as of the affected individual. The nation-states, the *BVerfG* noted, seek the exclusivity of their respective nationalities to set clear boundaries for their sovereignty over persons and to ensure their citizens' loyalties. Avoiding subjection to multiple duties (e.g., military duty) and to multiple assertions (e.g., diplomatic protection) would also be to the advantage of the affected citizens.[35]

2. *The Grudgesetz and the Protection of Resident Aliens*

Although non-resident aliens are not fully deprived of constitutional protection, only access to the German national territory places the individual in the general sphere of application of the *Grundgesetz*.[36] Residence, however, does not make the distinction between citizens and aliens an obsolete one for constitutional purposes. Thus, the *Grundgesetz* carefully distinguishes between a small number of rights granted only to Germans (citizen-rights) and those recognised to everyone, including aliens (human rights). Among the rights in the first group are: the right to freedom of assembly and of association; the right to resist the overthrow of the government; the right to choose a profession; the right to equal access to the public function; the right to hold an equal status of civil rights in all the *Länder*; the right to freedom from extradition; the right to enter, reside and move freely within the country; and, finally, the right to vote both at local and national level.[37]

However, with the consolidation of an alien population, the *BVerfG* has found some mechanisms to narrow the constitutional differentiation. Thus, the *BVerfG* has held that aliens can rely on Art. 2 *Grundgesetz* (a constitutional clause which recognises the general freedom of action to everyone) to derive some protection in the spheres of freedoms otherwise covered by the *Grundgesetz* citizen-rights.[38] Some constitutionalists have even sustained the ultimate

[35] See BVerfGE 37, 217, 254-255 (1974).

[36] Notice however, that the Federal Constitutional Court has also granted constitutional protection to non-resident aliens who nevertheless, have some significant connection to the country, such as family ties (see BVerfGE 76, 1). On the question of which ties are relevant to trigger constitutional protection in spite of non-residence see, H. Quaritsch, *'Der grundrechtliche Status des Ausländer'*, in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatasrecht*, Vol. I, Heidelberg: Allgemeine Grundrechte (1992), pp. 700-704.

[37] See the *Grundgesetz*, Arts. 8, 9, 11, 12, 16, 20, 28, 33 and 38. In reality, nowhere is the right to vote expressly limited to citizens. However, most scholars have taken this to be assumed by the constitutional sanctioning of the principle of democracy in Art. 20.2 *Grundgesetz*.

[38] See BVerfGE 78, 179 (1988). Briefly, the Court has stated that the legal restrictions on

equalisation of the constitutional status of citizens and alien residents along with the increasing residence and social integration of the latter, at least in the strictly non-political sphere.[39] Through constitutional interpretation, some authors have suggested, the rigidity of the constitutional distinction could be overcome in favour of an up-to-date and functional interpretation of the system of fundamental rights of the *Grundgesetz* (*Verfassungswandel*) which would allow confrontation with the social reality of the permanent sector of immigrant population formed by well established inhabitants of Germany who will develop, just as Germans do, their lives and personalities in Germany, being thus subject to the authority of the German public powers.[40]

The *BVerfG* has indeed accepted the relevance of the degree of social integration and the consolidation of personal and professional ties as relevant to define the degree of protection of citizens' liberties to be granted to aliens.[41] However, the *BVerfG* has never gone so far as to suggest that the differences that had been constitutionally sanctioned could be completely overcome through the consolidation of a residential status.[42]

freedoms covered by citizens' rights (such as the restrictions on the freedom to choose a profession or to remain within the country) need to be consistent with the general principles of a state founded on the rule of law *(Rechtsstaat)*. These principles include the requirements of definiteness; of equality before the law; and of proportionality and protection of reliance (see BVerfGE 49, at 180-81, 184-85 (1978)).

39 See G. Schwerdtfeger, 'Welche rechtliche Vorkehrungen empfehlen sich, um die Rechtstellung von Ausländern in der Bundesrepublik Deutschland angemessen zu gestalten? *Verhandlungen des Dreiundfünfzigsten deutschen Juristentags Berlin 1980*, Vol. II, Munich: C.H. Beck (1980), p. A 119 *Gutachten* A.

40 In favour of it, see H. Rittstieg, 'Ausländer und Verfassung', Vol. 48 *Neue Juristische Wochenschrift* (1983), p. 2747. Against it, see K. Hailbronner, 'Ausländerrecht und Verfassung', Vol. 38 *Neue Juristische Wochenschrift* (1983), p. 2110, according to whom, the wording of the constitution is a limit to any other possible interpretation.

41 See BVerfGE 76, 1; 51, 386; 50, 166; 49, 168; 35, 382 (1973).

42 Thus, concerning the freedom to choose a profession under Art. 12 *Grundgesetz*, even long-term non-EU persons enjoying permanent resident permits can be excluded, or at least discriminated against, in the exercise of the most diverse professions and activities. Among these are those which imply becoming a public officer, those which are more indirectly related to the public function (public notaries, judges, but also chimney cleaning supervisors) and others, such as veterinary, dentist, doctor, professional hunter, and, more generally, the entire set of activities dealing with weapons and explosives. For references, see F. Franz, 'Benachteiligungen der Ausländer Wohnbevölkerung in Beruf, Gewerbe und Gesundheitswesen', *Zeitschrift für Ausländerrecht* (1989), pp. 153-162; Quaritsch, *op. cite.*, note 4, pp. 723-728.
Restrictions similar to these have been closely scrutinised in the United States under Art. 3's equality principle. However, the Federal Constitutional Court has generally avoided a direct confrontation with the material similarities and/or differences between resident aliens and resident citizens to cover the constitutional differentiations, even if Art. 3 expresses itself in universalist terms. Unlike the US Supreme Court, the *BVerfG* has held that discriminations on the basis of alienage do not enjoy the qualified constitutional protection of Art. 3.3, which refers to other features such as gender, race or language, but rather must be measured against the general equality principle of Art. 3.1,

Even this more modest doctrine of the *BVerfG* has had important implications in a field which, in the U.S., has traditionally been considered within the absolute discretion of the political branches. As a precondition for the effective enjoyment of even those constitutional rights the *Grundgesetz* recognises in favour of everyone, the protection of aliens' residence within the country is of utmost importance. Relying on the general freedom clause[43] of Art. 2, the *BVerfG* has held that in deportations or in decisions not to renew residence permits, the public interest in the measure has to be balanced against the private interests at stake, including the consequences to the alien's economic, professional and personal life, all of which clearly depend upon the degree of integration of the alien into the German society.[44] Among these, the possibility of intrusion into the alien's family life has been granted the highest consideration, given that Art. 6 of the Basic Law which protects family life, is expressed in universal terms[45] and applies most effectively to families who are already within the country.[46]

The greatest obstacle to the thesis of equal citizenship concerns resident aliens' strictly political status, where some distinctions have been said to be not only constitutionally permissible, but even constitutionally required.[47] Thus in 1989, far from approving of it as constitutionally required, the *BVerfG* outlawed the legislative attempts of Schleswig-Holstein and Hamburg to grant local voting rights to long-term residents.[48] At stake was the interpretation of the principle of

which only protects against 'arbitrary' treatment (see BVerfGE 51,1 (1979), at 30; but see, arguing against this principle, M. Zuleeg, 'Zur staatsrechtlichen Stellung der Auslaender in der Bundesrepublik Deutschland. Menschen Zweiter Klasse?' in *Die Öffentliche Verwaltung* (1973), pp. 363-364). As the distinction between citizens and aliens is already sanctioned in the *Grundgesetz*, it has been difficult to hold that it is an arbitrary one (see Hamman/Lenz, *Grundgesetz*, p. 155; Ipsen, *Neumann-Nipperdey-Sheuner*, Die Grundrechte, Band II, p. 127; v. Münch, Stern, *Das Bonner Grundgesetz*, Art. 3, Anm.II, 4b 7).

43 Recall that the fundamental right to enter and move freely within the country has been expressly reserved for German citizens under Art. 11 of the *Grundgesetz*.

44 See BVerfGE 35, 382 (1973); BVerfGE 49, 168 (1978); BVerfGE 69, 220 (1985); and BVerfGE 50, 166 (1979); in relation to the principle of proportionality and protection of reliance.

45 Thus, the Court has, for example, interpreted that the constitutional interest in the preservation of family life outweighs criminal conduct deterrence interests, unless the crime is a especially serious one. See BVerfGE 51, 386 (1979); BVerfGE 50, 166 (1979.

46 See BVerfGE 76, 1 (1987).

47 Notice however, that in spite of their constitutional definition as citizen-rights, the freedoms of association and meeting have been statutorily recognised to aliens in terms almost equal to those of citizens (see Quaritsch, *op. cite.*, note 36, p. 710). As a matter of constitutional law however, most authors have understood that aliens' surrogate protection in the sphere of citizen-rights, Art. 2's general freedom clause, does only apply to negative freedoms and thus only to non-political freedoms. See Hans von Mangoldt, 'Die Deutsche Staatsangehörigkeit als Voraussetzung und Gegenstand der Grundrechte', in Isensee and Kirchhof (eds.), *Handbuch des Staatsrecht*, Heidelberg: C.F. Müller (1987), p. 660; Schwerdtfeger, *op. cite.*, note 39, p. A 119.

48 BVerfGE 83, 60II and 83, 37II.

democracy sanctioned in Art. 20 *Grundgesetz* and, more specifically, the question of who is to be judged as 'the people' (*Volk*) in the *Grundgesetz* for democratic legitimation purposes.[49] The *BVerfG* rejected the thesis that the principle of democratic legitimation of Art. 20.2.1 of the *Grundgesetz* implied that the public authority decisions had to be legitimated by those who are affected by them and expressly held that national citizenship is the legal precondition for an equal civil status.[50]

On the other hand, the *BVerfG* recognised the validity of the claim that there has to be congruence between the holders of political rights and those who are permanently subject to the public authority in a liberal democratic system.[51] However, the *BVerfG* ruled against the *Verfassungswandel* thesis that the constitutionally sanctioned difference between citizens and aliens are no longer relevant; it held that the regulation of citizenship is the only appropriate sphere for the legislator to take into account the change in the composition of the population of the Federal Republic and its implications on the exercise of political rights.[52] The democratic conception of the *Grundgesetz* could not imply the dissolution of the link between the condition of being German and the belonging to the people of the state, as holders of public power, and thus, to the legitimising 'people' in Germany's democracy.[53]

B. The United States

1. *The Constitution of the United States and Resident Aliens' Access to National Citizenship*

No 'right' of resident aliens to be naturalised has ever been recognised as a matter of constitutional law.[54] The Constitution vests Congress with the power 'to establish an Uniform Rule of Naturalisation'.[55] This competence has traditionally been considered to belong exclusively to the federal legislative powers[56] and to be virtually unrestricted.[57] On repeated occasions, the Supreme Court has referred

[49] Art. 20.1 *Grundgesetz* and Art. 20.2 *Grundgesetz* contain the democracy clause. According to the former, the Federal Republic of Germany is a democratic and social state. Art. 20.2 provides that 'all state authority emanates from the people' (Art. 20.2.1). 'It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs' (Art. 20.2.2).

[50] BVerfGE 83, 37 II, p. 51.

[51] *Ibid.* at 52.

[52] *Ibid.*

[53] *Ibid.*

[54] See *Petition of Ferro*, 141 F. Supp. 404, 408 (M.D. Pa. 1956); *United States* v. *Ginsberg*, 234 U.S. 462, 475 (1917); *United States* v. *Macintosh*, 283 U.S. 605, 615 (1931).

[55] Art.I, § 8, cl. 4.

[56] See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 701 (1898).

[57] Thus, the Congressional ability to define the classes of eligible aliens and the conditions for naturalisation have never been significantly limited by the Supreme Court. See *United States* v. *Macintosh*, 283 U.S. 605, 615 (1931); *Schneiderman* v. *United States*, 320

to naturalisation as a gift[58] or a 'privilege'[59] to be granted at the discretion of the American government.

In spite of this terminology, naturalisation in the U.S. has been a matter of statutory entitlement, rather than of administrative discretion, for all those who have complied with the required conditions.[60] In fact, as a classic immigration country, the U.S. has often perceived naturalisation as the intended end of the immigration process;[61] aliens are thus not only allowed but actually expected, to naturalise.[62] And this perception has had its constitutional relevance. Thus, the fact that resident aliens could rely on the possibility to naturalise has been more or less explicitly recognised as a relevant fact to judge the severity of the exclusion of aliens from the full enjoyment of rights and benefits. As a status from which the individual could withdraw himself, alienage was less likely to cover legislative discriminatory intent.[63]

Further, although not expressly prohibited in the wording of the Constitution, some discrimination criteria in naturalisation practices are said to be currently outlawed in a global vision of the constitutional practice. Among them are race or national origin.[64] And at least as a matter of statutory obligation, the right to become a citizen cannot currently be denied on the basis of sex or marital status, either.[65]

As for ascriptive citizenship at birth, the Constitution contains the Fourteenth Amendment's Citizenship Clause, according to which, '[a]ll persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside'. This *ius soli* citizenship has narrowed the issue of civic incorporation to the first generation of aliens. A proposal to read the Clause in a way such as to prevent the automatic

U.S. 118, 131-132 (1943).

58 See *Maney* v. *United States*, 278 U.S. 17, 22 (1928).

59 See *Schneiderman* v. *United States*, 320 U.S. 118, 131-132 (1943) which describes as a privilege, to be given or withheld on such conditions as Congress sees fit.

60 Thus, the Supreme Court has emphasised the existence of determinate statutory criteria for the granting of as a reason why assignment of functions to the federal courts is constitutionally valid. See *Tutun* v. *United States*, 270 U.S. 568, 576-78 (1926).

61 See T.A. Aleinikoff, 'Citizens, Aliens, Membership and the Constitution', Vol. 7 *Const. Comm.* (1990), p. 17. See also *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 104 (1976); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 585 (1952).

62 Connecting this expectation to the public interest of ensuring the preservation of some degree of national affinity and a general attitude of allegiance to the U.S. on the part of its resident aliens, see *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977), at 10 and 16.

63 To give an example, Gerald Neuman has found the inclusiveness of the laws one of the reasons why limiting the franchise to citizens does not necessarily deny resident aliens the equal protection of the laws. See G.L. Neuman, 'We Are The People: Alien Suffrage in German and American Perspective', Vol. 75 *Michigan Journal of International Law* (1992), p. 310, fn. 324.

64 See L.K. Kenneth, *Belonging to America: Equal Citizenship and the Constitution,* New Haven: Yale University Press (1989), pp. 196-97.

65 See 8 U.S.C. § 1422, 66 Stat. 239, § 311.

granting of American citizenship to the children of illegal immigrants born on American soil was launched in 1982 by Schuck and Smith, in their book *Citizenship Without Consent*.[66] The authors offered an alternative interpretation of the Citizenship Clause to replace the territorial notion of 'subjection to American jurisdiction' in the Fourteenth Amendment by a consensualist notion, meaning 'having been accepted by the American polity'.[67]

Interestingly, the strong rejection that such a thesis encountered in the scholarly debate relied partly on the need to prevent the formation of second and third generations of non-nationals, similar to those which resulted in Europe from its labour recruitment policies.[68] At the present time, Congress seems to have abandoned whatever intentions it might have had to go along that path in its fight against illegal immigration.

2. *The Constitution of the United States and the Protection of Resident Aliens*

Unlike the rights of the German Basic Law, the American Bill of Rights does not reflect an identifiable theory of the rights of aliens.[69] Resident aliens' constitutional status has thus been judicially constructed. Although, even more than the German Federal Constitutional Court, the U.S. Supreme Court has considered residence in the country essential to trigger even the most minimal constitutional protection,[70] here again, equal residence has not implied equal constitutional protection. As for this protection, one has to draw a basic distinction, depending on whether the discriminatory measure against aliens had its origin in the federal or in the state powers. This rigid duality remains a striking feature of the American system.

Accordingly, the Supreme Court has been most reluctant to subject any *federal* immigration measure to any substantial review. Under the so-called *plenary powers* doctrine, which has been criticised for embodying nineteenth century notions of national sovereignty,[71] the Supreme Court has consistently ruled that the immigration and naturalisation policies pertain exclusively to the political branches of the government.[72] Additionally, the Court has often assumed that

66 P.H. Schuck and R.M. Smith, *op. cite.* note 11.

67 Thus, for the authors, not only national-citizens but also aliens who have been admitted as permanent residents form the legitimated polity. See Schuck and Smith, *op. cite.*, note 11, pp. 85, 86, 99, 117 and 118.

68 See D. Martin, D., 'Membership and Consent: Abstract or Organic?', Vol. 11 *Yale Journal of International Law* (1985), pp. 283-284.

69 G. Neuman, 'Immigration and Judicial Review in the Federal Republic of Germany', Vol. 23 *International Law and Politics* (1990), pp. 76-77.

70 See *Ng Fung Ho* v. *White*, 259 U.S. 276, 282 (1922); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 738 (1893)(Justice Brewer dissenting).

71 See L. Henkin, 'The Constitution and the United States Sovereignty: a Century of Chinese Exclusion and its Progeny', Vol. 100 *Harvard Law Review* (1987).

72 Not until the 1970's did the Supreme Court suggest the possibility that some immigration policies could be subjected to some minimal level of review (see *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), *Fiallo* v. *Bell*, 430 U.S. 787 (1977)). For examples of decisions in

every federal regulation based on alienage, and not only those concerning their admission into or expulsion from the country, was necessarily sustainable as an exercise of the immigration power.[73] Thus, apart from the policy judgments regarding the number and classes of aliens who may enter and remain in the United States,[74] the *plenary powers doctrine* has generally covered the body of laws governing aliens' rights and obligations while in the territory.[75]

As a result, and most significant for our purposes, the federal government has enjoyed the largest discretion in the deportation of aliens, something which has left aliens in the permanently vulnerable position of being able to lose their general constitutional status as residents in the country. As an expression of such a broadly conceived power, Congress has traditionally enjoyed almost unfettered discretion in selecting deportation grounds.[76] This discretion could have retrospective effects, applying regardless of how long ago the offending conduct had occurred;[77] of how long the implicated aliens had been living in the United

which, in contrast to the cited German cases, the U.S. Supreme Court has shown almost absolute deference towards governmental and legislative discretion concerning not only access to the territory, but also the termination of an alien's residence in the territory and family reunification, see Neuman, *op. cite.*, note 69, pp. 35-85.

73 See G.M. Rosberg, 'The Protection of Aliens from Discriminatory Treatment by the National Government', *Sup. Ct. Rev.* (1977), pp. 337-338. Scholars have attempted to draw stricter limits on the concept of immigration policy (see T.A. Aleinikoff, 'Federal Regulation of Aliens and the Constitution', Vol. 83 *American Journal of International Law* (1989), p. 869).

74 Under the plenary powers doctrine, the Supreme Court upheld: the exclusion of Chinese nationals in the late 19th century, see *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713-14 (1893), upholding an act of Congress authorizing the deportation of Chinese laborers under Chinese Exclusion laws, and *Chae Chan Ping* v. *United States*, 130 U.S. 581, 609-10 (1889), upholding the statutory exclusion of Chinese laborers as a constitutional exercise of legislative power; the exclusion and deportation of homosexuals and political radicals in the twentieth century (see *Boutilier* v. *INS*, 387 U.S. 118, 120-23 (1976), holding that the then-existing 'psychopathic personality' ground of exclusion encompassed homosexuals, and *Harisiades* v. *Shaughnessy*, 324 U.S. 580, 591 (1952), upholding a statute providing for the deportation of legally resident aliens because of past membership in the Communist Party); indefinite detention of aliens (see *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 215 (1953), upholding the denial of entry to alien, notwithstanding the fact that the alien could not be returned to his own or any other country and therefore faced indefinite detention on Ellis Island).

75 See *Mathews* v. *Diaz*, 426 U.S. 67 (1976), upholding the denial of medical benefits to resident aliens with less than five years of residence.

76 See *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893), upholding against constitutional challenge an act of Congress authorizing deportation of Chinese laborers under Chinese Exclusion laws.

77 See *Harisiades* v. *Shaughnessy*, 324 U.S. 580 (1952) and *Galvan* v. *Press*, 347 U.S. 522 (1952), both approving deportation of long-time permanent residents - some of whom had been residing in the U.S. up to thirty-six years - based on earlier behaviour and/or membership in the Communist party that was lawful at the time in which it was engaged.

States;[78] and of how deeply the personal and family interests at stake were to be affected.[79]

In striking contrast with this deferential attitude vis-à-vis the federal government, the Supreme Court has been very demanding when examining state measures discriminating against resident aliens, unless such measures strictly related to political rights and public functions.[80] In these cases, the Equal Protection Clause of the Fourteenth Amendment[81] has enabled resident aliens to be viewed more as local residents sharing many of the relevant circumstances with American residents of the state, than as individuals linked to a foreign nation through the legal bond of nationality. Thus, in the landmark case of *Graham* v. *Richardson*, the Supreme Court held that 'aliens, like citizens, pay taxes and may be called into the armed forces.... [A]liens may live within a state for many years, work in the state and contribute to the economic growth of the state'.... '[T]here can be no special public interest in tax revenues to which aliens have contributed on an equal basis with the residents of the state'.[82] When controlling state classifications on the basis of alienage, the Supreme Court has therefore assumed that these similarities grounded an equal concern for the interests of permanent resident aliens in the community.

Applying the same rigorous test as it did in *Graham*, the Supreme Court has thus far invalidated many state measures such as those prohibiting aliens the profession of practising law[83] or public notary;[84] those absolutely excluding aliens from any civil service employment;[85] those denying aliens the possibility to acquire civil engineer licenses;[86] those requiring either citizenship or aliens' compliance with durational residence requirements for access to welfare benefits[87] and those restricting the receipt of state financial assistance for higher education

78 The landmark case in this respect was *Chae Chan Ping* v. *United States* (also known as the *Chinese Exclusion Case),* 130 U.S. 581 (1889), where a statute excluding Chinese labourers was applied to prevent the re-admission of a person who had been living and working in the U.S. for 12 years and had taken a temporary trip back to China.

79 See, for example, *Marcello* v. *Bonds*, 349 U.S. 302 (1955), upholding an *ex post facto* deportation of narcotics offender with citizen wife and children, or *Galvan* v. *Press*, 347 U.S. 522 (1954), upholding an *ex post facto* deportation of Communist party member with citizen wife and children.

80 Under the so-called strict scrutiny test, the Supreme Court has looked for a substantive state interest that could support the state measure. The Court has also verified that the means were narrowly tailored to its ends and that no less restrictive measures were available.

81 The Fourteenth Amendment reads as follows: '[N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws'.

82 *Graham* v. *Richardson*, 403 U.S. 365 at 376 (1971).

83 *In re Griffiths*, 413 U.S. 717 (1973).

84 *Bernal* v. *Fainter,* 467 U.S. 216 (1984).

85 *Sugarman* v. *Dougall*, 413 U.S. 634 (1973).

86 *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Otero*, 426 U.S. 572 (1976).

87 *Graham* v. *Richardson*, 403 U.S. 365 (1971).

to those resident aliens having filed an intent to apply for citizenship.[88] However, the equality principle has never taken the Court as far as to question the constitutional legitimacy of the exclusion of resident aliens from the franchise or from the exercise of public offices.[89]

In fact, a more lenient review has been applied by the Court to the exclusion of aliens from these positions which the Supreme Court considers strictly related to the state's constitutional prerogative to define its own political community. This exception to the *Graham* rule of heightened scrutiny, known as the *political function exception*, has allowed the states to require citizenship not only for having access to voting rights[90] but also for 'persons holding state elective and important non-elective executive, legislative, and judicial positions'[91] because these persons 'perform functions that go to the heart of representative government'.[92] The exception shows the limits to the equalisation of the constitutional status of citizens and resident aliens in the strictly political realm.[93] However, unlike in Germany, neither among the scholars nor in the Supreme Court's doctrine, can one find the conviction that granting suffrage to resident aliens and citizens, and more generally, equating their political status, would be constitutionally impermissible.[94]

88 *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977).

89 Interestingly enough, the Court has precisely taken aliens' political vulnerability which results from such exclusions as determining the need to review under heightened scrutiny the other kinds of discriminatory measures. The basic explanation for this is that not having an equal political voice, there is no guarantee that aliens' interests and concerns are going to be adequately represented in the ordinary legislative process and hence, that it is doubtful that the legislation discriminating against them deserves the strong presumption of validity that laws generally receive.

90 See *Skafke* v. *Rorex*, 97 S.Ct. 1638 (1977), dismissing the appeal of a Colorado state court's decision that aliens have no right to vote for want of a substantial federal question.

91 *Idem.* at 647.

92 *Ibidem.* A polemical issue remains however: that of defining the scope of the exception, deciding which are the functions that can be said to go to the heart of representative government. Thus, the exception has been applied to exclude resident aliens from positions with a dubious connection with the exercise of sovereign functions, such as police officer (*Foley* v. *Connelie*, 435 U.S. 291 (1978)) or public school teacher (*Ambach* v. *Norwick*, 441 U.S. 68 (1978)).

93 Quoting from the Supreme Court in *Cabell* v. *Chavez-Salido* (454 U.S. 432 at 439-440 (1982)), '(t)he exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: aliens are by definition those outside of this community. Judicial incursions in those area may interfere with those aspect of democratic self-government that are most essential to it.'

94 See Neuman, *op. cite.*, note 63, p. 259. As the author notes, this would be a strange thesis to sustain in the American context, where alien suffrage has a long historical tradition, the first election in which no alien participated taking place only in 1928 (*id.* at pp. 292-300). Occasionally it has been argued that granting the franchise to resident aliens is

As for the difference that residence specifically makes, the Supreme Court has recognised the connection of residence to constitutional membership; it has done so by referring to two different meanings of residence. On one hand, previously mentioned, the Court has called upon the essential importance of residence, conceived as being physically present on the national territory and hence, within the jurisdictional sphere of the Constitution, as opening the path to constitutional claims.[95] The Court has held that presence within the country, including illegal presence,[96] determines subjection to the laws and hence triggers the equal protection of the laws. This first meaning, which refers to the subjection to the laws and its relevance for determining constitutional membership explains why, notwithstanding the general attitude of judicial deference toward any kind of federal action concerning the right of aliens to remain within the country, the Court has at least granted some *procedural* constitutional guarantees to resident aliens in deportation cases, a protection it has denied to initial entrants in exclusion cases.[97]

As a second meaning, the Supreme Court has taken residence as an indicator of the possible consolidation of ties and attachments of aliens to the country as they are gradually integrated into the American society. Thus, the Court has occasionally affirmed that 'the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country'[98] and that 'once an alien gains admission to our country and begins to develop ties that go with permanent residence, [her] constitutional status changes accordingly'.[99]

In spite of this language, which seems to stress the constitutional relevance of the generation of dependency bonds to a social environment, this second meaning of residence has only played a limited role. Proof of it is the fact that no *substantive* protection has accompanied the deportation of long-term residents. This second meaning remains useful nevertheless to explain certain things: although

even constitutionally required. See G.M. Rosberg, 'Aliens and Equal Protection: Why not the Right to Vote?' Vol. 75 *Michigan Law Review* (1977), p. 1092.

95 The theory of *extraterritoriality*, on which the Court has occasionally relied, means that aliens cannot invoke the American Constitution unless they are on the national territory because the Constitution lacks extraterritorial effects and was never meant to confer rights on all people everywhere (see *Ng Fung Ho* v. *White*, 259 U.S. 276, 282 (1922)).

96 See *Mathews* v. *Diaz*, 426 U.S. 67, 78-79 (1976). In a most controversial decision, *Plyler* v. *Doe*, 457 U.S. 202, 211-212 (1982) the Court provided that children of illegal immigrants who are themselves illegally on the territory cannot be denied public education holding that all those who, in a geographical and territorial sense, are ordinarily subject to the state's laws enjoy the Constitution's guarantee of the equal protection of the laws.

97 Compare *Yamataya* v. *Fisher*, 189 U.S. 86, 100 (1903), a leading case on deportation guarantees, with *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950), a leading case on exclusion guarantees. In general, aliens are deportable rather than excludable if they have made an 'entry', as defined in §101(a)(13) of the INA, 8 U.S.C. §1101(a)(13) (1976). Note that even surreptitious entry qualifies as 'entry' and thus triggers the constitutional protection of deportation proceedings.

98 *Mathews* v. *Diaz*, 426 U.S. 67, 78-79 (1976).

99 *Landon* v. *Plasencia*, 103 S.Ct. 321, 329 (1982).

entry into the United States has generally been conceived of in a geographical sense, and thus, permanent resident aliens who are impeded from re-entering the country when they return from journeys abroad are subject to exclusion rather than deportation proceedings,[100] on some occasions, the Court has sought to circumvent this rigid rule. The Court has done so by either granting re-entering resident aliens the same degree of procedural protection in their exclusion proceedings as they would have had in deportation,[101] or else, by considering that the trip or the period of absence had not been significantly interruptive of the residence in the country and hence, deportation and not exclusion, applied.[102]

IV. EUROPEAN CITIZENSHIP: FROM WORKERS TO CITIZENS

The first paragraph of Article 8(1) of the EC Treaty, as amended by the Treaty of European Union, establishes Union Citizenship and refers to a list of rights to be enjoyed by the holders of this Citizenship. More than in the recognition of certain rights (some of which were already granted to many EC nationals and even to third country nationals), the novelty of this institution consists in the direct link connecting this new membership status of bounded equality to the recognition of a certain set of rights. Across the Member States, the concept presupposes a European polity within which the members share in a sphere of equal rights. Within each Member State the concept has more complex effects in that it adds to the level of full democratic membership, defined within the contours of national citizenship, a new sphere of equality shared by the nationals of other Member States, but from which third country nationals are, in principle, excluded.

If we conceive of a democratic polity as an association of individuals who share in a sphere of equality directly in their quality as members, there seem to be two ways to strengthen the democratic condition of this new membership status, which is the European Citizenship, and thus, of the European polity. One is that of developing a stronger concept of European citizenship, characterised by a wider and richer range of rights, broadening thereby the sphere of equality to be shared by its members.[103] This path appears to weaken the national citizenship membership status since it undermines the potential for exclusion. It is in this respect that one should value the evolution from a conception of European membership based on the recognition of economic freedoms, to both the inclusion of political rights and the redefinition of civil liberties (such as the freedom

[100] *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953).

[101] *Landon* v. *Plasencia*, 459 U.S. 21 (1982).

[102] *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 (1953); *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963).

[103] Such a path has been at least relatively open in that Art.8e foresees the possibility for the Council to fulfil these provisions contained in Art.8 by other rules whose enactment it is entitled to recommend to the Member States, according to their respective constitutional order.

of movement and residence) to free these liberties from the functional needs of the internal market and to have them encompass also non-economic related functions.

The second way in which the democratic criteria may be strengthened refers to the nature of the criteria for inclusion and to the extent to which these have been defined directly rather than indirectly through another membership status. In this last respect it has been pointed out that we are still far from a truly democratic citizenship in that, as we know, EU citizenship defines membership indirectly by reference to the concept of the national of a Member State, while respecting each Member State's sovereign power to define who its nationals are.[104]

Concerning the criteria for inclusion, I want to suggest that the liberal ethos defended in this paper should inspire the definition of European citizenship in a way which has thus far not sufficiently shaped national citizenship in most Western liberal democracies, namely, by setting time limits on the possibility of human co-existence in less than full civic equality. The implications of this would be twofold. On one hand, internally, it would mean that, whatever the definition of national citizenship in each Member State, after a certain period of residence in the Union, European citizenship would be acquired automatically and unconditionally. Clearly, this would be most significant for the incorporation of third country nationals into the European polity. On the other hand, externally, European citizenship would set a limit on the sovereignty of Member States in defining their national citizenship. It would do so by ensuring that, to the extent that full civic equality is still bound to national citizenship (rather than directly linked to European citizenship), this citizenship be granted automatically and unconditionally (hence, without requiring renunciation to the previous one) to everyone who has been living within a Member State for a certain period of time, be they nationals of other Member States or third countries.

As a step prior to the shifting of all the rights currently linked to national citizenship to the European level and even to the even more difficult complete harmonisation of nationality laws, the present enterprise would have the more modest aim of setting the limits within which a Member State can legitimately express and defend its own specific conceptions of political membership. The constraint concerning the exclusion of permanent residents would be one, though presumably not the only one, defensible from the point of view of liberal democratic order.[105] In any event, the idea of advancing in the shaping of a consensus around such legitimation constraints might represent a fair compromise

[104] The Declaration concerning nationality of a Member State, annexed to the Maastricht Treaty specifies that whenever the EC Treaty refers to national of 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.

[105] The respect for the fundamental rights which has been defended by many scholars as essential to a concept of European Citizenship would set other limitations on the range of valid definitions of national membership. In a way the thesis defended here could also be described as including, among the list of fundamental rights, the right to acquire equal citizenship in a community in which one has become a societal member.

between: 1) the position that defends the complete disconnection between the degree of inclusiveness of a political community and its commitment to a democratic political order; and 2) the position claiming that the abstraction from any kind of existing particularities is the only way to ground legitimation.

Underlying the proposal is the assumption that, in order to found a relevant European citizenship, steps should be made to replace the image of European citizens as individuals who are conceptually and teleogically linked to an economic function, by that of individuals who are encouraged to perceive of their European experiences in a more encompassing way. Rather than as nomads, or as persons endlessly engaging in economically-motivated, bracketed life experiences (which retain their meaningfulness only in relationship to a broader life project defined and rendered meaningful mainly within the cultural framework of their original national communities), European citizens would be both encouraged and challenged to perceive of their European citizenship as something which offers them a broader framework within which they can define and redefine the meaningfulness of their enterprises.

In achieving this change, it is essential that, apart from a right to move around as economic agents, European citizens grow aware of the possibility to settle permanently in any of the Member States, and there consolidate their social, professional and personal existence. Knowing that they are already, from the beginning, set on the route to equal citizenship and that they cannot be ultimately excluded from the sphere of civic equality would help citizens to do so.

By stressing the importance of living in a socio-cultural context for everyone, and not only for those who are born into them, almost paradoxically, the importance of national identities and loyalties becomes relativized and de-sacrilized. These come to be seen less as organically ascribed and more as open. Also, the possibility of multiple identities and attachments is to take the place of the idea of one single loyalty, be it towards the national community or towards the European community. European citizenship is therefore not to replace with a homogenous substance the locus of the different national identities and commitments, but rather to become a larger and richer context in which these can be defined and questioned in the recognition that identities, loyalties and attachments may be essential for the individual, yet may also be composite, mutable and plural.

Underlying the claims here are a concern with residence and certain assumptions as to the likelihood that people will generate ties and attachments connected to the social environment in which they live and that they will rely, to an important extent, on the cultural specificities presented by that social environment to interpret the meaningfulness of such ties and attachments. However, we may imagine attachments and cultural spaces that are created across frontiers and we can think of people conceiving of their life projects by being exposed to a socialisation process that is not necessarily territorially confined. Nevertheless, it remains true that for most people, the consolidation of a residence in a more local community remains essential, precisely because it helps to set the main framework for social and political interaction without which their specific life

projects can hardly be concretised, even if these were previously defined by the acquisition of non-territorially linked cultural idioms. Some people travel a lot. Few actually spend very long periods of time in more than one or two places throughout their lives. And our lifetime is limited.

There is a risk in advancing only in the direction of enlarging the list of rights linked directly to European citizenship without keeping in mind a background picture of how these can actually translate into freedom enhancing options for most people, and not just for a cosmopolitan élite. Thus, one may question the usefulness (or even legitimacy) of enriching the concept of European citizenship by recognising, as directly enforceable against the European polity, some rights, thereby freeing the Member States from the duty to attend to their nationals' interests with priority, if it were true that at this stage most people still perceive of their rights' meaningfulness only within a national framework. Could native-born national citizens be expected to leave their national communities in order to have, for example, their right to work satisfied somewhere else in Europe? Would this always be a relevant way of recognising the right? The same could be asked regarding the freedom to choose a profession if we are willing to admit that the meaningfulness of exercising many professions is socially and culturally conditioned.

There may not be an easy answer to these questions. Still, in trying to answer them one can perhaps find a clue as to how to advance in the construction of a relevant concept of European citizenship. It has been suggested in this chapter that ensuring that not only the European Union but also its Member States, remain ultimately open communities, perceiving of other Member State nationals and third country nationals as having a right to reside in their territories as potential equal citizens, will encourage the recognition of commonalities in civic culture without falling into the attempt of imposing homogeneity where there is difference, and where the value of such difference for the individual is specifically recognised. Admitting that equal citizenship for long-term residents is ultimately required, whatever the national specificities resulting from the national community's own perception of itself, means advancing in the search for commonalities which will allow the European Union to consolidate its own perception of itself.

V. CONCLUSIONS

Current processes of economic globalization are significantly stimulating human mobility across frontiers. Restrictive naturalisation practices and restrictive definitions of national citizenship, as well as a resistance to disentangle the full enjoyment of rights and freedoms from nationality, will further widen the gap between the social and the political membership which already exists in some countries and which, in the long run, poses serious concerns regarding democratic legitimation.

Some of the old assumptions of the nation-state should be abandoned in order to face the new social and political realities. Among them, most importantly,

the belief that national citizenship necessarily closes the circle of the democratically relevant sphere of political accountability and the concept that states are to remain internally and externally fully sovereign in order to define who is to count as a national citizen and who is not.

The commitment to a liberal democratic order should be useful in setting limits on the legitimate range of options Western democracies should have when defining themselves as political communities. As one relevant limitation, it has been suggested here that all those who permanently reside in a liberal democratic state ought to be ultimately recognised as equal citizens. Resident aliens' long-term and direct subjection to the laws founds a stake in participating in the process that generates these laws, as well as in having their interests and concerns equally pondered in such a process. Their dependency on a certain social and/or cultural environment to carry out a meaningful life project, which is likely to come about with increasing residence, strengthens their claim for inclusion.

The constitutional analysis of this chapter illustrates the situation in which the incorporation of resident aliens into a process which can lead to equal citizenship (either through the acquisition of national citizenship or through the acquisition of an equal constitutional status regardless of nationality) has met more serious obstacles. However, the foregoing analysis also portrays those situations where such an incorporation is already a constitutionally-sanctioned reality.

Thus in both the United States and Germany, it is residence rather than national citizenship, which allows for the enjoyment of a general constitutional status. However in both countries, not even long-term residence has been sufficient to place citizens and aliens on equal constitutional footing. The greatest resistance concerns the possibility of an equal status of political rights and of an equally stable residential status, which remain privileges linked to nationality. Yet in both countries, constitutional mechanisms of progressive equalisation have developed regarding social rights and civil freedoms. These mechanisms reflect the constitutional sensitivity towards the relevance of alien residents' permanent subjection to the laws and increasing personal and professional integration within the country.

As for the incorporation of resident aliens through access to national citizenship, this has been facilitated in the U.S., where the *ius soli* tradition has been constitutionalized. The same does not apply to Germany, where the idea of introducing *ius soli* elements into the nationality laws has been considered a mere legislative option, and even something which could go against the alleged commitment of the *Grundgesetz* to a specific concept of German nationhood. Naturalisation in both countries and from a constitutional perspective, is still largely regarded as a matter of political discretion linked to old concepts of national sovereignty. Nevertheless, there seems to be an increasing consensus on the need to subject both the laws of citizenship and naturalisation practices to all the ordinary constitutional constraints.

In this context, the process of formation of a concept of European citizenship offers a new floor for discussion. European citizenship should not remain as a mere derivative concept burdened with all the assumptions upon which the local

definitions of national citizenship currently rest. Rather, this new concept should allow for an updated reading of the old commitments of Western liberal democracies in a world with increasing human mobility. Preventing the organicistic conceptions of political membership by ensuring that the European Union and its Member States remain ultimately open communities should be a priority in the consolidation of a truly new concept of European citizenship.

CHAPTER XI
A NEW BASIS FOR EUROPEAN CITIZENSHIP: RESIDENCE?

Marie-José Garot

I. INTRODUCTION

Numerous authors, including some of the contributors to this book (notably, Alvaro Castro Oliveira and Rut Rubio Marín), advocate a separation of the law determining European citizenship from the laws of Member States concerning nationality. In short, these authors call for European citizenship to be based on residence in a Member State, and no longer on nationality. It is of value to consider the extent to which such a proposition may be realised, from the legal perspective (political or moral considerations are left for the works of other scholars). Firstly, the present article examines the reasons why such a proposition is made (why should European citizenship be based on residence?). Secondly, the meaning of the term European citizenship is clarified with respect to the classical concepts of citizenship and nationality. Finally, an in-depth study is carried out of the feasibility, juridically speaking, of the article's hypothesis, i.e. to found European citizenship on the basis of residence as opposed to the current basis of nationality in a Member State. In this regard, it is of particular interest to question whether the 'people of Europe' may comprise more than the sum alone of the peoples of the Member States, including as well all of the persons who live on the territory of the European Union.

II. TWO GOOD REASONS FOR USING RESIDENCE AS THE BASIS FOR EUROPEAN CITIZENSHIP

A. The Absence of the Union from the Determination Process of its Own Citizens

Article 8, subsection 1 (second part of Title II) of the Maastricht Treaty states as follows:

> Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 229-248.

Thus, all nationals, as citizens of a Member State, are also citizens of the Union. Consequently, excluded from Union citizenship are all persons having no connecting legal ties with the EU through the intermediary of a Member State. Acquisition or loss of Union citizenship is therefore dependent on one's acquisition or loss of nationality of a Member State. The recognition and exercise of citizenship are not subject, *a priori*, to any other condition apart from that of nationality.

Similarly, the Member States took the opportunity to specify in a Declaration on nationality of a Member State, annexed to the Union treaty, that they alone were competent to define their own nationals:

> The Conference declares that wherever the Treaty establishing the European Community reference is made to nationals of 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. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.[1]

This kind of declaration appears, according to the very terms of this Declaration, to serve a strictly informative purpose, as was demonstrated by the declarations of the United Kingdom and the Federal Republic of Germany.

Furthermore, at the European Council of Edinburgh of 11 and 12 December 1992, it was recalled that:

> the provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. 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.[2]

This is still the same formulation as presently indicated above: the Union in no way intervenes in the identification process of those entitled to European citizenship. Only the Member States have competence in this regard.

This solution was equally confirmed, or, to be more precise, anticipated, by the jurisprudence. In fact, since the entry into force of the Maastricht Treaty, it has not been necessary for the Court of Luxembourg to rule on the exclusive competence of the Member States with respect to nationality. The Court had already done so on 7 July 1992 in the case of *Micheletti*.[3] In this case, the Court declared in particular as follows:

1 Maastricht Treaty.
2 *Bull EC*, no. 12, 1992, part I.35, p. 25.
3 *Micheletti*, Case 369/90 [1992] ECR 4239.

> The provisions of Community law on freedom of establishment preclude a Member State from denying a national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host state deems him to be a national of a non-member country.[4]

At paragraph ten of the judgment, the Court recalled that the terms of the conditions for the acquisition and loss of nationality remained within the competence of each Member State, 'having due regard to Community law'.[5] Thus, the Court simply made reference to the texts and doctrine of the Community already existing on the subject: before the entry into force of the Maastricht Treaty, the Court followed the solution set out in Article 8a concerning European citizenship.

The conclusions of this case are confirmed by preceding case-law. To date, the Court has had occasion to decide two such specific cases[6]: one concerned an Austrian national who subsequently became French, but had obtained a veterinary diploma in Italy, while the other case concerned a Community national possessing both French and German nationalities.[7]

The principle articulated in Article 8 of the Maastricht Treaty is one which also appears in international law. Again, the notion is maintained that the States alone, as sovereign entities, are competent to define their nationals. Furthermore, it is acknowledged that, without exception, the State is alone competent to define its nationals whether the State's law regarding nationality is based on *ius soli* or *ius sanguinis*.[8] The Hague Convention of 12 April 1930 concerning Certain Questions with Respect to Conflicts of Law on Nationality legally establishes the principle. Article 1 declares as follows:

> It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality.

4 *Ibid.*

5 *Ibid.*

6 *Auer,* Case 136/78 [1979] ECR 437; *Gullung,* Case 292/86 [1988] ECR 111.

7 *In the Auer* case, the Court held that, '[t]here is no disposition of the Treaty which, within the field of application of the Treaty, makes it possible to treat nationals of a Member State differently according to the time at which or the manner in which they acquired the nationality of that State, as long as, at the time at which they rely on the benefit of the provisions of Community law, they possess the nationality of one of the Member States and that, in addition, the other conditions for the application of the rules on which they rely are fulfilled.' *Auer,* Case 136/78 [1979] ECR 437. In the *Gullung* case, the Court, faced with a problem of dual nationality (of two Member States), implicitly admitted that the individual in question could rely on either one of the nationalities in order to avail himself of the rights accorded by Community law.

8 One should note that the *ius sanguinis* is the right descending from being born of parents of a certain nationality, and the *ius soli* is the right descending from being born in the territory of a certain state (See Gustavo Gozzi, Chapter XVII of this volume.)

This formulation of the law was confirmed by the International Court of Justice in the famous *Nottebohm* case.[9]

B. Risks of Unequal Access to European Citizenship

Access to European citizenship therefore clearly results from the competence alone of the Member States. The determinant criterion is the possession of nationality of one of these States. It follows that, to date, each State remains sovereign to establish the criteria of access to its nationality. Generally, these criteria are based on two principles: *ius sanguinis* or *ius soli*. The adoption of one or the other principle reflects the conception that a State maintains of its Nation (the law of nationality can be conceived as the law of entry into the Nation). The adoption of *ius soli* as the principal criterion for the attribution of nationality coincides with an 'open' conception of the Nation: the law of nationality is open to the claimants of this nationality. By contrast, a law of nationality based on *ius sanguinis* reflects a 'closed' Nation, which defines itself as a principally ethnic entity. Entry into this group will thus be more difficult, the conditions being based on criteria of familial affiliation.

Meanwhile, as well as one can ideally classify the laws of nationality into two categories (*ius soli* and *ius sanguinis*), there exists no Nation State in Europe whose law of nationality corresponds exactly to one of these categories. Typically, a combination of the two principles is observed. That which distinguishes the law of one State from another is the 'proportion' used of the two principles; it is a question of dominance. Accordingly, for example, France is characterised by a primarily open law of nationality based principally on *ius soli* (but which still contains some criteria of the *ius sanguinis*). On the other hand, the German law appears 'closed' since it is based almost exclusively on *ius sanguinis*.

Each Member State determines itself the criteria of access to its nationality and, consequently, the criteria for access to Union citizenship. These criteria are the result of a combination of factors, including historical, demographic, and political aspects. This means that each law of nationality is particular to each Member State. Moreover, this means that the conditions of access to European citizenship necessarily vary with the different Member States. In other words, there is the risk of a certain amount of inequality where the access to Union citizenship derives from a naturalisation process according to the law of one or another Member State. As a result, and since there is no Community policy on the unification of nationality laws, it would appear that, indeed, access to Union citizenship would be easier through a Member State whose law of nationality is based primarily on *ius soli*, as opposed to a Member State whose law is based instead on *ius sanguinis*.

Therefore, two conclusions result from this Article 8, subsection 1: on the one hand, the Union in no way intervenes in the process of identification of its

[9] Nottebohm, *Liechtenstein* v. *Guatemala*, 2nd stage [1955] ICJR, p. 23.

own citizens, and, on the other hand, given that each Member State alone determines the conditions of access to its own nationality, and, consequently, to European citizenship, disparities in access inevitably exist. The problem is well appreciated when one takes into account that there are presently on the Union territory ten million people[10] who are not nationals of Member States, and who are thus excluded from European citizenship. Germany and France are the two States that host the greatest number of these persons: respectively 4,178,000 and 2,202,300 in 1992. However, in these same countries (to take just these two examples), the rate of naturalisation (i.e. the percentage of total foreigners who acquire nationality) is very different:[11] 2 % in France (in 1992) and only 0.43 % in Germany (strictly in respect of naturalisations which are not by right, i.e. due to particular ethnic or historical ties.)[12]

III. PRECISIONS AND DELIMITATIONS

With respect to these problems, that is, the dependence of the Union on the Member States (i.e. its exclusion from the process of determination of European citizens), and the inequality of conditions of access, there are two possible solutions. The first would entail the unification of the procedures of access to European citizenship, finally rendering uniform the different laws of nationality.[13] This problem presents some serious disadvantages: on the one hand, it calls into question a sacrosanct prerogative of the States, i.e. to determine their own nationals, and, on the other hand, it still does not permit the Union to determine its own citizens. It would be wiser to move instead in a different direction. Thus, within the framework of European citizenship, one could envisage a distinction between nationality and citizenship. Accordingly, it would be necessary to base European citizenship no longer on the nationality of Member States, but rather on residence in one of those States. In this way, one could avoid interfering with a prerogative of the sovereignty of States, while at the same time rendering the conditions of access to European citizenship more equal. In addition, this would permit the Union, as a result of determining itself the criteria of access (definition of residence, duration, etc. ...), to free itself from the Member States with respect to defining its own citizens.

[10] *See* EUROSTAT, *Rapid Reports, Population and Social Conditions*, vol. 7, Luxembourg: Office of Official Publications of the EC (1994); EUROSTAT, *Statistics in Focus*, vol. 3, Luxembourg: Office of Official Publications of the EC (1995); European Trade Union Institute, *Immigration in Western Europe*, Brussels: European Trade Union Institute, December 1993.

[11] For each Member State, the rates are as follows: Sweden - 8.5 %, The Netherlands - 5.7 %, Denmark - 2.8 %, Austria - 5.3 %, U.K. - 5.3 %, Spain - 2.1 %, Belgium - 1.8 %, Finland - 1.5 %, Italy - 0.7 %, Luxembourg - 0.5 %, Greece - 0.53 %, and Portugal - 0.08 %.

[12] The statistics are based on OECD, *'Tendances des migrations internationales', in SOPEMI Annual Report 1994*, Paris: OECD (1995). The statistic for Ireland is missing.

[13] The European Parliament had already proposed this idea in 1991, in a report of the Institutional Commission on Union Citizenship. *See* doc A3/0300/91, p. 5 and ff..

As well, in the next section, the 'feasibility' of this proposition is studied, i.e. to base European citizenship on residence. The following discussion does not address all of the rights of this new citizenship[14] (such as the rights of petition to the European Parliament and of complaint to an Ombudsman which are, in any case, already open to non-European citizens), but will consider in particular the right to vote in municipal and European elections. This right represents, in the opinion of the present author, the very heart of citizenship. The rights of diplomatic protection and free movement are thus left 'aside' for the purposes of this study.[15]

The right to vote is generally reserved for nationals. This right is the essential expression of citizenship in that it allows participation in the political power, permitting one to play a part in the formation of the laws to which one is subject. It permits an individual to be a member of and to become an active part of the political community in which one lives. By contrast, freedom of movement, i.e. the right to enter, exit, and live in a country, is, again in the opinion of the present author, a right of nationality and not a right attached to citizenship. It is certainly a condition *sine qua non* of the right to vote, but does not flow from citizenship. Not all the States recognize this conceptual distinction. However, a subtlety of the French law in this regard may be of particular assistance. It is necessary to distinguish citizenship (which is a specific status permitting participation in the process of political decision-making) from nationality (which is a juridical tie between a State and an individual). Nationality is a kind of identifying link. As seen above, nationality falls within the exclusive competence of States: only the State is competent to determine the criteria of access to its nationality. On this basis flow the rights of nationals such as the right to come and go in a country, or even the right to be protected by the State, etc.. However, as well as the case may be that, generally, a citizen (in the most narrow sense of the term, i.e. the holder of political rights and obligations of which the right to vote constitutes the most complete expression of such rights and obligations) is a national, in some circumstances certain States provide the right to vote to non-nationals. In a way, these persons become citizens of the State, but remain detached from the status of nationality: in order to further acquire this status, it is necessary to undergo a procedure of naturalisation.

It is here that the French distinction becomes useful. This distinction permits a person to qualify as a citizen without acquiring the attribution of national. The determination of such qualification remains within the exclusive competence of the State, which equally maintains absolute sovereignty in respect of defining its

[14] The rights associated with Union Citizenship, insofar as they are established by the Maastricht Treaty, are the following: free movement (Article 8a), right to vote in local and European elections (Article 8b), right to consular protection (Article 8c), and rights to address a petition to the European Parliament and to complain to an Ombudsman (Article 8d).

[15] On the extension of this right to nationals of third countries, *see* the Commission proposal for a Council Directive 'on the rights of third-country nationals to travel in the Community', COM (95) 346 Final, 12 July 1995.

own nationals. These individuals do not necessarily live on the territory of the State but they can legally rely on the State under certain circumstances (diplomatic protection, the right to come and go, etc...). These same persons, while foreigners in the country in which they reside, are however susceptible to the rules and norms of the host State. They are subjects of the State, in the sense that they are directly subordinated to its legislation given that they live on the territory of the State. 'Subject' similarly indicates that these persons do not participate in the formation of this legislation. Having been granted the right to vote in the host State, such a person becomes a kind of citizen while remaining a national of his/her state of origin. This situation avoids the need for naturalisation (which, it may be noted, connotes the breaking of numerous ties with the state of origin) in order to be able to participate in the decisions of the host community.

Moreover, some countries have already had such experiences. This is the case since Maastricht for all of the Member States, but had also been the case of numerous Member States even before the entry into force of Maastricht: Ireland, Denmark, Netherlands, United Kingdom, Spain, Portugal, Sweden, and Finland. This was also the case in the United States during many years between the colonial period and the First World War. During this period, numerous resident immigrants, i.e. non-Americans, were accorded full and complete political rights permitting them to participate in the elections of a particular state as well as federal elections.

It therefore appears possible to dissociate citizenship from nationality and, in turn, to grant political rights based on a principle of residence alone.

IV. RESIDENCE AND CITIZENSHIP: LEGAL PROBLEMS TO RESOLVE

Given the above discussion, it is interesting to consider whether European citizenship may possibly be based, legally, on residence, and no longer on nationality, in a Member State.[16] To this end, it is first necessary to examine whether a notion of residence exists in Community law that could serve as a reference point for the attribution of European citizenship.[17] European citizens would no longer be only nationals of the Member States, but would also be residents of the Community territory. The determination of European citizenship would therefore no longer rest upon the Member States as a function of nationality, but would depend only on the European Union and residence thereof. This concept of 'Community' residence would serve in the case of political rights of

[16] The European Parliament, in its resolution on the intergovernmental conference of 1996, also proposed extending European citizenship (the right to vote in local elections) to nationals of third countries who are resident for a certain number of years in Europe. See Europe Documents, no. 1982, 13 April 1996.

[17] The European Parliament has already called on the Council to define a notion of Union resident. *See Report of the Committee on Institutional Affairs on Union Citizenship,* Doc A3/0300/91, p. 7.

European citizenship (as it already so serves in the case of certain rights of European citizenship: i.e. the right to complain to an Ombudsman and the right to petition before the European Parliament).

It is therefore necessary to define that which one intends by the term 'residence' or 'resident' at the Community level. Paradoxically, this term, which is very often used (especially in articles concerning European citizenship and the right to vote), has never actually been defined. Accordingly, each Member State has enjoyed a wide margin of freedom in interpreting the concept, resulting in a risk of disparity as regards the principles being discussed. Here again one finds the same problems as were considered in the context of nationality: since each Member State is sovereign in the determination of its own nationals, it could be 'easier' in one Member State, as opposed to another Member State, to become a European citizen upon becoming a national of that State. At the same time, it appears absolutely out of the question to have a 'European nationality'. On the other hand, it is wholly possible to envisage a 'Community residence', any links to the Member States in this regard being completely severed.

A review of Community law and of the jurisprudence of the European Court of Justice is presented further below with a view to examining whether a notion of 'Community' residence may exist. Firstly, however, it is useful to define 'residence', and to clarify the distinction between this term and that of 'domicile'.

A. Distinction Between Residence and Domicile

The notions of domicile and residence are legal notions which import different meanings and applications according to the rights under consideration. Domicile serves to individualise a person and to legally connect that person to a given place. It is, according to legal vocabulary, described as follows:

> [Domicile is] the place where a person has his/her principal establishment, often referred to as voluntary domicile (since it is chosen, as opposed to legal domicile) which serves either to link a transaction to the territorial competence of an authority, or to permit contact with a person at the place where he/she is to be found. Domicile is not to be confused with residence, with which it does often coincide.[18]

Residence, by comparison, is,

> the place where a natural person effectively lives to a relatively fixed extent, but which may not be his/her domicile, and where the law principally attaches, subsidiarily or concurrently with the domicile, various legal effects.[19]

[18] On this definition, *see* G. Cornu, *Vocabulaire juridique*, Paris: Association Henri Capitant, P.U.F. (1987), p. 839, my translation.

[19] *Ibid.*

The above definitions provide the reader with a preliminary idea of the significance of these two legal notions which are generally unique to each national system. Thus, domicile appears as an essentially legal concept, based on a sort of fiction (since the person may not live in his/her domicile, but rather in another residence) while instead residence appears to be founded more solidly in reality given that it is the place with which a person actually possesses personal and occupational ties. Domicile is thus contrasted with residence, the latter being linked moreso with reality. Residence is the place where the person lives, the place where he/she is connected (and not necessarily legally) by personal and occupational links. In most cases, domicile and residence coincide, but one can find some circumstances in which the notions are separated. In effect, one can only possess one domicile but, by contrast, several residences; similarly, one could change residences while his/her domicile is supposedly fixed. Residence, more than just being a concept, produces in fact various legal effects.

To date, these two notions have never been the object of a definition or clarification in international law which could be applicable to Community law. There does not exist a concept corresponding to domicile in private international law, to identify individuals. The rules of domestic civil law are therefore called upon, or, similarly, conventions established between States for the resolution of a particular problem (but even these conventions make reference to domestic civil law in most cases). Only the Council of Ministers of the Council of Europe has adopted a resolution concerning the unification of the legal concepts of 'domicile' and 'residence', dated 18 January 1972. However, lacking legal effect, this resolution has not been followed in the adoption of European legislation. The Council of Ministers thus invites the Member States to contemplate some common rules in the formation of their law. Domicile is defined as importing 'a legal relationship between a person and a country governed by a particular system of law or a place within such a country.'[20] As well,

> this relationship is inferred from the fact that that person voluntarily establishes or retains his sole or principal residence within that country or at that place with the intention of making and retaining in that country or place the centre of his personal, social and economic interests.[21]

This classic definition which combines residence with intention juxtaposes several criteria without which neither of the two, *a priori*, may be determined. The term 'centre of interests' seems to indicate above all a cross-checking of several criteria. By contrast, residence is 'determined solely by factual criteria; it does not depend upon the legal entitlement to reside'.[22] In order to determine whether the residence is habitual, in addition to the length of stay (which is not necessarily continuous), 'other facts of a personal or professional nature which point to du-

[20] Council of Europe, *European Yearbook 1972*, The Hague: Martinus Nijhoff (1974), p. 323.
[21] *Ibid.*
[22] *Ibid.*

rable ties between a person and his residence'[23] will be taken into account. Thus, a clear and fixed concept either of domicile or of residence does not exist in private international law. Accordingly, the solutions of different domestic laws are taken into consideration.

Residence itself is not, however, a legal concept which is defined in domestic law. Meanwhile, it is possible to distinguish, from the common usage which has developed, a meaning of habitual residence The principal problem is determining whether it is a notion based in fact or in law. In this regard, Denis Masmegan has remarked:

> Perhaps the classification of habitual residence as a factual notion stems from an ambiguity: the concept, compared to domicile, is in effect distinguished by the pre-eminence of factum (that being the effective habitation) on the animus. However, it does not follow that habitual residence is a notion based on fact, since the subjective element is not in itself more juridical than the fact of effective habitation. It remains that habitual residence, use of the term having been renewed by several authors, is more realistic, closer to the common language, corresponding as well to the immediate observation of domicile.[24]

Thus, in order to determine whether residence is habitual, one can refer to criteria of a qualitative nature (centre of personal and/or professional interests) or of a quantitative nature (length of stay). This is moreover the solution of the resolution of the Council of Europe of 1972.

Even though residence is a legal notion which is neither defined in domestic nor in international law, the concept of domicile has an unequivocal meaning in most domestic legal systems. English law is clearly different from other legal traditions in that it places domicile in the same category as nationality; domicile does not serve to link a person to a place, but rather to a legal order. The other legal systems, at least of Europe, consider domicile as linking a person to a given place. For example, under Spanish law, domicile is the place of habitual residence. The formulation is purely objective, but it would appear that jurisprudence tends to import a subjective analysis in the application of the concept, subordinating the importance of the creation of an habitual residence to the existence of intention. Under German law, domicile is the place of steady establishment. Duration is thus the main element. By contrast, under Italian or French law, for example, 'domicile is the place where a person has his/her principal establishment.'[25] This 'principal establishment' serves above all to territorially link, by principle (and not by fact), a person to a determined place. It is composed of two elements, according to the doctrine: one element is objective (actual habitation), the other subjective (intention). Habitation is occasionally

[23] *Ibid*, p. 325.

[24] D. Masmejan, *La localisation des personnes physiques en droit international privé*, Renens: Imprimerie des Arts et Métiers (1994), p. 91, my translation.

[25] J. Carbonnier, *Droit civil*, Tome 1, Thémis: P.U.F. (1982), (1st ed. 1955), p. 286, my translation.

considered as the main criterion, to the lesser importance of intention.

Under French law, as is the case with other legal systems, it would appear that residence tends to play an increasingly important role, while domicile a lesser role, in response, apparently, to a concern for realism. Residence becomes habitual by virtue of its permanent character, which distinguishes it from domicile, while permitting it to remain a flexible notion, close to reality. Under family law, including divorce matters, as well as tax law, nationality law, social welfare law, and criminal law, residence is slowly taking the place of domicile.[26]

Thus, evidently, a notion of residence does not exist under international law which could be useful and even followed by Community law. Furthermore, domicile seems to be all the more 'determinant' than residence, while the latter produces legal effects and takes the place of domicile in certain areas of the law. Under Community law, as much as residence is a fundamental notion (above all in the area of free movement), it has not been the object of precise definition and appears to apply on a case by case basis. In the spirit of juridical justice, it would certainly be of use to clarify this concept. With this aim, the discussion now turns to a consideration of Community secondary legal texts as well as the jurisprudence of the Court of Justice of the European Communities.

B. The Official Texts

The Treaties of Rome and Maastricht do not provide clear elements, nor even guidelines, towards elucidating the notion of residence.[27] However, these texts often make reference to the concept in the contexts of freedom of movement or, as concerns the subject at hand, European citizenship. For example, Article 8b (regarding the right to vote in municipal and European elections) speaks of '[e]very citizen of the Union residing in a Member State' without specifying under which conditions a citizen is considered as resident in a Member State. Similarly, rights to petition to the European Parliament and to complain to an Ombudsman are open, according to Articles 138d and 138e, to 'any natural or legal person residing or having its registered office in a Member State',[28] without further explaining the meaning of 'residing'. Article 156 of Chapter XIX of the rules of the European Parliament of June 1994 regarding petitions reiterates the wording of Article 138e, Maastricht Treaty, without however clarifying the meaning of the words 'natural or legal person residing ... in a Member State'. As well, in a decision of the European Parliament dated 9 March 1994,[29] with respect to the status

[26] *See* A. Martin Serf, 'Du domicile à la résidence', *Revue trimestrielle de droit civil* (1978), no. 77, pp. 535 ff.

[27] Reference is made to residence, but never to domicile. This latter concept therefore remains in the national domains.

[28] Note that according to these Articles, any legal person having its registered office on the territory of a Member State is likened to a Union citizen by virtue of being a holder of the same rights!

[29] *Official Journal*, L 113/15 of 4 May 1994.

of the Ombudsman and the general conditions concerning the exercise of the Ombudsman's duties, this same formula is repeated without further elucidation at Article 2, subsection 2. Consequently, given the lack of Community clarification, it remains up to the Member States to define the concept of 'residence'. This, however, does not assist us for the present purposes, that is, to formulate a Community notion of residence upon which Union citizenship may be founded.

In the absence of a clear interpretation of 'residence' based on the Community Treaties, one may turn to an examination of secondary legal texts[30] for assistance in this regard. The Commission and the Council have never defined 'once and for all' that which they intend by 'residence'. Particularly, the Commission has never made use of Article 155 of the Treaty of Rome in order to define a notion of residence which could be valid in all cases where such reference is made. Article 155 provides competence to 'formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary'. Instead, the Commission has defined 'residence' on a case by case basis, such as for the first time in 1963 in the context of a Commission recommendation addressed to the Member States 'relating to the definition of the concept 'normal residence' for implementation, in relations between Member States, of the rules for temporarily importing private road vehicles'.[31] In paragraph I, 'normal residence' is likened to family domicile (in the case of multiple residence). Without specification as to that which the Commission intends by 'normal residence', one may nonetheless consider that normal residence is determined in relation to personal ties, in particular of a familial nature, as opposed to occupational ties.

Thus, *a priori,* such residence is determined as a function of qualitative elements. However, in paragraph II, the Commission adds a quantitative element: the duration of the residence. After two years of residence, the quantitative element can even supplant the qualitative element in the determination of place of residence (in certain specific cases such as for carrying out a mission or for attendance at a university or other school). Yet, already, as much as family domicile appears to be of primary importance, and a certain continuity (or stability) in the stay is required in order that the residence may be considered as normal, it is necessary that the individual concerned 'returns there at least once per month'.[32] The Commission does not clarify that which qualifies exactly as 'returning', thus leaving, fortunately, a great margin for interpretation in the application of this recommendation. It would therefore appear sufficient for one to demonstrate some links with this family domicile by, for example, occasionally 'returning' there.

30 The present study is based on the principle texts of secondary law which play an important role in the evolution of the notion of 'Community' residence. It is not possible to conduct an exhaustive study of all of the texts which make reference to this notion.

31 *Official Journal,* L 27/370, of 20/02/1963.

32 *Ibid.,* my translation.

In summary, it may be concluded that the Commission bases the determination of residence firstly on qualitative criteria (personal and, specifically, family links) and secondly on quantitative criteria (after two years in a given Member State, residence begins to amount to 'normal residence'). Of course, this applies only in the context of specific cases (mission or education), but the formulation does offer insight into the way in which the Commission regards normal residence.

In 1975, the Commission was presented with another opportunity to address the notion of residence, in the context of a proposal for a directive 'on tax exemptions for certain means of transport temporarily imported into one Member State from another'.[33] In the specific case of the application of the principle of free movement of goods, tax exemptions, the Commission gave certain 'general rules for proving residential status' (Article 7).[34] Reference was no longer made to 'normal residence', but to 'principal residence'. Article 7 did not in fact provide general rules on the establishment of residence, but rather set out the admissible forms of evidence for proving residence. This relatively short article declared as follows:

> For the purposes of this Directive, natural persons shall provide evidence of the place of their principal residence by producing their passport, their identity card, or, in the absence thereof, any other identity document recognised as valid by the Member State of importation.[35]

Thus, in this case, residence had more in common with a legal instrument, in the true sense of the term (a written document for the purpose of validating or proving a juridical situation), as opposed to a certain reality. In comparison with the above-discussed 1963 recommendation, the Commission did not undertake to provide criteria for the determination of residence, but instead identified the forms of legal evidence for its existence. Thus, the Commission left the matter entirely up to the Member States, since only they can prescribe these documents based on their own conceptions of residence. Apparently, the Commission refused to permit Community 'intervention' in the determination of residence which thus remained within the exclusive competence of the States.

In 1983, eight years after this proposal, the Council finally adopted the corresponding directive[36]; however, Article 7 was profoundly changed. It no longer referred only to forms of evidence for demonstrating residence, but also to its effective determination. The Council replaced 'principal residence' with 'normal residence', thereby returning to the terminology of the 1963 recommendation. Normal residence was defined as follows:

[33] *Official Journal*, C 267/8 of 21/11/1975.
[34] *Ibid.*
[35] *Ibid.*
[36] *Official Journal*, L 105/59 of 23/04/1983.

> the place where a person usually lives ... [that is,] for at least 185 days in each calendar year, because of personal and occupational links, or in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living.[37]

The two elements which were already defined in 1963 as necessary for the determination of residence were once again employed: along with the quantitative element (the duration of stay of more than 6 months per year), there was added the qualitative element of personal and occupational links which in fact serve as signs of residence in a particular place. Article 7 also envisioned the possibility of an absence of occupational ties. In this case, personal links were sufficient for the determination of residence. Similarly, in the case of separation between personal and occupational links (as envisaged by the second paragraph of subsection 1), the personal links seem to 'prevail' over the occupational links since they alone are able to determine the residence. However, it is still necessary to regularly 'return there'. This formulation is thus akin to that of 1963.

Thus, the Council in this directive appears to add a new, key, determining element to that already employed since 1963. Although personal links may be essential in this determination (since they alone count in the absence of occupational ties or of separation), occupational ties appear as a complementary element to the determination. Likewise, the duration of the stay takes on a decisive importance since it in a way serves to qualify these links, and to attribute the very quality of residence to the relationship between the person and the place under consideration. The qualitative element is thus confirmed by the quantitative element.

In 1993, the Commission adopted a new recommendation regarding 'the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident'.[38] In the second paragraph of the first article, the Commission seems to refuse to give any guidelines on the meaning of residence in this very specific case. The Commission relies on established conventions between the Member States or, in the absence of such conventions, to the different national laws. As discussed above, the majority of international conventions make reference to internal laws which means that Member States alone are competent to determine residence for the purposes of applying these tax principles. Thus, strangely, the Commission appears more hesitant than the Council to establish Community rules on a definition for residence, even though in numerous cases the Commission may be viewed as more 'progressive' than the Council, which latter remains the representative institution of the Member States.

This inclination is confirmed in the explanatory memoranda of the two implementing directives for Article 8b, Maastricht Treaty, with respect to mu-

[37] *Ibid.*
[38] *Official Journal*, L39/22 of 10/02/1994.

nicipal[39] and European[40] voting rights. In these memoranda, the Commission reiterates the same arguments for justifying its refusal to provide some kind of determining element in relation to residence. Certainly the Commission recognises that residence is an essential notion of Union citizenship, but it refuses itself, to define the concept. In essence, the Commission refuses to intervene in the electoral regimes of the Member States. It thus leaves to the Member States themselves the responsibility of establishing the criteria for the determination of residence, which, according to the Commission, it does out of a concern for equality between nationals and non-nationals. It appears that in the explanatory memoranda of Article 4, regarding residence, the Commission characterises the condition of residence in a purely quantitative sense. In fact, the Commission declares that it wishes to abstain from setting out a prerequisite, minimum period of residence for an individual to be able to vote, in order to not disadvantage those European citizens who would not be able to satisfy this condition. However, the Commission does not appear either to consider it necessary under the circumstances to define residence in qualitative terms. It is a question which does not arise in the case at hand since the basis of European citizenship stems in the first place from the fact of possessing the nationality of a Member State. This is the foremost indispensable condition to enjoying the benefits of European citizenship. In the end, residence is almost only accessory. The States themselves thus establish the necessary criteria to be satisfied in order to qualify for residence, but that which counts above all is to be a European citizen, i.e. national of a Member State. In order to have the right to vote in a Member State of residence, the Commission does not require a minimum stay in that Member State in a given place coupled with establishing particular links to that place, but rather simply requires that one be a citizen of the Union. This is the reason why the Commission does not define residence.

Despite the immediately foregoing discussion, the study of several texts of secondary law does provide some insight into that which the European Union intends by residence. It is necessary, in order for a place to qualify as one's residence, that it be the centre of ties, firstly personal and secondly occupational, this being established by the fact of living there for more than 185 days of the year. The article now turns to a consideration of the perspective of the Court of Justice of the European Communities on the subject at hand.

C. The Jurisprudential Solutions

To date, the Luxembourg Court has in only a few cases pronounced on the notion of residence. The first such occasion took place in 1973 in the *Angenieux* case[41] which dealt with the free movement of workers and, in particular, a prob-

[39] COM (94) 38 Final, 23 February 1994.
[40] COM (93) 534 Final, 27 October 1993.
[41] *Angenieux*, Case 13/73 [1973] ECR 935.

lem involving social security. It concerned, *inter alia*, determining in which State a business representative could be considered as resident in order to benefit from social security benefits. In this context (and strictly, it would appear, in respect of this specific case), the Court offered some dictum as to its conception of residence:

> By 'permanent residence' in the sense in which this term is used in Article 13 (1) (c) (first section) and more extensively defined in Article 1 (h) of Regulation No. 3, there must be understood, in the case of a business representative pursuing the kind of activities described in the order of reference of a preliminary ruling, the place in which that worker has established the permanent centre of his interests and to which he returns in the intervals between his tours.[42]

Of course, this formulation regards a specific case, but the Court does provide a very wide definition of residence, calling it 'the permanent centre of interests'. The Court does not specify the precise nature of these interests, i.e. personal and/or professional, nor the necessary duration of stay in order to qualify as a habitual residence, or the permanent centre of interests. It basically suffices that the interested party return regularly to the place in question. Consequently, that which renders a residence as habitual is the simple fact that it is 'the permanent centre of interests'. In this case, thus, the Court of Justice offers a very flexible conception of residence.

The *Di Paolo* case[43] is the second case on the subject. It also concerned a problem of social security rights. The Court followed the same formulation that it had developed a few years earlier, associating habitual residence with 'the habitual centre of interests' of the party concerned. This solution is perhaps even more open-ended than that formerly offered by the Court since the residence no longer needs to be the 'permanent' centre in order to be habitual, but rather it suffices that the centre be 'habitual', which amounts to a much decreased emphasis on the stable, permanent characteristic of residence. In addition, states the Court, the 'concept of residence in one State does not necessarily exclude non-habitual residence in another Member State.'[44] In paragraph 22, the Court specifies as follows:

> account should be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his absence, the nature of the occupation found in the other Member State and the intention of the person concerned as it appears from all the circumstances.[45]

In summary, residence is defined in relation to general circumstances specific to each situation: as a function of length of stay, and, once again, the intention of

[42] *Ibid.*
[43] *Di Paolo,* Case 76/76 [1977] ECR 315.
[44] *Di Paolo,* Case 76/76 [1977] ECR 315.
[45] *Ibid.*

the interested party to establish (or not establish) his residence in one place or another. Thus, the Court does not set criteria which are too rigid as concerns, for example, duration, and primarily takes into consideration subjective elements for determining habitual residence.

In 1988, in the *Schäflein* case,[46] the Court indirectly pronounced on the conception of residence as part of rendering an interpretation of Article 7 of the above-described 1983 directive on tax exemptions for certain means of transport. The Court follows the conclusions the Advocate-General Mancini who himself borrowed the elements employed by Advocate-General Trabucchi in the Angenieux case with respect to acquiring residence. Thus, he concludes as follows:

> Residence is not based simply on the actual fact of living in a given place. It also involves the intention of thereby achieving the continuity which stems from a stable way of life and from the course of normal social relations.[47]

Advocate-General Mancini thereby disputes the reasoning of the Commission which, basing itself on Article 7 of the 1983 directive, only took into account the quantitative element (i.e. the amount of time spent in a certain place) in order to determine residence:

> the passage of a certain period of time can at most constitute an indication of residence; it is by no means a constituent element thereof.[48]

The Court in turn follows the very solutions offered by Advocate-General Mancini:

> it is must be pointed out that the concept of residence, [...] must be understood as meaning the place in which the former official has in fact established the centre of his interests.[49]

The Court continues as follows:

> Proof of residence means all the factual circumstances which constitute residence and that the former official may furnish for those purposes whatever supporting evidence he considers appropriate. Neither the wording nor the purpose of the aforesaid provision permits such evidence to be limited to the formal and quantitative factors which are relied upon by the Commission and which consists in the requirement of an uninterrupted stay of 185 days per year and in the production of an official residence permit.[50]

46 *Schäflein,* Case 284/87 [1988] ECR 4475.
47 *Ibid.*
48 *Schäflein,* Case 284/87 [1988] ECR 4475.
49 *Ibid.*
50 *Ibid.*

This formulation of the Court is particularly 'open-ended' since it no longer attempts to define residence on the basis alone of juridical tests, as outlined by the Member States, nor as a function of the length of stay, but rather on the basis of subjective elements which are in particular linked to the intention of the interested party. The official documents serving as proof of residence and the length of stay are, for the Court, only simple 'indications' without 'decisive' value for its determination. Residence is thus determined on the basis of the place where 'the centre of personal interests' is located. However, the Court hardly provides discerning elements for clarifying the exact meaning of this expression, apart, possibly, from that of 'financial resources'.

This solution is particularly open since it leaves a large margin for the interpretation of residence, of which some formal elements (such as the official authorisation of the stay) and duration are not sufficient to effectively evoke the status of residence. Instead, that which truly counts is that the residence is 'the centre of personal interests'. Accordingly, in the absence of occupational ties (such as in the case of a pensioner), only personal ties have a determinative importance, and moreso than the duration of the stay, which, in any case, is an element covered by Article 7 of the 1983 directive.

In 1991, the Court again ruled on the notion of residence, in the context still of Article 7 of the 1983 directive.[51] The Court followed its now established jurisprudence and stated as follows:

> It must be stated, first, that the criteria laid down in those provisions refer both to a person's occupational and personal ties with a place and to the duration of those ties and consequently that they must be examined in conjunction with each other. Normal residence must, according to consistent decisions of the Court in other spheres of Community law, be regarded as the place where a person has established his permanent centre of interests.

It follows that all the relevant elements of fact must, in the light of the criteria laid down in the above-mentioned provisions, be taken into consideration in determining normal residence as the permanent centre of interests of the person concerned.[52]

The Court thus reiterates a well-known definition of normal residence, while reinforcing the enunciated elements under Article 7 of the 1983 directive. Factual elements are essential in the determination of residence. Thus, in this way, as much as, *a priori,* the quantitative and qualitative criteria seem to be cumulative, the qualitative criterion appears to be more determinative than the other criterion.

In 1994, the Court reaffirmed this line of jurisprudence[53] even in the case of an interruption of residence for a period of 8 months during one year:

51 *Rigsadvokaten* v. *Nicolai Christian Ryborg,* Case 297/9 [1991] ECR 1943.
52 *Ibid.*
53 *Pedro Magdalena Fernandez,* Case 452/93 [1994] ECR 4295.

> The place of habitual residence is that in which the official concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. However, for the purposes of determining habitual residence, all the factual circumstances which constitute such residence must be taken into account.[54]

Accordingly, given the above review of secondary legal texts and, even more importantly, of the jurisprudence of the European Court, one may assert that there does exist a Community notion of residence, which notion is defined in very broad terms as 'the permanent centre of interests'. Some elements such as the fact of possessing certain links of a family nature, of paying taxes, and of disposing of the majority of one's financial resources constitute signs of the existence of this residence even in the case of an interruption in the stay. Demonstration of an intention to establish residence is essential in the determination of the place of residence. All of the constituent elements are to be taken into consideration in order to determine residence. As regards European citizenship, one could thus base such citizenship not on nationality as is presently the case, but rather on residence, this latter concept being defined at the Community level. The present author is in agreement with Advocate-General Jacobs who states as follows in the *de Witt* case[55] (which, albeit, concerned a Community regulation unrelated to European citizenship):

> Residence is one of the key concepts in Regulation No. 1408/71 [(this is equally the case for the Articles concerning European citizenship relating to the right to vote)],[56] and should, in order to ensure uniformity of interpretation, be given an independent Community meaning, the breadth of which should neither be curtailed nor extended by national law.... As the Commission has pointed out, if the term were interpreted by reference to national law, there is a danger that a person would be considered resident in more than one Member State or in no Member State at all.[57]

This reasoning can without difficulty be applied to the rights to vote attached to European citizenship. In this way, all persons, no matter of which nationality, residing, according to the definition of the Court, on the territory of the European Union, would acquire the rights to vote at the municipal and European levels. The national regimes for determining residence would not interfere in an area which would rely essentially on Community law.

54 *Ibid.*
55 *De Witt*, Case 282/91 [1993] ECR 1221.
56 This is the present author's remark.
57 *De Witt*, Case 282/91 [1993] ECR 1221.

V. CONCLUSION

To base Union citizenship on residence rather than nationality in respect of a Member State is, according to the present author, desirable for enhancing European integration. Furthermore, it is juridically feasible at the Community level since a Community notion of residence exists. Of course, certain juridical problems, of a constitutional nature, persist at the level of the States. However, these problems are not insurmountable. Accordingly, the conclusion almost presents itself: to base European citizenship, or at least its associated political rights, on residence, depends on a 'political will', the exercise of which remains entirely within the responsibility of the Member States. The construction of a 'Europe of Nations' or of a 'people's Europe', more and more united, depends entirely on these Member States.

PART III

A Special Kind of Citizenship?

CHAPTER XII
FUNDAMENTAL RIGHTS AND THE EUROPEAN CITIZEN*

David O'Keeffe and Antonio Bavasso

I. INTRODUCTION

The legal system of the European Community is a 'composite legal order' whose structure affects the type of rights the individual can enjoy as well as their protection. Member States co-exist within the Community and with the Community itself. In this legal order, therefore, fundamental rights derive from different sources of rights, from the national and also from the supra-national levels.[1] Likewise, the protection of these rights is ensured at different levels, national and supra-national, and the different approaches of the European and national courts affect the actual content of those rights. The structure of this legal order and its implications in terms of protection of fundamental rights can be analysed from the institutional point of view, considering the relationship between Member States and the European Union. This fragmentation of the system constitutes a major problem in developing a coherent and effective European judicial protection of fundamental rights.

Judge Lenaerts, using the metaphor of concentric circles to explain the different sources of rights, has very clearly expressed the fragmentation of the system of protection of fundamental rights from the point of view of its sources.[2] By contrast, other scholars have seen this problem from the perspective of the public authority in relation to which fundamental rights are claimed.[3] However, the

* This paper is an extended version of a speech given at the Xth Congress of the *Union des Avocats Européens.*

1 K. Lenaerts, 'Fundamental Rights to be Included in a Community Catalogue', *ELRev.* (1991), p. 367.

2 *Ibid.*

3 S. O'Leary, 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law', Vol. 32 *CMLRev.* (1995) p. 519, at p. 524. O'Leary distinguishes between (i) Rights which the nationals of one Member State enjoy while in another Member State on the application of Community Law in that Member State; (ii) Rights which Member States nationals assert against their own Member State on the basis of Community Law; (iii) Rights which Member States national derive directly from Community law and which can assert against the Community or Union and Member States.

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 251-265.

issue of fundamental rights may now be seen from another perspective: that of the individual as Union citizen. Fundamental rights are intimately connected with the individual and should constitute the hard core of his or her European dimension as Union citizen. It is no coincidence that the Reflection Group and the Turin European Council stressed the importance of the future development of the European Union in function of its significance to the Union citizen.

The dimension of the individual in general is critical in the case of fundamental rights. As Weiler points out, 'human rights are not necessarily and always a jurisdictional battleground of Community versus Member States' but 'more typically we should expect to pit an individual on the one hand and the Community public authority on the other.'[4] In our composite legal order the public authorities are both at national and supra-national levels. Their actions affect the individual's rights in the civil, social and political spheres. Of these, we shall concentrate on the issue of fundamental rights, the topic of this paper. We take as starting point that the Union citizen is entitled to a fundamental rights protection (civil and political) both at national and European level.

In this respect, we will consider the composite status of individuals (as nationals of the Member States and as European citizens) which reflects the composite status of the Member States vis-á-vis the Community with certain important differences. We will also examine the different categories of rights and the type of judicial protection enjoyed as a result of this composite status. This composite status of the individual is itself a trait of the European composite system and is, in fact, nothing more than the projection, on the individual, of the institutional composite structure of States and Community. In this paper, we shall consider how this status of the individual, as Union citizen, can influence judicial protection of fundamental rights.

II. THE IMPACT OF CITIZENSHIP ON THE JUDICIAL PROTECTION OF FUNDAMENTAL RIGHTS

Citizenship is a premise for statehood.[5] However, there is another aspect which is connected with the relationship between the individual and the national community. It has been pointed out by other commentators that, at national level, the membership of the national community is understood in ethno-cultural or 'volkish' terms. In 'objective terms'[6] these are to be understood as common language, common history, common cultural habits and sensibilities, and more controversially, common ethnic origins. However when we refer to 'volkish' terms we refer to the single elements and to the sense of identity or belonging which

[4] J.H.H. Weiler and N.J.S. Lockhart, '"Taking Rights Seriously" Seriously: the European Court of Justice and its Fundamental Rights Jurisprudence', Vol. 32 *CMLRev.* (1995) Part I, pp. 51-94, Part II, pp. 579-627, at p. 591.

[5] J.H.H. Weiler, 'The State über alles. Demos, Telos and the German Maastricht Decision' in Due, Lutter and Schwarze (eds.), *Festschrift für Ulrich Everling*, Nomos.

[6] *Ibid.* at p.1675.

derives from sharing most of these elements. At the European level however this sense of identity or belonging has to be founded on an additional civic value as otherwise the concept of Union citizenship would not add to the already existing concepts of national citizenship. The values of the European *demos*, as a community not perceived in 'volkish' terms, are uncertain or have yet to be established. However, we would submit that these values should include social justice, (human) solidarity and respect for fundamental rights at a supranational level based on guarantees for the rule of law, democracy and equality. These can be adequately guaranteed at a supranational level only by an effective system of judicial protection.

This perspective of European *demos* implies 'a commitment to the shared values of the Union' and to duties and rights of a civic society. It 'invites individuals to see themselves as belonging simultaneously to two demoi', that 'albeit based on different subject factors of identification' 'transcend the ethno-national diversity' preserving it at the same time. Protection of fundamental rights should constitute the hard core of Union citizenship. In return, the 'commitment to the European values' affects the way these rights are protected at European level.[7]

In this sense we can view Lenaerts' metaphor of concentric circles from another perspective. There is an attachment of the individual to ethno-cultural values whose starting point is as low as the level of any individual's sensibility of attachment (parish, village, town, county, province, region, Land, Member State or Union). The whole process however reaches a point where all the national cultural diversities or European multi-cultural identity are protected, and therefore preserved, by the common values of fundamental rights.

Union citizenship as the formal common denominator is of paramount importance for the protection of fundamental rights which can only be ensured by judicial protection. The status of the European citizen constitutes another aspect of the composite legal system and, therefore, significantly affects the protection of fundamental rights, in terms of the sources of rights of the individual connected with his or her composite status as European citizen, and of the underlying values of that citizenship. The whole conditions the scope of the ECJ's jurisdiction.

This analysis of the status of the individual is also relevant in understanding why there is a lack of legislative protection at the Union level in the sense of a Community/Union Bill of Rights. Although legislative protection is not the theme of this paper, it has a direct influence on the jurisdiction of the European Court of Justice which is limited by the scope of EC law. European Community Law is based on the Treaties which the Court has defined as the constitutional charter of a Community based on the rule of law.[8] However, as Judge Mancini has pointed out, a treaty is very different from a constitution. Crucially, it 'does

[7] *Ibid.* at p. 1685.

[8] Case 294/83, *Les Verts* v. *European Parliament* [1986] ECR 1339; Case 2/88 Imm., *Zwartveld and Others* [1990] ECR I-3365; Opinion 1/91 (EEA Agreement) [1991] ECR I-6079.

not recognise fundamental rights of individuals affected by its application'.[9]

Before the entry into force of the Treaty, a judicial and legislative protection of fundamental rights already existed at national level.[10] The ECJ ensured its extension at European level. In Lenaerts' words, the Court recognised that 'the Treaties establishing the European Communities perform the function of a constitution in a composite legal order'.[11]

However, there is a legislative weakness: the lack of a formal constitutional basis for fundamental rights which are judicially protected. This legislative deficiency may be attributed to the lack of a vision underlying legislation of 'one people' or *demos*, a single community of people that could claim equal treatment for any fundamental right. This aspect highlights the other essential function of a national community: that of providing, on the basis of equal treatment, protection from the power of the political or public authority. At the European level, lacking a common denominator and, therefore in the absence of a community that could, however crudely, be understood as a Nation, the need for a Bill of Rights did not arise. However, the peculiar aspect of our system is that these rights already existed at national, supra-national and international levels and their protection is itself the common denominator of our community.

Judge Mancini has rightly adverted to this aspect and has underlined how individuals enjoy rights, in the composite legal order, either as citizens of the Member States or, in connection with that status, 'by virtue of their being workers, self-employed persons or provider of services, that is qua units of a production factor' in the EC.[12] Although the case-law and some directives extended this notion, the Court and the Community legislator persisted in founding it on the restrictive notion of 'production factor'.[13] Individuals in the European legal system used to, and generally continued to 'derive their transnational rights from their constitutional position of being nationals of a Member States from their status of being workers'.[14] As a result, there was not a real equality amongst individuals throughout the European composite legal order.

European law has reacted to this failure most recently by the introduction in the Treaty on European Union (TEU) of the concept of citizenship of the Union. In its restricted form, Union citizenship contains comparatively little *per se*, as it is often a declaration of existing or 'scattered' rights and does not, apparently, add significantly to those rights. In order to give a meaning to Union citizenship which goes beyond a merely declaratory vision of its provisions, equality should be the goal of Union citizenship, and judicial protection its guarantee. Thus, an analysis of the theme of protection of fundamental rights should refer

9 G.F. Mancini, 'The Making of a Constitution for Europe', Vol. 26 *CMLRev.* (1989) p. 595.

10 See generally Clapham, Vol. 10, *Yearbook of European Law* (1990), p. 309.

11 Lenaerts, *op. cite.*, note 1, at p.367.

12 Mancini, *op. cite.*, note 9, at p. 596

13 Case 159/90, *SPUC* v. *Grogan* [1991] ECR I-4685; Case 186/87, *Cowan* v. *Le Trésor Public* [1989] ECR 195.

14 Mancini, *op. cite.*, note 9, at p. 607.

to the beneficiaries of these rights, Union citizens, who are now, by the very fact of being characterised as Union citizens, connected by the umbrella of common rights which in time may translate into shared civic values.

III. UNION CITIZENSHIP: MAIN CHARACTERISTICS

Union citizenship reflects the interaction between the notions of both citizenship and nationality. The drafters of the Maastricht Treaty were aware of the importance of preserving the functions and the meaning of national citizenship in respect of both enjoyment of rights and attachment to the national identity. The institution of Union citizenship is a further step in the process of ensuring European integration. It tends towards the equality of individuals and preserves, at the same time, their national cultural diversity. Protection of fundamental rights is not only the common basis of a multinational community but also a means to guarantee the respect of diversity, one of the most important values of a modern society and which should be observed uniformly throughout the Union. The composite structure of Union citizenship is the paradigm of this process. To realize this we have to construct a *trait d'union* between the status of Union citizen and protection of fundamental rights. Thus, the second or European *démos* should respect and even preserve the aspects of the first or national *démos*.

The Treaty drafters reconciled these two facets by placing nationality and Union citizenship in a composite relationship which again reflects the composite structure of the Community/Union. In fact, under Article 8, nationality of a Member State constitutes a pre-requisite for Union citizenship and EU citizenship automatically derives from it. This structure is also intended, at the purely 'political' or formal level, to prevent the destruction of national identity as a result of the extension of special treatment for Union citizens.

The Treaty drafters' aims of furthering European integration and the equality of individuals could only be achieved by giving Union citizenship an additional character.[15] The additional character not only permits the achievement of these goals but is also consistent with the general principle of subsidiarity as it is now generally understood. Therefore, as Union citizenship is additional to national citizenship, the rights which it implies are additional and supplementary to the rights already enjoyed at national level.

In legislative terms, the *status civitatis*,

> is based on a set of rights additional to another two: national rights and responsibilities stemming from national citizenship at the level of Member States which will subsist in any case, and the set of Community rights and responsibilities stemming from the Rome Treaties for Citizens of a Community Member State.[16]

[15] In general see D. O'Keeffe, 'Union Citizenship', in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (1994).

[16] C. Closa, 'The Concept of Citizenship in the Treaty on European Union', Vol. 29 *CMLRev.* (1992) p. 1136, p. 1160.

Inherent in the notion of additionality is the thesis that the relationship with the national public authority is the primary one and that there is an indirect relationship between the individuals and the Union 'since the link which entitles individuals to the enjoyment of rights is the link with a Member State.'[17]

In respect of legislative protection at national level this thesis is still valid. In fact even though it is widely recognized that a distinctive characteristic of EU citizenship is its dynamic character, meaning the capacity to engender new rights, the TEU has failed to link the establishment of Union citizenship with the insertion of fundamental rights as a justiciable part of the Treaty.

Nevertheless, in relation to fundamental rights, legislative protection does not tell the whole story. First, we note that fundamental rights are 'by nature rarely, if at all absolute' and their 'very definition involves a balance between competing interests of individual on the one hand and, the general interest of the society on the other'.[18] In this field 'the material difference is not in the category of rights that are protected but in the manner these balances are struck'.[19] In this respect, the ECJ is in a strategic position. Article 177 enables the Court to cooperate with national courts on the one hand, but, on the other, to be the final arbiter and to retain the monopoly to strike the balance between EC law and human rights.

The ECJ, aware of this position, has tried to ensure that, in striking this balance, the broader interests of the Community are considered. Alternatively, in safeguarding the aims of the Community, it seeks to ensure that the fundamental rights of individuals are protected. This remarkable task is further complicated by the need to combine this balancing process, which permits maintaining the supremacy[20] of EC law, with enforcement of fundamental rights.

Academic commentators have disputed the motivation of the Court as regards the protection of fundamental rights.[21] Without entering into the dispute, the whole question arises from an undoubted lacuna of EC law concerning the protection of fundamental rights. These rights, granted at national level, are undoubtedly perceived by certain national constitutional Courts, as the inalienable vestiges of their sovereignty.[22] In fact, judicial activism in the field of protection

17 *Ibid.*

18 Weiler and Lockhart, *op. cite.*, note 4, at p. 585.

19 *Ibid.*

20 Some scholars have seen in the process developed at a judicial level, the 'unserious' intention of the ECJ of ensuring, not only respect for EC law, but also its supremacy over that part of national law which has been traditionally devoted to the protection of fundamental rights: J. Coppel and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', Vol. 29 *CML Rev.* (1992) p. 69. Weiler and Lockhart have convincingly shown that this criticism is without grounds or insufficiently supported: Weiler and Lockhart, *op. cite.*, note 4.

21 See in general Coppel and O'Neill, *op. cite.*, note 20 and Weiler and Lockhart, *op. cite.*, note 4.

22 Though not explicitly stated, one thinks of certain judgments of the Italian and German Constitutional Courts: *Solange I*, judgment of 29 May 1974, BVerfGE, 37, 271; *Wünsche Handelsgesellschaft* (*Solange II*) [1987] CMLR 225; *Frontini* v. *Ministero delle Finanze*,

of fundamental rights has important implications as this protection 'operates both as a principle of interpretation as well as of validation'[23] and cannot be restricted to be only an interpretative criterion as has been suggested.[24] We agree with Weiler when he says that, at the end of the day, the real aims of the Court in judicial activism are not relevant.[25] What, on the contrary we are concerned with, is the way the balance is struck and what part the Court reserves to the judicial role in the composite legal order.

Union citizenship however, provides us with a new perspective which allows us to surmount disputes concerning the underlying motivation of the Court in fundamental rights protection. This protection has now to be understood as the principal connecting factor of the status of European citizen. This is not based on ethno-cultural identity but is founded on the civic and judicial protection of citizens while respecting their diversity. Furthermore, it constitutes the political premise of the deepened European democracy. A democracy in fact does not exist in a vacuum[26] and therefore European law defines the boundaries of public authority and the *démos* rights counterweigh its power. In short, if the Union is a community based on the rule of law and is indissoluble from respect of democracy, then judicial protection of the rights of the Union citizen is the crucial connecting factor.

IV. THE IMPACT OF UNION CITIZENSHIP ON FUNDAMENTAL RIGHTS

Fundamental rights' protection within the Community legal order is ensured by the ECJ and is now a well established practice.[27] Aware of the composite structure of the European legal order, where fundamental rights are mostly to be found in national constitutions and in international documents such as the ECHR, the Court had no other choice but to adopt a minimalist approach and to refer to those rights that were already recognised in all Member States.[28] Since *Internationale Handelsgesellschaft*,[29] the Court has explicitly admitted that its action has been 'inspired by constitutional traditions common to Member States', to the point that it recognised in *Nold* that it cannot uphold 'measures which are incompatible with fundamental rights recognised and protected by the constitu-

judgment of 27.12.1973 [1974] Vol. 2 *CMLRev.* pp. 383-90; *Granital*, judgment of 8 June 1984 No. 170 of the Italian Constitutional Court.

23 Weiler and Lockhart, *op. cite.*, note 4 at p. 590.

24 C. Closa, 'Citizenship of the Union and Nationality of Member States', in *Legal Issues of the Maastricht Treaty*, *op. cite.*, note 15.

25 Weiler and Lockhart, supra note 4 at p. 71.

26 Weiler, *op. cite.*, note 5 at p. 1653.

27 Case 29/69, *Stauder* v. *City of Ulm* [1969] ECR 423 at p.438; Case C-260/89, *ERT* v. *Dimotiki* [1991] ECR I-2925.

28 Weiler and Lockhart, *op. cite.*, note 4 at p. 598.

29 Case 11/70 [1970] ECR 1125.

tions ...' of the Member States.[30] The point, discussed below, qualifies the notion of the minimalist approach as being that of the lowest common denominator. To this has been added respect for international human rights treaties to which Member States are parties.

As a result, following *Nold*,[31] the Court has developed a constant case-law whereby,

> Fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of which they are signatories...,

in particular the ECHR.[32]

In general terms, the Court has to face a double problem in its judicial supervision: a problem of jurisdiction,[33] meaning the scope of its activity and a problem of approach in respect of sources of protection. In both cases the notion of citizenship affects the solutions of the problems.

V. THE ISSUE OF JURISDICTION

The power of the Court to adjudicate on a matter basing itself on fundamental rights raises the question of jurisdiction of the Court and reflects the difficult relationship between EC law and national sovereignty. In theory it is true that, as stated by Lenaerts, 'there is simply no nucleus of sovereignty that the Member States can invoke as such against the Community'.[34] However, it is also clear that 'the Community legislator has not [...] taken the advantage of this full potential'[35] and many subject matters are left to Member States.

Furthermore the issue of fundamental rights itself has not found legislative support in the Treaty. The *acquis* of the Court concerning judicial protection of fundamental rights has eventually found a legislative recognition in Article F2 of the Maastricht Treaty. In the light of the fact that it is not justiciable,[36] Article F2

30 Case 4/73, *Nold, Kohlen- und Baustoffgrosshandlung* v. *Commission* [1974] ECR 491 at 507, point 13.

31 In *Nold*, *ibid*, the Court held (at p. 507, point 13) that, 'international treaties for the protection of Human Rights on which Member States are have collaborated or to which they are signatories, can supply guidelines which should be followed within the framework of Community law.'

32 Joined Cases 97-99/87, *Dow Chemical Ibérica SA* v. *Commission* [1989] ECR 3165 at 3184, point 10.

33 See G. Gaja, 'Aspetti problematici della tutela dei diritti fondamentali nell'ordinamento comunitario', Vol. 71 *Rivista di diritto internazionale* (1988) p. 574 et seq.; Lenaerts *op. cite.*, note 1, at p. 372; Weiler and Lockhart, *op. cite.*, note 4, at p. 64.

34 K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism', Vol. 38 *AJCL* (1990) p. 205, at p. 220.

35 Weiler and Lockhart, *op. cite.*, note 4, at p. 64.

36 Article L, TEU. However the Court of First Instance quoted Article F(2), TEU in Case

may sound no more than an unconvinced or half-hearted approval of the ECJ's previous judicial activism.

So far as a potential expansion of jurisdiction is concerned,[37] we agree with Weiler and Lockhart that ECJ judicial supervision of fundamental rights apart from Community measures appears to be restrained to:

> (i) Member State measures adopted by the State when acting for, or on behalf, of the Community - as its 'agent' or executive branch - or where the Member State measure is specifically required by a Community measure. ...
> (ii) Member State measures which would be illegal but for a derogation to one of the four fundamental free movement provisions.[38]

At the end of the day, we do not think that this interpretation differs very much from one of Coppel and O'Neill's theses to the effect that,

> [T]he only Member States actions which the Court might decline to vet on human rights grounds are ... those which occur in an area of exclusive Member State jurisdiction.[39]

The fact that a power is retained by Member States does not, however, necessarily imply that it is reserved to them without further external control. On the contrary, it may be circumscribed by standards imposed by EC law.[40] This may be supported by an example from the Union citizenship provisions.

Article 8 of the Treaty makes Union citizenship dependent upon holding the nationality of a Member State.[41] In this sense Member States retain one of the major expressions of their sovereignty: the grant or withdrawal of their nationality/citizenship.[42] However, Article 8 determining the automatic acquisition of Union citizenship affects the exercise of the States' sovereign powers. If Article 8 is given a strong interpretation, it could be argued that as regards

T-10/93, *A.* v. *Commission* [1994] ECR II-183, 201.

37 Weiler and Lockhart, *op. cite.*, note 4, at p. 64. Lenaerts *op. cite.*, note 1, at p. 372 stresses that the ECJ itself denied any impact of the Community concept of fundamental rights upon Member States' freedom outside the field of 'infringements by the Community itself or by Member States acting in the field of application of Community law'.

38 Weiler and Lockhart, *ibid.*

39 Coppel and O'Neill, *op. cite.*, note 20, at p. 681. After a period of judicial activism (see Case 222/84, *Johnston* [1986] ECR 1651, Case 222/86, *Heylens* [1987] ECR 4097, Cases 201-2/85, *Klensh* [1986] 3477), there has been judicial restraint in Case 12/86, *Demirel* [1987] ECR 3719, where the Court has stressed that it will only supervise those provisions which fall within the 'cadre du droit communautaire': *Demirel* at p. 3754, para. 28.

40 *ERT*, *op. cite.*, note 26.

41 S. Hall, *Nationality, Migration Rights and Citizenship of the Union*, (1995) at p. 137; S. Hall, 'Loss of Union Citizenship in Breach of Fundamental Rights', Vol. 21 *ELRev.* (1996) p. 129.

42 It is not proposed to enter into a discussion of the distinctions between nationality and citizenship. See O'Keeffe, 'The Individual and European Law', *Collected Courses of the Academy of European Law 1995*, Vol. 5, Book 1 (1996).

naturalisation, for example, the States, for the purposes of European law are no longer totally free to act independently of the interests of the Community/Union. That the Court accepts such external supervision of a bedrock of national sovereignty in connection with citizenship is evident from its holding in *Micheletti* to the effect that 'the Member State's competence must be exercised in compliance with Community law'.[43]

Judicial supervision by the ECJ will not apply in most of the cases in which naturalisation is denied nor, probably, as regards the criteria on the basis of which it is granted.[44] However, once an individual has obtained the status of European citizen and the rights attached to it, judicial supervision concerning depriving an individual of national citizenship/nationality is perfectly admissible in the light of the effects that this measure will produce on European citizenship rights.[45]

VI. PROBLEM OF APPROACH IN RESPECT OF SOURCES OF PROTECTION

One of the key problems in approaches to sources of protection is the level at which this should be pitched. At its simplest, the minimalist approach is based on the lowest common denominator, whereas the maximalist approach envisages a cumulative process aggregating the sum of the rights recognised in the different Member States at national level. Concerning these alternatives, Weiler has accurately identified the reason why, 'as a matter of policy and logic',[46] a maximalist approach could not be accepted. He rightly raises the hypothetical but practical example of the possible contrast of two fundamental rights that might arise if a maximalist approach were accepted. However, we find this not entirely persuasive. In fact we believe that, as a matter of judicial policy, the perspective should be different. As we have said above, fundamental rights are by nature not absolute. Therefore, if such a contrast between fundamental rights arises within an internal system, this conflict would be resolved and is routinely (albeit with difficulty) determined by national courts which strike the balance between competing interests of individuals or individuals and public authorities. This is possible on the basis of the assumption that all the parties claiming these interests are equal and that the national court holds the yardstick to evaluate the interest of the whole (national) society.

At the Union level, once the ECJ has jurisdiction, there is an implication that there is a European interest at issue that deserves judicial protection. Therefore,

[43] See H. Jessurun D'Oliveira, annotation of Case C-369/90, *Micheletti* v. *Delegaçion del Gobierno en Cantabria* [1992] ECR I-4239.

[44] Case 369/90, *Micheletti op. cite.*, note 44. Hall thinks that supervision is admissible, especially in cases where the 'attainment of the Treaty's objectives' are at risk, to ensure the respect of a duty of solidarity under Articles 5 and 2, *op. cite.*, note 41 at p. 80.

[45] For further details see Hall, *op. cite.*, note 41, at p. 99.

[46] Weiler and Lockhart, *op. cite.*, note 4, at p. 598.

as a matter of logic, we should leave to the Court the freedom to strike the balance, taking the principle of subsidiarity into strong consideration. We appreciate that, in reality, the ECJ does not yet have the 'political authority' to bear the responsibility of 'preferring' one right to another. In making a decision between two conflicting rights, this may be perceived as expressing a value judgment on the collective values of a national society where the results arrived at by the Court are different to those which would have been reached by the national Constitutional Courts or their equivalent. Such a perception is, however, perverse because the Court's judgment in such a case is directed towards individuals and community of individuals bound by the common values underlying Union citizenship[47] rather than States. However, the perception can be explained by the fact that the thresholds for fundamental rights are still perceived as a reflection of the collective values of a national society and thus a divergence from them could be construed as an attack on national sovereignty broadly understood.

For the purposes of equality and the integration that derives from it, there is a need for uniformity in the level of protection of individuals 'throughout the legal system and *vis-á-vis* all holders of public authority'.[48] We believe that there is a corpus of European values as mentioned above and a system of European fundamental rights shared by all European citizens which should find judicial implementation.[49]

In our view the notion of Union citizenship, and its implication in terms of equality for individuals, has provided a new justification for finding a common basis in the judicial process that strives to justify a minimalist or a maximalist approach.

In support of this, we can take the examples of *Wachauf*[50] and *Bostock*.[51] Would *Bostock* have had a different outcome had the Court considered the position of the British citizen's right in relation to the right already recognized to the German national in *Wachauf*? If a right is interpreted in a certain way by the ECJ should it not find uniform implementation regardless of the possible beneficiaries and the relevant underlying national law? We do not see that this would give rise to any risk to national identity in 'volkish' terms. Nor should there be imperative concerns about efficiency at national level such as to require the application of the principle of subsidiarity.

Furthermore, the general right of free movement under the Treaty and sec-

47 As said above these include a commitment to democracy, the rule of law, equality, social justice and (human) solidarity.

48 Lenaerts, *op. cite.*, note 1 at p. 368.

49 See the contribution of Professor Joseph Weiler to the Bruges Colloque on Globalisation, March 1996, which convincingly illustrated the current lack of values to underpin contemporary European integration as the previous values on which the European construct had been based, have largely lost their meaning. See also his Harvard Jean Monnet Working Paper 12/95, 'Europe after Maastricht - Do the New Clothes have an Emperor?'

50 Case 5/88, *Wachauf* v. *Federal Republic of Germany* [1989] ECR 2609.

51 Case 2/92 [1994] ECR I-955.

ondary legislation, confirmed by Article 8a(1) as regards Union citizens (although unclear in its scope),[52] permits the free movement within the Union of Union citizens who bring with them their national fundamental rights heritage.[53] In a case such as *Bostock* what would have been the position of the Court if the claimant in Britain had German nationality? If the position would have been the same, would not this jeopardise, *de facto*, the free movement of persons? The duty of the ECJ is to ensure that, in so far as EC law is concerned, individuals find a uniform 'rights environment' and equal treatment among all Union citizens.

VII. IS THERE A NEED TO REFER TO NATIONAL STATUS?

EU citizenship, based on nationality of the Member States, indirectly confirms the *acquis* on fundamental rights that the ECJ has derived from the common legal traditions of Member States. However, as we have already seen, the notion of Union citizenship goes beyond this and allows, to a certain extent, the enlargement of the scope of ECJ jurisdiction in terms of subject matter. Furthermore, this notion overcomes the need to refer to the status of national.

Strictly speaking, in order to reach the necessary uniformity of protection of fundamental rights in the European Union, the Court does not need to refer to the status of Member State national. The Court has already adopted a minimalist approach. This solution, in the light of the establishment of Union citizenship, can now be (re-)founded on the assumption that all individuals throughout the Union constitute a single community of people by the enjoyment of common rights and their direct political connection to the Union established by Union citizenship.

The minimalist approach can be accepted but it has to be combined with a substantial change in the perspective of the Court. The individual in Europe has to be detached from the restrictive economic role and reach a civic dimension. Using Advocate General Jacobs' words, anyone should be entitled to feel and be 'civis europeum'.[54] Union citizenship marks the move from the economic to the constitutional role of the individual, and the Court has already taken some steps towards this in its process of constitutionalisation of the Treaty and the consequent focus on the individual as a subject of Community law divorced from the purely economic aspect. However, this process is by no means complete: the creation of Union citizenship gives the Court and national courts a unique opportunity in the field of the protection of the individual.

Finally, there is another element that may allow fundamental protection to be independent of national status. We have seen that the reference to the ECHR is already contained both in the case-law of the ECJ and in article F2. In examining

[52] See O'Keeffe, *Collected Courses*, *op. cite.*, note 42.

[53] See Case C-168/91, *Konstantinidis* v. *Stadt Altensteig* [1993] ECR I-1191; note by R. Lawson, Vol. 31 *CMLRev.* (1994) p. 395.

[54] Advocate General Jacobs in *Konstantinidis*, *op. cite.*, note 53, at p. 1205.

the sources of protection of fundamental rights, Judge Lenaerts finds in the ECHR the nucleus of his theory of concentric circles. The Strasbourg and Luxembourg based systems of protection need a stronger *trait d'union* to avoid the risk of a divergent jurisprudence which has already occurred in some cases.[55] The requirement of a stronger link is implicit in the proposal of the accession of the Community to the ECHR. If Article L restrains judicial activism through review of Article F2 and frustrates attempts to introduce 'a bill of rights by the [judicial] back-door',[56] accession to the ECHR, compatible with the Court's recent Opinion,[57] would have the effect of formally constitutionalising enforceable human rights principles in the Community legal order. Authoritative scholars have seen the Court's task in relation to the ECHR as a 'signe de maturité et une consécration de son rôle de Cour suprême d'une Communauté quasi-étatique'.[58]

Although the ECHR was already widely effective throughout the composite legal order, through the accession of the single Member States to the Convention, the ECHR does not cover cases where EC institutions have exclusive powers directly affecting the individual without the interposition of the Member States. It has been argued[59] that the *trait d'union* could in any event have already been found in an interpretation that would consider ECJ proceedings as part of the exhaustion of local remedies by means of Article 177 reference from national courts. In our opinion this would not provide a satisfactory solution to the fact that the EC institutions are still not bound by the Convention and, as a result, this would have the unacceptable result of rendering Member States liable for an act which was not theirs but which they were bound to accept.

If a Treaty amendment were to allow accession to the ECHR,[60] this would lead to a situation where there was no need to refer to individuals' national status. It would go much further: as a matter of logic, accession to the Convention should be combined with Treaty-level provisions on the justiciability of fundamental rights.[61]

55 For example, in the case of protection of premises, the Luxembourg Court is in favour of efficiency in the inquiry by the agent of the European Commission: Joined Cases 46/87 and 227/88, *Hoechst* v. *Commission* [1989] ECR 2859. The Strasbourg Court is in favour on the other hand of the protection of premises as private domicile: *Niemitz* v. *Germany*, 16 December 1992 [1993] Series A, Vol. 251, 16 EHRR 97.B; *Funke and others* v. *France*, 25 February 1993 [1993] Series A, Vol. 256 - ABC.

56 P. Twomey, 'Citizenship of the Union and Nationality of Member States', in *Legal Issues of the Maastricht Treaty*, *op. cite.*, note 15 at p. 110.

57 Opinion 2/94 (ECHR), 28 March 1996.

58 G.F. Mancini and V. Di Bucci, 'Le développement des droits fondamentaux en tant que partie du droit communautaire', *Collected Courses of the Academy of European Law 1990*, Vol. 1, Book 1, p. 27 at p.51.

59 Clapham, *op. cite.*, note 10, at p. 322.

60 As the Court seems to suggest, see Opinion 2/94, *op. cite.*, note 59, at para. 35.

61 An amendment of Article 173 might be advisable to enable any beneficiary of the rights to have direct access to the ECJ before starting the ECHR proceedings. This would avoid the dilemma posed in Case 314/85, *Foto-Frost* [1987] ECR 4199 whereby the Court ruled out the possibility for national courts to hold Community acts invalid.

VIII. FINAL REMARKS

It seems indisputable that, at least in legislative terms, Union citizenship has not been connected to protection of fundamental rights.[62] We have tried to show how the very notion of citizenship is founded on European values and that the real content of fundamental rights is to be found in the way in which they are protected rather than in their purely textual context. This notion of citizenship may thus assist judicial protection of fundamental rights by means of enlargement of the ECJ's jurisdiction and its approach to sources of judicial protection.

Let us finish with the perspectives for the future. The protection of fundamental rights at the European level requires a formidable agenda. If we follow the conventional approach,[63] we can distinguish three successive levels of rights: civil, political and social.

There is no doubt that the new challenge is to detach civil rights from the status of citizenship. 'The removal of the issue of nationality from the rights equation'[64] should apply to both national and European citizenship. The ECHR is already applicable to citizens of the contracting states and foreigners alike, and accession thereto would assist in this extension.

We should also consider the issue of political rights in the light of the growing political powers, internal and external, of the Union. The traditional political notion of citizenship presupposes the concept of Nation as body contrasted with the political power. Although this notion has not yet been transferred to the Union level, further steps and time may achieve this. This would also add extraordinary novelty to the concept and have the potential to cure the chronic disease of the Union that mostly affects political rights of European citizens: the democratic deficit.

Finally there is the issue of social rights. On the one hand we recall that, as the great Italian scholar of European legal integration, Mauro Cappelletti, memorably said 'to exclude social rights from a modern Bill of Rights, is to stop history at the time of *laissez faire...*'.[65] On the other we appreciate that this is a highly political issue and Denmark's position confirms these concerns. This matter requires further, separate study.

It seems unlikely that Union citizenship will replace national identity based on national concepts of citizenship and nationality.[66] However, Union citizenship in co-existence with national citizenship and nationality, can provide a paral-

62 Closa, *op. cite.*, note 24, at p. 114, observes that, 'the way in which the Union citizenship has been designed as being additional to nationality, implies the generalisation of certain rights reserved by constitutional orders for their own nationals to all nationals of Member States.'

63 T.H. Marshall, *Class, Citizenship and Social Development* (1973).

64 P. Twomey, 'European Citizenship and Human Rights: Actual Situation and Future Perspectives', in Marias (ed.), *European Citizenship* (1996), at p. 120.

65 M. Cappelletti, 'The Future of Legal Education. A Comparative Perspective', Vol. 8 *SAJHR* (1992) p. 1, at p. 10.

66 See generally O'Keeffe, *Collected Courses*, *op. cite.*, note 42.

lel identity for individuals, bringing them closer to the European integration process. As the concept develops, it can provide a shared platform for individuals by which they can participate in that process, enhancing democratic legitimacy. This is not to suggest that a sense of a European *Heimat* may emerge, but rather more simply, that the European and the national models may co-exist side-by-side, with the European construct having the purpose of enabling individuals to take part in a closer way than is now possible, in the European integration process, and deriving from Community law civil, political and social rights which are common to all citizens.[67]

[67] See Weiler, *op. cite.*, note 5.

CHAPTER XIII
UNION CITIZENSHIP AND THE CONSTITUTIONALIZATION OF EQUALITY IN EU LAW

Andrew Evans

I. INTRODUCTION

The first paragraph of Article 8(1) of the EC Treaty, as amended by the Treaty on European Union, 'establishes' Union Citizenship, and Articles 8a-8d set out a non-exhaustive list[1] of the rights to be enjoyed by holders of this Citizenship. According to the Commission, the implications are that the nature of rights previously secured or envisaged for nationals of Member States under Community law has been 'fundamentally altered' and that such rights have been granted 'constitutional status'.[2] In other words, while their formal content may appear unaffected,[3] the nature of these rights has been transformed.[4] In essence, the limited equality once secured for 'economically active' nationals of Member States[5] by provisions such as Article 7 of the EEC Treaty[6] has been 'constitutionalized' in

1 Art. 8e EC allows for adoption of 'provisions to strengthen or to add to the rights laid down'.

2 *Report on the Citizenship of the Union*, COM(93)702, p. 2. Moreover, at least on expiry of deadlines stipulated therein, most of these provisions may become directly effective. See J. Verhoeven, 'Les Citoyens de l'Europe', *Annales de droit de Louvain* (1993) pp. 165-191, p. 183. To the extent that they do so, their operation will no longer be exclusively 'controllable' by legislative activity in the Council of the Union.

3 H-U. J. D'Oliveira, 'European Citizenship: Its Meaning, Its Potential' in R. Dehousse (ed.), *Europe After Maastricht. An Ever Closer Union?*, Munich (1994) pp. 126-48, p. 135.

4 According to the *Bundesverfassungsgericht* in *Manfred Brunner* v. *The European Union Treaty* (1994) Vol. 1 CMLR 57, para. 40; 89 *Entscheidungen des Bundesverfassungsgerichts* 155, p. 184, 'with the establishment of Union Citizenship by the Maastricht Treaty, a legal bond is formed between the nationals of the individual Member States which ... provides a legally binding expression of the degree of de facto community already in existence.'

5 The limited equality secured might be explained by reference to the limited comparability of nationals of the host Member State with nationals of other Member States. See AG Warner in Case 112/76 *Manzoni* v. *FNROM* [1977] ECR 1647, 1665 and the ECJ itself in Case 8/77 *Sagulo, Brenca and Bakhouche* [1977] ECR 1495, 1505-6.

6 Now Art. 6 EC. The prohibition of discrimination therein has been described as 'ein Leitmotiv des ganzen Vertrages', E. Wohlfarth *et al.*, *Die Europäische Wirtschaftgemeinschaft*, Berlin (1960), p. 15.

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 267-291.

favour of Union Citizens.[7]

To give real meaning to this transformation may be problematic.[8] If Union Citizenship is to be at all meaningful, equality of treatment must be secured for holders of this Citizenship in relation to some matters of importance. However, the Treaty attaches significance to the 'bond of nationality'[9] lying at the heart of the nation State,[10] and the implication is that major differences between holders must remain.[11] In particular, the implication is that nationals of different Member States are not comparable[12] for the purposes of enjoyment of political rights and may thus be treated differently in respect of enjoyment of such rights.[13] Article 8(b)(1) of the Treaty itself allows for some differentiation regarding enjoyment of local electoral rights and participation in direct elections 'where warranted by problems specific to a Member State'. Similarly, Treaty arrangements for participation in Union decision making are only intelligible if some differentiation is maintained between persons, depending on the Member State to which they 'belong'.[14] In other words, while 'removal of the disabilities of alienage'[15] may be sought by the Treaty, the latter does not envisage US-style 'nation build-

7 Compare S. Douglas-Scott and J.A. Kimbell, 'The Adams Exclusion Order Case; New Enforceable Civil Rights in the Post-Maastricht European Union' *Public Law,* (1995) pp. 516-25, regarding *R.* v. *Secretary of State for the Home Dept, ex p. Adams* Vol. 3 CMLR 476 (1995).

8 Persons claiming welfare benefits and not 'genuinely' seeking work in another Member State continue to be denied entitlement to free movement. See *R.* v. *Secretary of State for the Home Dept, ex p. Vittorio Vitale,* Vol. 3 CMLR 605 (1995). See also, regarding the continued obligation to apply for 'residence permits', Commission Reply to Written Question E-531/95 by Alex Smith *(Official Journal* 1995 C277/2).

9 Case 149/79 *EC Commission* v. *Belgium* [1980] ECR 3883, 3900; [1982] ECR 1845, 1851.

10 Compare the idea of 'l'obligation mutuelle du souverain au sujet' in Jean Bodin, *Les six livres de la république*, Bk 1, Chap. 6.

11 Compare Case 207/78 *Ministère public* v. *Gilbert Even and Office national des pensions pour travailleurs salariés* [1979] ECR 2019, 2034.

12 Compare the early view that equality of treatment was only required under the ECSC Treaty in respect of economic actors in a comparable position (Case 9/57 *Chambre syndicale de la sidérurgie française* v. *ECSC High Authority* [1957-8] ECR 319, 330).

13 Compare the view that it was necessary, where doubts existed, to reinforce the criterion of comparability by comparing the result to which it led with that intended by the Treaty in Joined Cases 7 & 9/54 *Groupement des industries sidérurgiques luxembourgeoises* v. *ECSC High Authority* [1954-6] ECR 175, 195.

14 Even the European Parliament, according to Art. 137 EC, represents 'the peoples of the States' (the French *Conseil constitutionnel* preferred 'de chacun des peuples de ces états', Judgment of 30 Dec. 1976, Dall. (1977) J. 201) and, according to the Parliament itself, 'the development of a federal type of European Union has not yet reached a sufficiently advanced stage for proportional representation in the European Parliament to be introduced' (Resolution on a uniform electoral procedure: a scheme for allocating the seats of Members of the European Parliament *(Official Journal* 1992 C176/72), para. 2). Compare, however, the reference to political parties and 'the political will of the citizens of the Union' in Art. 138a EC.

15 *Paul* v. *Virginia* 75 US 168, 180 (1869).

ing."[16]

In essence, therefore, realization of Union Citizenship faces problems of the relationship between two aspects of equality - equality of treatment and equality of participation.[17] Reconciliation of the two aspects may be necessary for the realization of Union Citizenship, but implies greater demands on the Union legal system than might be suggested by the language of the first paragraph of Article 8(1) of the Treaty.[18]

In the following sections these demands are explored, having regard to conceptions of equality based, respectively, on the common market, reciprocity between Member States and fundamental rights.

II. MARKET EQUALITY

Article 8a(2) of the EC Treaty provides that every Union Citizen shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect. The main object of this reference to other Treaty provisions is, presumably, Articles 48-66. The effect of the reference may be to perpetuate the tendency for free movement sought by these provisions to operate as the 'core and origin' of Union Citizenship.[19]

According to this tendency, the equality demanded by the Treaty has basically depended on these provisions.[20] True, the Court of Justice has accepted that the prohibition of discrimination in Article 6 'applies independently ... to situations governed by Community law in regard to which the Treaty lays down no

16 *Toomer* v. *Witsell* 334 US 385, 395 (1948).

17 Compare the distinction in Aristotle, *Politics*, III. 1. 3-4 between access to the courts and participation in judicial and governmental decision making. Compare also the distinction between equality before the law and equality in participation in public office in Leonardo Bruni's *Funeral Oration*, quoted in D. Heater, *Citizenship*, London (1990), p. 24; that between 'active' and 'passive' citizenship in Immanuel Kant, *The Metaphysics of Morals*, Part One, para. 46 and Edmund Burke, *Reflections on the Revolution in France*, A.J. Grieve (ed.), London (1971), pp. 56-7; and that between 'civil' and 'political' citizenship in T.H. Marshall, *Class, Citizenship and Social Development*, London (1967), p. 78.

18 Compare, regarding 'the increasing contrast between the EC as an 'economic' entity and the political and constitutional developments represented by the European Union' in *R.* v. *Secretary of State for the Home Dept, ex p. Vittorio Vitale* (1995) Vol. 3 CMLR 605, p. 623.

19 See, e.g., H-U. J. d'Oliveira, 'European Citizenship: Its Meaning, Its Potential', *op. cite.*, note 3, p. 132 and p. 147.

20 It only covers measures which 'involve restrictions on freedom of movement for persons and on the right, conferred by the Treaty on persons protected by Community law, to enter and reside in the territory of the Member States'. See Case 118/75 *Lynn Watson and Alessandro Belmann* [1976] ECR 1185, 1199. According to AG Reischl in Case 90/76 *Van Ameyde* v. *UCI* [1977] ECR 1091, 1137, if a national rule was compatible with provisions regarding free movement, it was also compatible with the then Art. 7 EEC.

specific prohibition of discrimination'.[21] Thus in the case of students, a limited extension of the Article 6 prohibition has been secured by reference to vocational training policy in Article 128 of the Treaty.[22] However, 'extension'[23] of this prohibition more fully to meet the needs of Union Citizenship may be more problematic. The European Courts may prefer, as in the case of national rules governing the issue and mutual recognition of driving licences, to elaborate the prohibition by reference to a link with the free movement required by provisions such as Article 52 rather than by reference to Article 8a.[24] National courts may be at least as reluctant to extend the prohibition of discrimination beyond the requirements of Articles 48-66.[25]

Practice concerning Articles 48-66 originates principally[26] in efforts to liberalize the movement of persons as factors of production[27] and to prevent 'social dumping'.[28] These provisions are interpreted not merely as seeking elimination of obstacles to the free movement of persons arising from inequalities which place migrants at a disadvantage in comparison with nationals of the host Member State.[29] They are also interpreted as prohibiting the application of any national measures which might be unfavourable to persons wishing to extend their activities beyond the territory of a single Member State.[30] Therefore, prohibited

21 See, e.g., Case 10/90 *Maria Masgio* v. *Bundesknappschaft* [1991] ECR I-1119, I-1138.

22 Case 295/90, *European Parliament* v. *EC Council* [1992] ECR I-4193, I-4234-5.

23 *Towards a Citizens' Europe*, Bull. EC, Supp. 7/75, p. 31.

24 Case 193/94 *Sofia Skanavi and Konstantin Chryssanthakopoulos* (not yet reported), paras 22-3. A.G. Leger did recognize Art. 8a EC as embodying a 'general principle', but he considered it to be inapplicable, because a right to free movement for the self-employed was more specifically created by Art. 52 EC. For the same reason, Art. 6 EC was considered inapplicable (paras 20-2).

25 *R.* v. *Secretary of State for the Home Dept, ex p. Vittorio Vitale* (1995) 3 CMLR 605, 623.

26 Though the evolution of these provisions as an element of Union Citizenship may have been anticipated by some. See C.F. Ophuls, 'La Rélance Européenne', *European Yearbook* (1958) pp. 3-15, p. 13, and Presidenza del Consiglio dei Ministri, *Comunità Economica Europea*, Rome (1958), p. 106.

27 Comité intergouvernemental crée par la Conférence de Messine, *Rapport des chefs de délégation aux ministres des Affaires étrangères* (1956), p. 89-91. As regards Art. 48 and implementing measures, 'the purpose of the provisions is to assist in the abolition of all obstacles to the establishment of a common market in which the nationals of a Member State may move freely within the territory of those States in order to pursue their economic activities' (Case 298/84 *Iorio* v. *Azienda Autonoma delle Ferrovie dello Stato* [1986] ECR 247, 255).

28 Art. 48(2) 'has the effect ... in accordance with Art. 117 EC, of guaranteeing to the State's own nationals that they should not suffer the unfavourable consequences which could result from the offer or acceptance by nationals of other Member States of conditions of employment or remuneration less advantageous than those obtaining under national law.' See Case 167/73 *EC Commission* v. *France* [1974] ECR 359, 373.

29 AG Trabucchi in Case 66/74 *Alfonso Farrauto* v. *Bau-Berufsgenossenschaft* [1975] ECR 157, 168.

30 Case 143/87, *Christopher Stanton and SA Belge d'assurances L'Étoile 1905* v. *Inasti (Institut national d'assurances sociales pour travailleurs indépendants)* [1988] ECR 3877, 3894.

measures are not only those which deny national treatment to persons moving between Member States but also those which disadvantage such movement in comparison with remaining at home.[31]

In other words, beneficiaries of free movement should be as free to engage in economic activity elsewhere in the Union as they are in their Member State of origin. Accordingly, differential treatment is prohibited where persons are sufficiently similar that such treatment restricts exercise of such freedom, and like treatment is prohibited where they are sufficiently different that such treatment has this effect. To the extent that such a restriction is present, differential treatment depending on origin and like treatment failing to take account of different origins may constitute prohibited discrimination.

The prohibition concerns not only specific rules on the pursuit of an economic activity but also rules relating to the various general facilities which are of assistance for the pursuit of that activity.[32] The prohibition has even been applied by the Court of Justice where a migrant is denied access to a State scheme to compensate victims of violent crimes. The rationale was that protection from harm was a corollary of free movement.[33] Hence, equality of treatment should apply both to State protection against the risk of assault and to compensation provided for by national law when that risk materialized.[34] In other words, discrimination was prohibited in State performance of a public duty which constituted a precondition for competition in economic activity.[35] Again, discrimination in a Member State as regards charges for access to museums has been prohib-

31 The charge that migrant workers obtain an advantage over workers who have never left their own country cannot be accepted, since no discrimination can arise in legal situations which are not comparable. See Case 22/77 *FNROM* v. *MURA* [1977] ECR 1699, 1707.

32 See, regarding the purchase of property, Case 305/87 *EC Commission* v. *Greece* [1989] ECR 1461, 1478, and, regarding access to social housing, Case 63/86 *EC Commission* v. *Italy* [1988] ECR 29. In the interpretation of Art. 48 the ECJ is said to have shown a 'social' tendency marked by the choice, in case of doubt, of the most favourable interpretation for the worker. See AG Capotorti in Case 55/77 *Maris* v. *Rijksdienst voor Werknemerspensioenen* [1977] ECR 2327, 2338.

33 The right to pursue leisure activities, including the registration of maritime pleasure boats was similarly characterized by AG Fennelly in Case C-334/94 *EC Commission* v. *France* (not yet reported), though reference was also made by the AG to 'the essential human as well as economic needs' of persons exercising free movement and to their 'well-being' and integration into the society of the Member State concerned. The ECJ itself simply said that access to leisure activities available in the host Member State was a corollary of the freedom to enter another Member State to pursue an economic activity. Compare, regarding the education of children of migrant workers, Joined Cases 389 & 390/87 *GBC Echternach and A. Moritz* v. *Netherlands Minister for Education and Science* [1989] ECR 723, 761.

34 Case 186/87 *Ian William Cowan* v. *The Treasury* [1989] ECR 195, 221.

35 Compare, regarding attacks by French farmers on lorries carrying strawberries from Spain, the Reply by Mr Fischler to Written Question P-1344/95 by Maria Izquiredo Rojo (*Official Journal* 1995 C222/67).

ited.[36] The imposition on tourists from other Member States of museum charges from which nationals were exempt was seen as likely to influence decisions of such persons to visit the Member State concerned.[37] In other words, it was conceivable that conditions of competition in the tourist trade were distorted. While such case law entails an expansive approach to definition of the equality of treatment necessary for establishment of the common market, it does not meet the implication in establishment of Union Citizenship that discrimination between Union Citizens should in itself be prohibited.[38]

True, if a Member State imposes physical restrictions on the movement of migrants for political reasons, such restrictions may readily be found to conflict with competition requirements.[39] As a consequence, some equality of treatment regarding participation in political activity is secured for migrants. However, restrictions on the activity of migrants, political or otherwise, which do not affect their competitive position are not prohibited.[40] Were they prohibited, distortions of competition incompatible with the requirement in Article 3(f) of the Treaty of undistorted competition in the common market would be created. Such creation would differ from the failure of the Treaty to prohibit 'reverse discrimination' and to liberalize activity 'wholly internal' to a Member State,[41] because a distortion would not simply be replaced by another but an entirely new one would be created.

In other words, the dynamic element in the development of free movement has been provided by competition requirements.[42] Since such requirements are based on market concepts, some other dynamic[43] has to be found to justify and control equality demands, if free movement is to evolve in accordance with the needs of Union Citizenship. Market rights and political rights may not be in such a relation that the former can be expected to generate the latter.

In essence, therefore, a substitute for competition requirements has to be

36 Case 45/93 *EC Commission* v. *Spain* [1994] ECR I-911.

37 This argument was expressly approved by AG Gulmann *(ibid.,* I-914-5) and tacitly accepted by the Court itself *(ibid.,* I-919).

38 According to AG Rozès in Joined Cases 314-316/81 & 83/82 *Procureur de la République* v. *Waterkeyn* [1982] ECR 4337, 4368, 'the principle of equality before the criminal law ... appears out of place in a Community legal order which is socio-economic in nature'. On the other hand, according to the ESC, 'workers coming from other Member States must be ... treated in the same way as the indigenous worker. This will enable workers from Member States to feel that they genuinely are 'Community workers' and not just nationals of a Member State' (Opinion on the action programme in favour of migrant workers and their families (*Official Journal* 1976 C12/4), para. 7.2.2).

39 Case 36/75 *Roland Rutili* v. *Minister of the Interior* [1976] ECR 1219.

40 Compare Case 177/94 *Gianfranco Perfili* (not yet reported), regarding an Italian requirement that a victim of a criminal offence who wishes to bring suit as a civil party in criminal proceedings must grant his representative a special power of attorney.

41 Case 175/78 *R.* v. *Vera Ann Saunders* [1979] ECR 1129, 1135.

42 See, e.g., Case 168/91 *Christos Konstantinides* v. *Stadt Altensteig and Landratsamt Calw, Ordnungsamt* [1993] ECR I-1191, I-1218-9.

43 A. Evans, 'European Citizenship', MLR (1982) pp. 497-515.

found to structure 'spill-over' from market unification issues not only to fields such as education and sport[44] but also to 'higher' or, perhaps, 'core' politics.[45] In the absence of such a substitute, rationality in judicial decision making may be endangered. For example, according to the Court of Justice, discrimination is prohibited regarding grants designed to cover fees charged to students by the educational establishment concerned but not regarding maintenance grants. Efforts to justify the apparent inconsistency entailed may rely on a narrow concept of equality,[46] a finding of an insufficiently direct link between means of subsistence and access to a course[47] or on description of educational and social policies as lying, in principle, outside the scope of the Treaty.[48]

III. RECIPROCAL EQUALITY

The second paragraph of Article 8(1) of the EC Treaty states that every person having the nationality of a Member State shall be a Union Citizen.[49] This paragraph reflects established Union practice. Procedurally, such practice has involved successive intergovernmental reports, such as the Adonino Reports,[50] which envisaged the development of Union Citizenship through agreements[51] between Member States.[52] These agreements may take the form of Summit Dec-

44 See, e.g., the Resolution of the European Parliament *(Official Journal* 1994 C205/486) on the EC and Sport. Application of Union law to sport raises serious and controversial problems. See, e.g., A. Evans, 'Freedom of Trade under the Common Law and European Community Law: The Case of the Football Bans', LQR (1986), pp. 510-48.

45 The Commission prefers to 'reserve its position' as regards questions of voting rights for migrants in national elections. See the Reply to Written Question E-487/95 (*Official Journal* 1995 C175/45).

46 According to AG Lenz in Case 357/89 *VJM Raulin* v. *Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027, I-1050, only measures restricting access to a course are prohibited; denial of a maintenance grant does not entail such a restriction, because the student may work during his spare time or holidays.

47 AG Slynn in Case 197/86 *Steven Malcolm Brown* v. *Secretary of State for Scotland* [1988] ECR 3205, 3230.

48 See the view of the Court itself (ibid., 3243).

49 Art. 3 of the Draft Treaty of European Union of the European Parliament (*Official Journal* 1984 C77/33) went further and expressly stated that citizenship of the Union could not be acquired or lost independently of the citizenship of a Member State. Art. 25(3) of the Declaration of Fundamental Rights and Freedoms of the European Parliament (*Official Journal* 1989 C120/51) also provided that 'a Community citizen within the meaning of this Declaration shall be any person possessing the nationality of one of the Member States', and the right of residence and electoral rights were only granted to such persons. However, there was the possibility in Art. 25(2) thereof for the rights set aside for Community citizens to be extended to other persons. Art. 8e EC is less specific in this regard.

50 *A People's Europe*, Bull. EC., Supp. 7/85.

51 Compare the idea that a change of citizenship depends on a reciprocal agreement between the sovereigns concerned in Jean Bodin, *op. cite.*, note 10.

52 Para. 22 of the First Report (*A People's Europe*, Bull. EC, Supp. 7/75, p. 14) referred to

larations, such as that of December 1974,[53] but they may also be reflected in amendments to the EC Treaty, such as those introduced by the Treaty on European Union.[54] The underlying idea, as expressed by the Court of Justice, is that such agreements should promote 'solidarity' between Member States and should prohibit national action which 'brings into question the equality of Member States before Community law and creates discrimination at the expense of their nationals'.[55] In other words, satisfaction of the demands of Union Citizenship is to be sought by reciprocal extension of given rights by Member States to each other's nationals.[56]

In accordance with this idea, the 1974 Summit Declaration[57] described the rights involved as 'special rights'[58] to be secured for nationals of Member States on a reciprocal basis.[59] The concern was with the creation of 'autonomous rights'[60] or 'specific rights'[61] for nationals of a Member State in another Member State rather than the imposition of a general obligation on the latter Member State to treat them equally with its own nationals.[62] They were thus to enjoy rights additional[63] to those associated with their nationality of a Member State,

the need for 'a political decision of principle' by the European Council regarding the right of residence.

53 Bull. EC 12-1974, point 1104.

54 Note also the Resolutions of the Representatives of the Member States (*Official Journal* 1981 C241/1 and *Official Journal* 1982 C179/1) regarding a 'European passport'. Note, in contrast, the willingness to introduce the 'European driving licence' by Dirs 80/1263 (*Official Journal* 1980 L375/1) and 91/439 (*Official Journal* 1991 L237/1).

55 Case 128/78 *EC Commission* v. *UK* [1979] ECR 419, 429.

56 The implication is even clearer in relation to diplomatic protection. See Art. 8c.

57 Bull. EC 12-1974, point 1104, para. 11.

58 The Dublin Summit in June 1990 used the expression 'specific rights' (Conclusions of the Presidency, Annex I, Bull. EC 6-1990, I.35). Compare the idea of Union citizenship as 'en quelque sorte une citoyenneté 'd'attribution', par rapport à la citoyenneté 'de droit commun' qu'est la citoyenneté étatique' in R. Kovar and D. Simon, 'La Citoyenneté Européenne', CDE (1993) pp. 285-315.

59 For example, recognition of local electoral rights for nationals of other Member States in Art. 88(3) of the French Constitution is subject to a reciprocity condition. If such rights were treated as elements of the free movement required by Arts 48-66 EC, they could not lawfully be made dependent on the existence of a specific reciprocal agreement between Member States. See Case C-20/92 *Anthony Hubbard* v. *Peter Hamburger* [1993] ECR I-3777, I-3795. See also Case 235/87 *Matteucci* [1988] ECR 5589.

60 AG Lenz in Case 59/85 *Ann Florence Reed* v. *Netherlands* [1986] ECR 1283, 1290 described them as 'positive rights'. The Dutch Government referred to the idea of 'expressly recognized' rights of 'access' in Case C-295/90 *European Parliament* v. *EC Council* [1992] ECR I-4193, I-4213.

61 See the submission of the UK Government, ibid., I-4210.

62 *Ibid.*, I-4207. According to AG Lenz in Case 59/85 *Netherlands* v. *Ann Florence Reed* [1986] ECR 1283, 1289, Art. 48 does not aim 'to place (beneficiaries) in the same position as nationals of the host State, who enjoy comprehensive freedom of action in their home country, not a right to reside there for a specific purpose'.

63 See, regarding the concept of additionality of Union Citizenship, C. Closa, 'The Concept of Citizenship in the Treaty on European Union', Vol. 29 *CMLRev.* (1992)

and the latter rights were to be unaffected.[64]

To base the development of Union Citizenship on such thinking may be problematic for two reasons in particular. First, the implication is that enjoyment of such Citizenship is dependent on possession of the nationality of a Member State. Secondly, general equality as regards political rights, usually associated with the concept of citizenship, is implicitly withheld.

A. NATIONALITY

According to the Danish Declaration at the December 1992 meeting of the European Council, Union Citizenship was a political and legal concept entirely different from the concept of citizenship within the meaning of the Danish Constitution and legal system.[65] The former 'in no way in itself' gave a national of another Member State the right to obtain Danish Citizenship or any of the rights, duties, privileges or advantages that were inherent in Danish citizenship. However, Denmark would fully respect all specific rights expressly provided for in the Treaty and applying to the nationals of the Member States.[66] The Council agreed that the provisions of Part Two of the EC Treaty gave nationals of the Member States additional rights and protection as specified in that Part.[67] They did not in any way take the place of the national citizenship.[68] This declaration develops ideas of dependence of Union Citizenship and of the link between an individual and his State of nationality rather than with the Union itself constituting the basis for his enjoyment of such Citizenship.

Such thinking presupposes that each Member State is competent so to define its nationality[69] (and even to define its nationality for Union law purposes differ-

pp. 1137-69.

64 Art. B TEU includes as a Union objective 'to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union'. The Preamble to this Treaty speaks of Member States 'establishing a citizenship common to nationals of their countries'.

65 The idea that it is 'different from and in no way a substitute for the concept of national citizenship' is stressed in the second recital in the Preamble to Decn 95/553 of the Representatives of the Governments of the Member States meeting within the Council regarding protection for citizens of the EU by diplomats and consular representatives (*Official Journal* 1995 L314/73).

66 Bull. EC 12-1992, I.42.

67 See, earlier, the Conclusions of the Presidency following the Oct. 1990 meeting of the European Council (Bull. EC 10-1990, I.4).

68 Bull. EC 12-1992, I.35.

69 The Declaration concerning nationality of a Member State (the legal status of which is unclear, according to J. Verhoeven, *op. cite.*, note 2, p. 170), annexed to the TEU (see also Part A of the Decision of the Heads of State or Government, meeting within the European Council, concerning certain problems raised by Denmark in relation to the TEU (Bull. EC 12-1992, I.35)), states that whenever the EC Treaty refers to nationals of 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 con-

ently from the definition or definitions it employs for other purposes)[70] as to meet reciprocity demands made by other Member States.[71] The further implication is that such a definition should be binding on the Member State concerned,[72] though changed conditions may mean that continued satisfaction of reciprocity demands depends on redefinition in the light of such demands.[73]

To the extent that a Member State may, whether in accordance with, or in response to, reciprocity demands, alter its definition of nationality for Union law purposes, the rights of Union Citizenship may be precarious.[74] Indeed, where a Member State makes such an alteration, it might be said that discrimination would be involved against former nationals of this State who had exercised their freedom of movement prior to the alteration. Those whose residence rights are affected by changes in the nationality law of the State to which they 'belong' may

cerned (this view had earlier been expressed by AG Mayras in Case 33/72 *Monique Gunnella* v. *EC Commission* [1973] ECR 475, 486 and AG Roemer in Case 14/68 *Walt Wilhelm* v. *Bundeskartellamt* [1969] ECR 1, 28). According to the Commission, this Declaration 'spells out' Art. 8(1) EC and implies that rules on the acquisition and possession of the nationality of a Member State fall within the scope not of this Treaty, but of the national law of the Member State concerned. See the Explanatory memorandum to the Proposal regarding rights to participate in elections to the European Parliament, COM(93)534, p. 11.

70 According to Part A of the Decision of the Heads of State or Government, meeting within the European Council, concerning certain problems raised by Denmark in relation to the TEU (Bull. EC 12-1992, I.35), Member States may declare, for information, who are to be considered their 'nationals for Community purposes' by way of a declaration lodged with the Presidency and may amend any such declaration when necessary. The current UK definition of UK nationals for Community law purposes was applied by the CFI as a basis for holding that a British Overseas Citizen was not rendered ineligible for a Union-financed research fellowship in the UK by virtue of possessing the nationality of that Member State (Case T-230/94 *Frederick Farrugia* v. *EC Commission* (not yet reported)). It was noted, however, that such application of the definition was consistent with the functional requirements of the Union scheme.

71 The original definition of UK nationality for Community law purposes may have been affected by demands of existing Member States. See W.R. Bohning, *The Migration of Workers in the UK and the EEC*, London (1972), p. 134.

72 Compare AG Warner in Case 257/78 *Evelyn Devred, nee Kenny-Levick* v. *EC Commission* [1979] ECR 3767, 3791.

73 Thus the UK Government considered that alteration of its original definition of nationals for Community law purposes, consequent upon enactment of the British Nationality Act 1981, was a matter 'subject to discussions with the Community' (Official Report, Standing Committee F, British Nationality Bill, 26 March 1981, c. 810; see also *British Nationality Law*, Cmnd 6795).

74 Compare, the recognition of the need for a Union law definition of 'workers' in Case 75/63, *Mrs M.K.H. Unger (née Hoekstra)* v. *Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177, 184-5. It is argued, however, that 'nationality' is a qualitatively different concept because of its link with statehood. See H-U. J. d'Oliveira, 'European Citizenship: Its Meaning, Its Potential', *op. cite.*, note 3, p. 129. Compare also the objections of the ECJ to an 'ambiguous state of affairs' in Case 167/73 *EC Commission* v. *France* [1974] ECR 359, 372.

enjoy some protection under international law against deprivation of such rights in that State.[75] However, the same protection would not apparently be available in relation to any other Member State to which such persons, in the exercise of their free movement, had chosen to move.[76]

Even in the absence of alterations of nationality definitions, the continuing terms of such definitions may still jeopardize the exercise of free movement. For example, under United Kingdom law descendants of persons born to British Citizens who have exercised this freedom may be denied British Citizenship.[77] In the sense that persons who exercise this freedom may only be able to pass on a 'second class' citizenship under the national law of their State, its exercise may be said to expose them to discrimination in comparison with those who do not exercise it.[78] While nationality law may reflect national traditions, its application may be problematic where it is employed as an instrument of immigration control having effects so incompatible with free movement requirements.[79]

The problems may be compounded by the role of nationality law in relation to movement between third States and the Union. Nationality law was chosen by the Union legislature as a substitute for common rules regarding such movement[80] and was, presumably, supposed to operate analogously to rules of origin within a free trade area for goods.[81] However, if a Member State may unilaterally alter its nationality law, such law may not perform this function effectively. While steps are now being taken towards adoption in Union law of common rules regarding movement between third States and the Union,[82] the effectiveness of the rules may still be undermined. To the extent that Member States may make such an alteration, they may thereby vary the persons to whom such rules are to apply. Moreover, to the extent that a Member State may employ a different

75 *East African Asians*, Vol. 13 YECHR 928.

76 Compare the rationale for recognition of 'vested rights' in Art. 102(6) EEA. Compare, more particularly, the concern of the ECJ in Case C-295/90 *European Parliament* v. *EC Council* [1992] ECR I-4193, I-4236 that annulment of a Directive should not prejudice the exercise of a right of residence deriving from the Treaty. The principle of legal certainty was invoked by AG Jacobs (ibid., I-4227).

77 S. 2 of the British Nationality Act 1981. Compare D. Bonner, 'British Citizenship: Implications for UK Nationals in the European Communities', ELR (1981) pp. 69-75.

78 Compare recognition by the ECJ that rights of entry and residence 'cannot be fully effective if a (Community national) may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse' in Case 370/90 *The Queen* v. *Immigration Appeal Tribunal and Surinder Singh, ex p. Secretary of State for the Home Dept* [1992] ECR I-4265, I-4294.

79 An analogy might be drawn with criminal law, which remains in principle within the competence of Member States but which cannot operate in such a way as to impede free movement. See, e.g., Case 203/80 *Guerrino Casati* [1981] ECR 2595, 2618.

80 See, e.g., A. Evans, 'Nationals of Third Countries and the Treaty on European Union', EJIL (1994), pp. 199-219.

81 Compare the Declaration by the German Government on the definition of the expression 'German National' with the Protocol on German Internal Trade and Connected Problems.

82 Art. 100c EC and Art. K(1) TEU. See, generally, A. Evans, *op. cite.*, note 80, pp. 199-219.

definition of its nationality for Union law purposes from that employed for other purposes, persons having a right of entry and residence in the Member State concerned may be subject to control of their entry and residence elsewhere in the Union.[83] Yet, effective rules governing movement between third States and the Union are seen as a precondition for removal of border controls within the Union[84] and, hence, for development of free movement for Union Citizens.

The ruling of the Court of Justice in *Micheletti*[85] might be thought to offer a solution to such problems. This case concerned an Italian national who also held Argentine nationality. He had been refused a residence card in Spain because his 'habitual residence' prior to arrival in Spain had been in Argentina, and so under Spanish law he could not be treated as a national of a Member State. The Court ruled that the competence of each Member State to define the conditions for acquisition and loss of its nationality 'doit être exercée dans le respect du droit communautaire'.[86] This obligation was presumably regarded as the necessary corollary of the obligation of Member States to recognize the Treaty rights of nationals of other Member States[87] and thus as a prerequisite for ensuring that the application of free movement did not vary from Member State to Member State.[88]

The legal foundation of the former obligation might be said to be the duty of loyalty in Article 5(2) of the Treaty, taken together with provisions such as Article 8a(2) or 48. However, its real effect depends on the content which might be given to it by Union law rules. Such rules in this area are at best rudimentary[89] and may not necessarily lend themselves easily to significant development by case law alone.[90]

Recognition of the limits to judicial law making in this area[91] may be implicit

83 Conversely, British Dependent Territories Citizens from Gibraltar are formally subject to immigration control under UK law but as UK Nationals for Union law purposes benefit from free movement under Union law.

84 A. Evans, *op. cite.*, note 80, pp. 199-219.

85 Case 369/90 *Mario Vicente Micheletti* v. *Delegación del Gobierno en Cantabria* [1992] ECR I-4239.

86 *Ibid.*, I-4262. Compare, earlier, the ruling in Case 21/74 *Airola* v. *EC Commission* [1975] ECR 221, 228 that 'the concept of 'nationals' in Art. 4(a) (of Annex VII to the Staff Regulations) must be interpreted in such a way as to avoid any unwarranted difference of treatment as between male and female officials who are, in fact, placed in comparable situations.'

87 Even where the persons concerned are also their own nationals. See Case 292/82 *Claude Gullung* v. *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111, 136.

88 Compare, regarding recognition of identity documents issued by other Member States, Case 376/89 *Pangiottis Giagounidis* v. *Stadt Reutlingen* [1991] ECR I-1069.

89 According to AG Tesauro in *Micheletti*, [1992] ECR I-4239, I-4254, they are non-existent.

90 Compare the question-begging argument that such rules may be developed on the basis of 'the objectives and effective operation of the free movement provisions and Union citizenship', which is advocated by S. O'Leary, 'Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows', YEL (1992) pp. 353-84, p. 378.

91 Compare AG Mayras in Case 33/72 *Monique Gunnella* v. *EC Commission* [1973] ECR

in calls by the European Parliament for the harmonization of nationality laws.[92] More particularly, the Parliament considers that free movement and 'extension of European citizenship call for the replacement of the principle of *ius sanguinis* by the principle of *ius soli* as a basis for citizenship'.[93] Such harmonization may have a role to play,[94] particularly given that the 'new approach'[95] to harmonization would obviate the need for comprehensive Union regulation of nationality issues.[96]

Such harmonization would not be precluded by the subsidiarity principle, because, to the extent that the requirements of free movement and Union Citizenship are at stake,[97] this principle is necessarily inapplicable.[98] Harmonization would also be necessary to render effective steps towards developing a common policy regarding the entry and residence of third State nationals in the Union. Hence, the conditions for resort to Article 8e, 49 or 235 of the EC Treaty may be met. Indeed, the possibility of a Union 'initiative' of this kind is not explicitly rejected by the Commission,[99] and the latter implicitly accepted in *Micheletti* that the Union could 'regulate' in this area.[100] Paradoxically, therefore, by seeking to preserve 'statehood' by basing Union Citizenship on nationality the Member States invite Union regulation of their nationality law.

However, technical complications may limit harmonization possibilities.[101] Complications may arise not only from differences in specific rules of nationality law but also from contact between such rules and those governing matters

475, 487.

92 See, in connection with the need to reduce Statelessness, the Resolution on the British Nationality Bill (*Official Journal* 1981 C260/100), para. 10.

93 Para. 93 of the Resolution on respect for human rights in the EC (*Official Journal* 1993 C115/178).

94 S. O'Leary, *op. cite.*, note 90, p. 384.

95 Compare *Technical harmonization and standards: a new approach* (COM(85)19) and the Council Resolution on a new approach to technical harmonization and standards (*Official Journal* 1985 C136/1).

96 Though it may be argued that such harmonization 'should await a parallel political development of the Union' (C. Closa, *op. cite.*, note 63, p. 513).

97 According to AG Trabucchi in Case 118/75 *Lynn Watson and Alessandro Belmann* [1976] ECR 1185, 1210, 'as long as there is no Community nationality, nationals of other Member States will always have a different status from that of a national of the State concerned even where he enjoys the right of free movement and residence on conditions of parity with such a national.'

98 Compare, regarding internal market requirements, AG Tesauro in Case 300/89 *EC Commission* v. *EC Council* [1991] ECR I-2867, I-2890.

99 In its Reply to Written Question 1674/87 (*Official Journal* 1988 C123/15) the Commission stated that it had 'no intention at present of taking any initiative in this field'.

100 Case C-369/90 *Mario Vicente Micheletti* v. *Delegacion del Gobierno en Cantabria* [1992] ECR I-4239, I-4250.

101 A. Evans and H-U. J. d'Oliveira, 'Nationality and Citizenship' in A. Cassesse *et al.*, *Human Rights and the European Community: Methods of Protection*, Baden-Baden (1991) pp. 299-350, p. 305.

such as adoption,[102] marriage[103] and divorce. While 'progressive harmonization of certain sectors of private law is essential to the completion of the internal market',[104] underlying such complications may be the fundamental problem that any definition of nationality implies the kind of homogeneity between nationals and their distinctiveness as against non-nationals supposedly associated with the nation State.[105] If the Union lacks the qualities of such a State, only limited progress in harmonization of nationality law is likely,[106] even though such harmonization seems to be a logical precondition for effective development of a form of Union Citizenship limited to nationals of Member States.[107]

In other words, there may be severe limitations to the capacity of the Union, whether through case law or legislative harmonization, to develop its own definition of nationality and, hence, to the viability of nationality as a basis for development of Union Citizenship. While a focus on definition of nationality of Member States for Union law purposes,[108] as opposed to that for other legal purposes, might defuse certain political sensitives, underlying complications would apparently remain. Besides, while different definitions of nationality for different purposes may often be feasible[109] and reflect the multiplicity of the functions of nationality law, the kind of integration entailed by Union membership may ultimately preclude maintenance of a different definition of nationality for Union law purposes from that generally employed by the Member State concerned.[110]

[102] The Commission considers that the Community has no competence in relation to matters of adoption law. See the Reply to Written Question E-553/94 (*Official Journal* 1994 C349/39).

[103] See, regarding definition of a 'spouse', Case 59/85 *Netherlands* v. *Ann Florence Reed* [1986] ECR 1283, 1300.

[104] Resolution of the European Parliament on the harmonization of certain sectors of the private law of the Member States, recital D in the Preamble (*Official Journal* 1994 C205/518).

[105] 'Transcendence and differentiation are the basic characteristics of the nation' (C. Closa, *op. cite.*, note 63, p. 489). Compare, regarding the role of nationality law in the 'self-definition' of States and their 'personal substratum', S. O'Leary, *op. cite.*, note 90, p. 360. See also the comment by H-U. J. d'Oliveira on *Micheletti,* Vol. 30 *CMLRev.* (1993), pp. 623-37.

[106] Compare, regarding 'the diversity of demographic conditions' in *Nottebohm* (1955) ICJ, 23.

[107] A. Evans, 'European Citizenship: A Novel Concept in EEC Law', AJCL (1984), pp. 679-715, p. 689.

[108] For such purposes, definitions of the nationality of a third State might even be contemplated in Council measures under Art. 59 EC 'extending' freedom to provide services to such persons.

[109] A. Evans, *op. cite.*, note 107, p. 687.

[110] Compare the argument that '(a)s long as there is no agreement among the Member States on the concept of citizenship, as distinguished from nationality, Union Citizenship may have the potential of becoming the sum total of the citizenships in the Member States combined, which, of course, will mean the end of the Member States.' in H-U. J. d'Oliveira, 'European Citizenship: Its Meaning, Its Potential', *op. cite.*, note 3, p. 135.

In short, reliance on a nationality condition as the basis for enjoyment of Union Citizenship, though possibly inevitable in an approach to realization of such Citizenship through reciprocal equality, may prejudice its realization.

B. Political Rights

Article 157(1) of the Treaty stipulates that Commissioners must be nationals of a Member State. While the same express stipulation is not made in relation to the Council of the Union, Article 146 provides for Member States to be represented in this Council by persons 'of ministerial rank'. Thus representatives derive their capacity as such from national law. In determining those with the necessary capacity, national law is apparently unfettered by Union law. Article 48(4) of the Treaty provides that freedom of movement for workers does not apply to employment in 'the public service'.[111] This provision is interpreted so as to respect the 'bond of nationality', and as meaning that Member States may reserve to their own nationals posts, including ministerial posts, whose holders exercise decision-making powers conferred by public law.[112] It not only implies that a Member State may reserve to its own nationals opportunities to participate as its representatives in the Council, it also means that posts involving internal implementation of Union law may be so reserved. To this extent, the original version of the EEC Treaty left enjoyment of political rights to depend on action by Member States.

The Court of Justice has shown little inclination to challenge the resultant freedom of Member States in this area. According to the Court, Articles 48-66 require equal treatment in relation to social advantages generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States seems likely to facilitate their mobility within the Union. The requirement does not apply to advantages 'essentially linked to the performance of military service'.[113]

The Member States agreed only to a limited surrender of their freedom in the Treaty on European Union. Article 8b(1) of the EC Treaty, as amended by the Treaty on European Union, provides that every Union Citizen residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that Member State. Article 8b(2) provides for corresponding rights in relation to elections to the European Parliament. To this extent, equality of treatment is to encompass equality of partici-

[111] See also Art. 55 EC, regarding activities 'connected, even occasionally with the exercise of official authority'.

[112] Case 149/79 *EC Commission* v. *Belgium* [1980] ECR 3883, 3900; [1982] ECR 1845, 1851.

[113] Case C-315/94 *Peter de Vos* v. *Stadt Bielefeld* (not yet reported). See, earlier, Case 207/78 *Ministère public* v. *Gilbert Even and Office national des pensions pour travailleurs salariés* [1979] ECR 2019 and Case C-310/91 *Schmid* v. *Belgium* [1993] ECR I-3011.

pation.[114]

However, by referring only to Union Citizens and only to these two categories of elections, these provisions tend to underline rather than resolve more general problems of the relationship between these two aspects of equality. In so far as political rights for resident aliens are coming to be treated as fundamental rights, it may be problematic to limit the scope of Article 8b(1) and (2) to nationals of Member States.[115] It may be equally problematic to limit 'domestic' electoral rights to the local level,[116] because levels of government are interlinked and such rights are granted in relation to direct elections to the European Parliament.[117]

More particular problems may arise in respect of the content of the rights which are granted. For example, Directive 93/109[118] implements Article 8b(2). In the preamble to this measure, the right to vote and stand as a candidate in elections to the European Parliament in the Member State of residence is described as an instance of the application of the equality principle and a corollary of the right to move and reside freely.[119] Hence, nationals of other Member States should be subject to the same conditions as nationals of the host Member State for participation in such elections.[120] To preclude effective discrimination, Article 5 of the Directive provides that where a national of a Member State must have completed a minimum period of residence in his own Member State to be eligible to vote there, an equivalent period of residence for 'Community voters' in another Member State will suffice. On the other hand, requirements of a minimum period of residence in order to vote in a particular locality are unaffected by this provision. Nationals of the Member State concerned are more likely to be able to meet such requirements than nationals of other Member States. As a result, the latter may not be as free to participate in such elections if they move to another Member State as if they stay in their own.

Such problems may, at least in part, be an inevitable consequence of efforts to

[114] See, regarding the implications of Union Citizenship for internal institutional arrangements of Member States, H-U. J. d'Oliveira, 'European Citizenship: Its Meaning, Its Potential', *op. cite.*, note 3, p. 139.

[115] Compare, regarding the position of nationals of third States, A. Evans, *op. cite.*, note 80. See, more particularly, regarding their 'civic rights', the Opinion of the Committee of the Regions on the draft directive on local electoral rights (*Official Journal* 1995 C210/51), para. 1.5.

[116] Union Citizens 'satisfying special conditions' should also have the right to participate in national elections. See the Resolution of the European Parliament on the granting of special rights to the citizens of the EC (*Official Journal* 1977 C299/26), paras 3(e) and (f).

[117] H.U.J. d'Oliveira, 'Electoral Rights for Non-Nationals' NILR (1984), pp. 59-72.

[118] Laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (*Official Journal* 1993 L329/34).

[119] Third recital in the Preamble.

[120] Sixth recital in the Preamble. See also the Explanatory memorandum to the proposal, COM(93)534, p. 8.

introduce political rights for Union Citizens through reciprocal equality based on extension of national treatment to nationals of other Member States. Apparently, therefore, reciprocal equality may be an inadequate basis for introducing such rights.[121]

IV. EQUALITY AND FUNDAMENTAL RIGHTS

Part Two of the EC Treaty, which includes Articles 8 and 8a-e, makes no express mention of fundamental rights. Instead, such rights are dealt with in the Treaty on European Union. Article F of the latter Treaty states that the Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States, as general principles of Community law.[122] More particularly, under Article K(2) of the same Treaty matters of common interest in the field of justice and home affairs are to be dealt with in accordance with the Convention. Thus the Treaties tend to follow general State practice in treating fundamental rights issues separately from citizenship issues.

A. Dependence of Fundamental Rights

The underlying concern in Articles F and K(2) of the Treaty on European Union is apparently to contain Union encroachment on fundamental rights rather than to treat Union law as an instrument for promoting them. The case law of the Court of Justice seems, in the light of contrasts which may be drawn between rulings such as that in *Rutili* and the *Demirel* ruling, to entail for such rights an even more limited function within the Union legal system. *Rutili* concerned restrictions on the movement of an Italian trade unionist in France. Here the Court required that, in exercising their powers under provisions such as Article 48(3) of the EC Treaty and Directive 64/221[123] to restrict the movement of nationals of other Member States on public policy grounds, Member States must respect principles enshrined in the European Convention on Human Rights.[124] In *Demirel*,[125] which concerned the expulsion from Germany of a Turkish woman who had gone to Germany to join her husband who was working there,

[121] The case law may also be unsuitable for application by analogy to equality in the field of political rights, if equality in this field is to be based on national treatment. This lack of suitability may underlie the limited freedom of internal movement secured in Case 36/75 *Roland Rutili* v. *Minister for the Interior* [1975] ECR 1219.

[122] Though, according to Art. M TEU, this provision does not affect the EC Treaty.

[123] *Official Journal* 850/1964.

[124] Case 36/75 *Roland Rutili* v. *Minister of the Interior* [1976] ECR 1219, 1232. See also, regarding the need for Reg. 1612/68 to be interpreted in the light of the requirement of respect for family life in Art. 8 of the Convention, Case 249/86 *EC Commission* v. *Germany* [1989] ECR 1263, 1290.

[125] Case 12/86 *Meryem Demirel* v. *Stadt Schwäbisch Gmünd* [1987] ECR 3719.

provisions of the Turkish Association Agreement[126] requiring the progressive introduction of the free movement of workers between the Parties were at issue. The Court noted that the free movement of workers was, by virtue of Article 48 of the EC Treaty, one of the fields covered by this Treaty and did not accept that the Member States entered into commitments to Turkey concerning this freedom in the exercise of their own powers. These commitments fell within the powers conferred on the Community by Article 238 of the Treaty.[127] However, they merely set out programmes and were 'not sufficiently precise and unconditional to be capable of governing directly the movement of workers.'[128] The Court did not address the question whether in implementing these commitments the Member States had to respect the Treaty[129] and, more particularly, fundamental rights[130] embodied in Union law.

Such practice renders availability of fundamental rights dependent on market unification requirements.[131] In other words, there is reluctance to allow the transformation of 'objective' rights into 'subjective' rights. In particular, respect for family life is treated as 'a necessary element in giving effect to the freedom of movement of workers [and] does not become a right until the freedom which it presupposes has taken effect'.[132]

Adverse consequences of such practice may not necessarily be limited to third country nationals.[133] It is recognized in the European Parliament that although nationals of Member States are not subject to immigration control within the Union, they may suffer bureaucratic oppression and discrimination. Moreover,

126 *Official Journal* 3687/1964.

127 [1987] ECR 3719, 3751.

128 *Ibid.*, 3753.

129 Compare the finding that Art. 7 EEC applied to the tax treatment of teachers employed at the European Schools, i.e., such treatment fell within the scope of application of the Treaty for the purposes of this provision, in Case 44/84 *Hurd* v. *Jones* [1986] ECR 29, 85. Where the Union has not acted, Art. 7 may still apply. See Case 61/77 *EC Commission* v. *Ireland* [1978] ECR 417; Case 88/77 *Minister for Fisheries* v. *Schonenberg* [1978] ECR 473.

130 Compare J. Weiler, 'Thou Shalt Not Oppress a Stranger: on the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique', *EJIL* (1992), pp. 65-91. Compare also the argument regarding the need for Member States to respect fundamental rights in implementation of their obligation to hold direct elections in A. Evans, 'Nationality Law and European Integration' *ELRev.* (1991), pp. 190-215, p. 208. Compare also Case 5/88 *Wachauf* v. *Germany* (1989) ECR 2609, 2639-40.

131 See Case 159/90 *Society for the Protection of Unborn Children Ireland Ltd* v. *Stephen Grogan* [1991] ECR I-4685, 4740-1.

132 AG Darmon in Case 12/86 *Meryem Demirel* v. *Stadt Schwäbisch Gmünd* [1987] ECR 3719, 3745. According to the Court itself, such a right would depend on a provision defining the conditions in which family reunification must be permitted (ibid., 3754). See also Case 295/90 *European Parliament* v. *EC Council* [1992] ECR I-4193, I-4236.

133 The legitimacy of controls on intra-Union movement of Union Citizens may be justified on the grounds that Art. 7a EC does not require liberalization of the movement of third country nationals. See *R.* v. *Secretary of State for the Home Dept, ex p. Donald Walter Flynn* (1995) 3 *CMLR* 397.

the restrictions which form part of national immigration policies help to foster fear and distrust or even hatred of foreigners generally,[134] which may ultimately lead to threats to democracy in Europe.[135] In other words, lack of a real fundamental rights dimension[136] to integration processes may be detrimental to the processes themselves[137] and, more particularly, to effective enjoyment by nationals of Member States of the rights of Union Citizenship.[138]

B. ECHR Breaches

Existing practice may be inadequate not only for the purposes of developing Union Citizenship for nationals of Member States but also, if the general tendency of Union law is to permit, or even to encourage, discrimination between third country nationals and nationals of other Member States, for preventing breaches of the European Convention on Human Rights. For example, although this Convention does not guarantee rights of entry and residence as such and the Fourth Protocol thereto only guarantees these rights in the case of nationals of the State concerned, expulsion of aliens may involve action contrary to other rights which are guaranteed by the Convention. Thus expulsion of a third country national related to someone resident in a Member State may constitute a violation of the right to respect for family life in Article 8(1) of the Convention, unless it can be justified under Article 8(2).[139]

Differential treatment of different categories of aliens, that is, between nationals of other Member States and nationals of third States, may not necessarily be easy to justify, where such a right is involved. Parties to the Convention and its

134 Freedom of movement is seen as contributing to the fight against social exclusion and thus to 'real citizenship'. See *Towards a Europe of Solidarity: intensifying the fight against social exclusion, fostering integration*, COM(92)542, p. 27.

135 Report of the Committee on Social Affairs and Employment on the Commission communication on guidelines for a Community policy on migration, EP Doc. A2-4/85, p. 16-7.

136 See, e.g., the Resolution of the European Parliament on European immigration policy, regarding the incompatibility with fundamental rights of arrangements being made to coordinate control of the entry and residence of TCNs (*Official Journal* 1993 C255/184).

137 According to Aristotle, *Politics*, Bk III, ch. 6, 'when there are many poor people who are incapable of acquiring the honours of their country, the state must necessarily have many enemies within it.' In more modern terms it might be said that 'state-mass democracy social welfare' is deficient, in that it has not, as is claimed by J. Habermas, *Communication and the Evolution of Society*, London (1979), p. 194, 'involved everyone in the legitimation process as voting citizens'.

138 Compare the link made by the Commission between treatment of migrants and political union in Case 36/75 *Roland Rutili* v. *Minister for the Interior* [1975] ECR 1219, 1226 with the attempt to distinguish social matters from the integration of workers from third States in Joined Cases 281, 283-5 & 287/85 *Germany, France, Netherlands, Denmark and the UK* v. *EC Commission* [1987] ECR 3203, 3252-3.

139 See, e.g., Application 8244/78 *Uppal Singh* (17 D. & R. 149).

Protocols cannot lawfully derogate from the rights embodied therein simply by concluding agreements,[140] even one as important as the EC Treaty, amongst themselves. There is no provision in the Convention analogous to Article XXIV(5) of GATT,[141] and it is questionable whether Union Citizenship, which lacks the historical foundation of, for example, Commonwealth Citizenship or the special treatment accorded Irish nationals in the United Kingdom, could always provide an objective justification for such differentiation.[142] It is equally questionable whether it could be justified by reference to the demands of European Union or, indeed, that it would be desirable.[143]

Such questions appear to have received little attention from the European Court of Human Rights in *Moustaquin* v. *Belgium*.[144] This case concerned a Moroccan national who had arrived in Belgium in 1965, when he was one year old, and had lived there with his family until being deported in 1984 because of his criminal record in Belgium. Amongst the arguments against the compatibility of the deportation with the Convention was that his right to family life in Article 8 of the Convention was less well protected than it was in the case of nationals of other Member States. The Court stated that there was an 'objective and reasonable justification' for 'preferential treatment' of nationals of Member States in comparison with nationals of third States,[145] because Member States 'belong ... to a special legal order'. Certainly, if the right to family life within the meaning of Article 8(1) of the Convention is not at stake, the fact that family life may have a higher level of protection in the case of nationals of other Member States than in the case of nationals of third States need not in itself entail that interference with the family life of the latter constitutes a violation of this provision by the Member State concerned. However, where such a right is at stake, as in *Moustaquin*, and the question is whether the right may be restricted under Article 8(2) of the Convention, differential treatment between nationals of Member States and nationals of third States may be of greater significance. It is not apparent why expulsion of the latter alone could be justified on grounds such as public order or could be accepted as being 'necessary in a democratic society' for the purposes of

[140] Application 11123/84 *Tete* v. *France* 11 EHRR 91.

[141] It states that the 'provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area', provided certain specified conditions are met.

[142] Though there may be attractions for national authorities. For example, the status of British Dependent Territories Citizens from Gibraltar as UK nationals for Union law purposes was used in s. 5 of the British Nationality Act 1981 to delimit the beneficiaries of the right of registration as British Citizens under this provision.

[143] See, generally, A. Evans, *op. cite.*, note 130.

[144] Ser. A, No. 193, 1, 120; 13 EHRR 802, 816.

[145] The question did not arise whether preferential treatment of the latter in comparison with nationals of the Member State concerned, i.e. 'reverse discrimination', which may be allowed by the EC Treaty, might similarly be justified. However, the Court accepts that national constitutional rules may be applied against such discrimination (Case 132/93 *Volker Steen* v. *Deutsche Post* [1994] ECR I-2715, I-2724) and might also consider principles of the Convention to be applicable.

Article 8(2). This point, however, was not addressed by the Court, possibly because Article 8 had already been found to have been violated in this case.

Such issues may be rendered all the more pressing by the European Economic Area Agreement. This Agreement provides for extension of freedom of movement and the prohibition of discrimination to benefit nationals of EFTA States which are Parties to the Agreement.[146] Thus persons lacking the nationality of a Member State will enjoy the protection of the very principles which lie at the heart of Union Citizenship. Indeed, their rights are described as 'identical' to those of nationals of Member States.[147] It, therefore, becomes increasingly implausible to treat the rights of Union Citizenship as dependent on possession of the nationality of a Member State[148] rather than as fundamental rights[149] which might be protected as such by Union law.[150]

C. Potential Dynamism of Fundamental Rights

While the above legal issues may not have been fully explored by the Union institutions, there is apparent unease within these institutions at limiting rights entailed by Union Citizenship to nationals of Member States. For example, in relation to the Commission draft for what became Directive 90/364[151] on the right of residence for nationals of Member States not otherwise qualifying for this right, the European Parliament proposed that the Directive should provide for a 'European Resident's Card' to be issued to legal residents from third countries under the same conditions as to nationals of Member States. More particularly, the right of residence should be available to third country nationals who, before having reached the age of six years, were resident in a Member State and had since regularly resided there as well as to recognized political refugees and 'displaced persons' residing in a Member State.[152]

[146] See, generally, Art. 4 of the EEA Agreement and A. Evans, *European Community Law, including the EEA Agreement*, Deventer: Kluwer (1994), Chap. 9.

[147] Art. 1(1)(a)(iii) of the draft convention on controls on persons crossing external frontiers, COM(93)684.

[148] Compare the call for the 'creation of a Community citizenship ... independent of nationality' in the ESC Opinion on the proposal for a Directive on voting rights for Community nationals in local elections in their Member State of residence (*Official Journal* 1989 C71/2), para. 3.1.

[149] Art. 2(1) of Prot. 4 to the ECHR provides: 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence'.

[150] According to the ECJ, it was not contrary to the prohibition of discrimination as between nationals of different ACP countries in the Lomé Convention for a Member State to reserve more favourable treatment to nationals of one ACP State, provided that such treatment resulted from the provisions of an international agreement comprising reciprocal rights and obligations. See Case 65/77 *Jean Razanatsimba* [1977] ECR 2229, 2239. However, fundamental rights issues were not explicitly put to the Court.

[151] On the right of residence (*Official Journal* 1990 L180/26).

[152] *Official Journal* 1990 C175/84. See also the Resolution on the original Commission

In the case of pensioners,[153] the Parliament proposed insertion of a clause in the Preamble to the draft for what became Directive 90/365[154] envisaging future measures to recognize rights for third country nationals identical to those of nationals of Member States. The Directive itself should apply to third country nationals who had lived on a regular basis in a Member State since the age of six, as well as to political refugees and to stateless persons[155] recognized as such in a Member State and residing there.

In the case of students, the Parliament proposed inclusion of a clause in the Preamble to the Commission draft for what became Directive 90/366[156] to the effect that the EC Treaty envisaged a 'right of people to choose to reside in any one of the Member States without any distinction whatsoever'. The Directive should, according to the Parliament, be a point of reference for the extension of the right of residence to students from third countries.[157]

More particularly, recognition of the right to family life is advocated.[158] In its Resolution of 15 November 1977[159] the European Parliament requested the Member States to adopt, in their legislation, as liberal an attitude as possible when it came to regularizing the position of illegal migrants and their families.[160] Even electoral rights may be advocated. According to the Parliaent,[161] resident

proposal (*Official Journal* 1980 C117/48).

153 *Official Journal* 1990 C175/89.

154 On the right of residence for employees and self-employed persons who have ceased their occupational activity (*Official Journal* 1990 L180/28).

155 Arts 1 and 2 of Reg. 1408/71 (*Official Journal* 1971 L149/2) already expressly assimilate stateless persons and admitted refugees and their relatives to nationals of Member States for social security purposes. Moreover, according to the Declaration of the Representatives of the Governments of the Member States, meeting within the Council, on the subject of refugees (*Official Journal* 1225/1964), refugees within the meaning of the Geneva Convention on the Status of Refugees who were resident in one Member State should be treated as favourably as possible if they wished to enter another Member State for the purposes of taking employment there. See, later, the Statement by the Representatives of the Governments of the Member States, meeting within the Council, concerning refugees (*Official Journal* 1985 C210/2), regarding self-employed refugees.

156 On the right of residence for students (*Official Journal* 1990 L180/30). Following the ruling in Case 295/90 *European Parliament* v. *EC Council* [1992] ECR I-4193 that the Council had unlawfully adopted this measure on the basis of Art. 235 EC rather than Art. 6(2) EC, it was replaced by Dir. 93/96 (*Official Journal* 1993 L317/59).

157 *Official Journal* 1990 C175/96.

158 See also, regarding 'unmarried companions', Case 59/85 *Netherlands* v. *Reed* [1986] ECR 1283, 1303.

159 On the proposal for the harmonization of laws in the Member States to combat illegal migration and illegal employment (*Official Journal* 1977 C299/16), para. 12.

160 See also the Report of the Committee on Social Affairs, Employment and Education on the amended proposal for a Directive concerning the approximation of the legislation of the Member States in order to combat illegal migration and illegal employment, EP Doc. 238/78, 12 and the ESC Opinion on employment and the changed situation in the Community (*Official Journal* 1974 C109/52), para. 4.17.

161 Resolution on migrant workers from third countries (*Official Journal* 1990 C175/80), para. 1. See, most recently, the Resolution on the resurgence of racism and xenophobia

third country nationals should be entitled to vote and stand for election at the local level.[162]

A logical progression from such proposals and a reflection of the link between Union Citizenship and democratic legitimacy of the Union[163] would be to treat the principle in Article 3 of the First Protocol to the European Convention on Human Rights as entailing rights independent of nationality conditions.[164] It provides that the 'High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.[165] This principle could be extended so as to secure equality for all those who had resided in a Member State for a sufficient period to be regarded by Union law as 'belonging' to that Member State[166] for the purposes of full participation in political life

in Europe and the danger of right-wing extremist violence, where the Parliament also advocated action regarding access to citizenship for third country nationals, grant of citizenship to all children born in the Union and adoption of a Resident's Statute for 'non-nationals' (*Official Journal* 1993 C150/127), paras 9, 11 and 12.

162 See also the ESC Opinion on the proposal for a Directive on voting rights for Community nationals in local elections in their Member State of residence (*Official Journal* 1989 C71/2).

163 Spanish Delegation, Intergovernmental Conference on Political Union: European Citizenship (21 Feb. 1991). Compare, however, regarding the perceived incongruities of Union Citizenship and democracy with the framework of the nation-state, U.K. Preuss, 'Problems of a Concept of European Citizenship', ELJ (1995), pp. 267-81.

164 The applicability of Art. 3 to participation by Community nationals in national elections was assumed by the ESC in its Opinion on the proposal for a directive on voting rights for Community nationals in local elections in their Member State of residence (*Official Journal* 1989 C71/2), para. 2.8. The implication in the rulings of the European Commission of Human Rights in Application 7730/76 *X* v. *UK* (15 D & R 137, 138) and Application 8227/78 *X* v. *Germany* (16 D & R 179, 180) is that general tendencies towards granting some electoral rights to aliens mean that reservation of such rights to nationals may have to be justified under this provision.

165 According to the European Commission on Human Rights, this provision implies a right to vote and stand as a candidate in elections to legislative bodies. See Applicns 6745 & 4746/74 *X* v. *Belgium* (2 D & R 110). This view was expressly approved by the European Court of Human Rights in *Mathieu-Mohin and Clerfayt* v. *Belgium* Ser. A No. 113, 1, 23; 10 EHRR 1, 16.

166 It is argued by the Committee on Civil Liberties and Internal Affairs that the principle of territoriality should, whenever possible, be a decisive criterion for conferring rights and duties and for receiving effective protection from the State. See the Annual Report on Respect for Human Rights in the EC, EP Doc. A-30025/93, 58. According to the Parliamentary Resolution on the Right of Nationals of other Member States to Vote and Stand in Local Government and European Parliamentary Elections in their Country of Residence (*Official Journal* 1985 C345/85), para. 1, the right to vote in local elections should be enjoyed by 'all the inhabitants of a local community'. Compare, regarding the link between local electoral rights and the 'social' objectives in Art. 2 EC, the Resolution on the right of citizens of a Member State residing in a Member State other than their own to stand for and vote in local elections (*Official Journal* 1983 C184/28), recital D in the Preamble.

there.[167] Such treatment of the principle would entail extension, in effect if not in form,[168] of the status of Union Citizenship as well as development of the content of the rights involved.

Progress along these lines may not necessarily be dependent on legislative reform. To the extent that denial of such rights is contrary to the European Convention and its Protocols, the principles of which are part of Union law,[169] their denial may be contrary to existing Union law. Even in the absence of legislative reform, then, there may be scope for judicial recognition of the rights entailed by Union Citizenship as fundamental rights generally available within the Union.[170]

V. CONCLUSION

This chapter has discussed three possible approaches to development of Union Citizenship in accordance with the equality principle. These approaches, which may be of analytical utility and, to the extent that they have been and are pursued by Union institutions, may also have normative impacts, need not necessarily be mutually exclusive. However, market equality concepts alone may be too limited a basis for developing a form of Citizenship which is both meaningful in itself and adapted to the wide-ranging integration sought by Union law. Nationality concepts, as applied in the search for reciprocal equality, also seem too limited. Transfer of the same concepts to the Union level, that is, the embodiment

[167] Compare the Proposal for a Regulation amending Reg. 1612/68 on freedom of movement for workers within the Community (*Official Journal* 1989 C100/6), in which the Commission proposed that derived rights for the spouse and dependants of a national of a Member State exercising his freedom of movement should subsist his death or the dissolution of the marriage. The explanatory memorandum described the right as conditional on 'a tie to the employment market of a Member State' (COM(88)815, p. 22). Compare, regarding holders of driving licences issued by a Member State, Art. 8 of Dir. 91/439 (*Official Journal* 1991 L237/1) on driving licences.

[168] Art. 8(1) EC does not expressly provide that Union Citizenship, let alone the rights entailed thereby, must be limited to nationals of Member States. According to the *Communication on Immigration and Asylum Policies*, COM(94)23, p. 34, 'the logic of the internal market implies the elimination of the condition of nationality for the exercise of certain rights'.

[169] See, e.g., Case 36/75 *Roland Rutili* v. *Minister of the Interior* [1975] ECR 1219, 1232. According to AG Lenz in Case 260/89 *Elliniki Radiophonia Tileorassi AE* v *Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925, I-2946, 'the rules of the Convention are to be regarded as part of the Community legal order'.

[170] Compare the acceptance by AG Trabucchi in Case 21/74 *Airola* v. *EC Commission* (1975) ECR 221, 233 that fundamental rights may limit the freedom of Member States to define for themselves holders of their nationality. Art. 15 of the Universal Declaration of Human Rights states that everyone has a right to a nationality. More particularly, Art. 24 of the International Covenant of Civil and Political Rights provides that all children have the right to acquire a nationality. See, regarding withdrawal of nationality, S. Hall, 'Loss of Union Citizenship in Breach of Fundamental Rights', ELR (1996) pp. 129-43.

in Union law of a comprehensive definition of nationality, would imply a consensus as to the desirability of a centralized integration which is not apparent.

Treatment of the rights of Union Citizenship as fundamental rights may constitute an approach to solution of the problems involved which does not overtake the evolutionary potential of the Union legal system and is adapted to the needs of integration processes seeking more than mere market unification. Such treatment may offer a basis for justifying and controlling development of equality, in accordance with the implications of the concept of Union Citizenship and the 'principles of democracy' mentioned in Article F(1) of the Treaty on European Union.[171] Within the scope of such rights equality could encompass electoral participation in the host Member State for nationals of other Member States who had resided in the former for a sufficient period to be regarded as 'belonging' to that State for the purposes of the rights concerned.

Moreover, if the basic implication in EU law - that exercise of such rights should not be conditional on possession of the nationality of the Member State in which they are claimed - were taken to its logical conclusion, third country nationals might also qualify for such rights on the basis of residence in a Member State.[172] The consequence would be that nationality law would no longer provide the basis for excluding substantial numbers of individuals from participation in the political life of the Union and of their State of residence.[173]

[171] According to the earlier Tindemans Report, there was a need 'to restore to use at the European level that element of protection and control of our society which is progressively slipping from the grasp of State authority due to the nature of the problems and internationalization of social life.' (*Towards a Citizens' Europe*, Bull. EC, Supp. 7/75, p. 28).

[172] Art. 6 of the Council of Europe Convention on the Participation of Foreigners in Public Life at the Local Level (ETS 144) accords the right to vote and stand as candidates in local elections to aliens who have been resident in the State concerned for five years or more.

[173] Compare the idea of 'proto-cosmopolitan citizenship' in H-U. J. d'Oliveira, 'European Citizenship: Its Meaning, Its Potential', *supra* note 3, p. 148. The underlying idea is by no means novel. See, e.g., Plato's *Protagoras*, 337d; St Augustine's *The City of God*, Bk 19, Chap. 17; William of Ockham, *A Short Discourse on the Tyrannical Government*, Bk 1, Chap. 4.

CHAPTER XIV
EUROPEAN CITIZENSHIP IN ACTION: FROM MAASTRICHT TO THE INTERGOVERNMENTAL CONFERENCE

Epaminondas Marias

I. INTRODUCTION

European Citizenship[1] constitutes a dynamic institution with an evolving dimension. Introduced by the Maastricht Treaty, it is regarded as the inevitable consequence of the completion of the Internal Market. As the spill-over effects of economic integration reached the periphery of political integration, the establishment of a supranational European political system became highly essential. In the framework of this political system, the citizens of the European Union were called upon to play an important role.

Consequently, the 'market citizen'[2] established in the framework of the European Community, was vested with basic Union rights and arrived at the centre of the political structure of the Union. To this extent, the European Union is now based on two vital political cornerstones: Member States, on the one hand, and Union citizens on the other.

European Citizenship is of central importance as it forms the basis of the Political Union and the foundation of its democratic legitimacy. It expresses a political relation between the citizens and the Union. To this extent, the legitimation basis of the Union now rests with its citizens.

Furthermore, Union Citizenship contributes to the formation of a psycho-

1 Regarding European Citizenship, see Epaminondas A. Marias (ed.), *European Citizenship*, Maastricht: European Institute of Public Administration (1994). See also: David O'Keeffe, 'Union Citizenship' in D. O' Keeffe and P. W. Twomey (eds.), *Legal issues of the Maastricht Treaty*, London (1994), pp. 87-107; C. Closa, 'Citizenship of the Union and Nationality of Member States', in D. O' Keeffe and P. W. Twomey, *op. cite.* pp. 109-119; Mechan, 'Citizenship and the European Community', Vol. 64 *Political Quarterly* (1993), p.185; C. Closa, 'The concept of citizenship in the Treaty on European Union', 29 *CMLRev* (1992), 1137-1170; R. Covar and D. Simon, 'La Citoyenneté Européenne', in *Cahiers de droit européen* (1993), pp. 285-316; V. Constantinesco, 'La citoyennete de l' Union', in *Vom Binnenmarkt zur Europaischen Union,* J Schwaze Hrsg, Baden - Baden: Nomos (1993).

2 See Epaminondas A. Marias, 'From Market Citizen to Union Citizen', in Marias *op. cite.* note 1, pp. 1-24.

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 293-316.

logical *community* among the peoples of the Union and the gradual shaping of a substantive consensus between the Union and its citizens. The creation among the peoples of the Union of a feeling of 'belonging to' a *Gemeinschaft* with a common destiny, common beliefs and common values is highly essential for the creation of real solidarity among the Union citizens.

The establishment of European Citizenship presupposes a third sphere of rights and duties for the Union citizens.[3] These rights are additional[4] to those currently existing either in the national sphere (resulting from State citizenship) or in the Community sphere (resulting from the Treaties of the European Communities). Union citizenship constitutes the very source of Union citizens' rights, which are enumerated in Part Two of the EC Treaty.

The European Community Treaty establishes a catalogue of fundamental rights for Union citizens which provides *inter alia* for special non-judicial bodies, competent for safeguarding these rights. According to the EC Treaty, the non-judicial bodies responsible for safeguarding these rights are the Petitions Committee of the European Parliament and the European Ombudsman. These non-judicial bodies, together with the judicial system of the Community, constitute a broad spectrum guaranteeing the participation of the citizens in the everyday life of the Union.

The purpose of this chapter is to examine the implementation of the aforementioned catalogue of fundamental Union rights since the Maastricht Treaty came into effect. The first part of this chapter will be devoted to examining the application of European electoral rights. The second part will cover measures taken regarding mechanisms of protection of Union citizens' rights.

II. EUROPEAN POLITICAL RIGHTS

A. The Right to Vote and Stand for Election to the European Parliament

In June 1994, the elections of the European Parliament took place. These elections were the first direct elections to be held in the framework of the European Union. The citizens of the Union residing in a Member State of which they were not nationals had for the first time the right to vote and stand as candidates in these elections in the Member States in which they resided. Furthermore, the creation of political parties at supranational level was a significant factor for Union citizens to express freely their ideas and undertake political action.

The number of resident non-nationals who are citizens of other Member

[3] See Spanish Delegation, Intergovernmental Conference on Political Union and European Citizenship, 21 February 1991, in Marias *op. cite.* note 1, pp. 141-151; Marias, *op cite.* note 2, p. 17.

[4] See Spanish Delegation, *op. cite.* note 3, Report of the Committee of Institutional Affairs on Union citizenship, DocA3-0300/91, PE 153. 099/fin, p. 10; O'Keeffe, *op. cite.* note 1, pp. 102-103; Marias, *op. cite.* note 2, p. 17.

States stands at approximately 1.3 million in Germany and France, 880, 000 in the United Kingdom, 541,000 in Belgium, 240,000 in Spain, 163,000 in the Netherlands, 150,000 in Italy, 105,000 in Luxembourg, 62,000 in Ireland, 50,000 in Greece, 29,000 in Portugal and 27,000 in Denmark.[5]

The number of EU nationals who are established outside their Member State of origin includes 1.2 million Italians, 840,000 Portuguese, 630,000 Irish, 470,000 Spaniards, 400,000 Britons, 360,000 Greeks, 300,000 French, 290,000 Germans, 240,000 Dutch, 130,000 Belgians, 40,000 Danes and 11,000 Luxemburgers.

1. *The Council Directive*

Pursuant to the second paragraph of Article 8b, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and stand as a candidate in elections to the European Parliament in that Member State, under the same conditions as nationals of that state. This right shall be exercised subject to detailed arrangements which were to be adopted before 31 December 1993 by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament.

2. *Aims and scope*

On 6 December 1993, the Council issued Directive 93/109/EC, laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.[6] The Directive is based on the following policy options:

- minimum rules, avoiding any harmonisation of national electoral systems;
- non-discrimination between nationals and non-nationals;
- free choice by the citizen of the place he wishes to vote or to stand as a candidate;
- no-one to vote twice or stand as a candidate in two places; and
- mutual recognition of rules on disqualification.

The aim of the Directive is to implement Article 8b(2) of the EC Treaty and to ensure the effective exercise of the Union citizens' fundamental right to vote and stand as candidate in elections to the European Parliament. To this extent, the Directive strengthens the democratic legitimacy of the European Parliament and contributes to the reduction of the democratic deficit in the Union. On the other hand, it is very clear that the Directive is not aimed at harmonising the electoral laws of the Member States and to this extent, it does not cover the right to vote of Union citizens residing in their home Member States, nor the right to vote of Union citizens wishing to vote in a Member State which is neither that of

5 See Eurostat Population Statistics, 1992.
6 *Official Journal* L329, 30/12/1993, pp. 34-38.

origin nor that of residence.

Moreover, pursuant to Article 1 paragraph 2 of the Directive, this Directive does not affect each Member State's provisions concerning the right to vote or to stand as a candidate of its nationals who reside outside its electoral territory. This provision is very important as all Member States, with the exception of Ireland, have adopted laws entitling their nationals living abroad to vote. Yet the solutions pursued by national laws are far from been uniform. While Denmark, the Netherlands and Portugal grant such voting rights only to those of their expatriate nationals who are living in another Member State, Belgium, Greece, Spain, France, Italy and Luxembourg continue to allow their nationals to vote in the elections to the European Parliament even if they are living outside the Community.

It follows from the Preamble of the Directive that it takes into account the principle of proportionality set out in Article 3b(3) of the EC Treaty and does not go beyond what is necessary to achieve the objective of Article 8b(2) of the EC Treaty. The Directive lays down the detailed arrangements whereby the citizens of the Union residing in a Member State of which they are not nationals may exercise the right to vote and to stand as candidates in elections to the European Parliament.

Accordingly, any person who, on the 'reference day', is a citizen of the Union but not a national of the Member State of residence, shall have the right to vote and stand for election in the elections to the European Parliament in the Member State of residence, provided he satisfies the same conditions in respect to these rights as that Member State imposes by law on its own nationals, and under the condition that he has not been deprived of those rights pursuant to Articles 6 and 7 of the Directive. This principle of non-discrimination between nationals and non-nationals is further safeguarded by the provision that where in order to stand as a candidate, nationals of the Member States of residence must have been nationals for a certain minimum period, such as in the case of Germany, citizens of the Union shall be deemed to have met this condition when they have been nationals of a Member State for the same period.

It is thus clear from Article 1 of the Directive, that it lays down two principles: a) the requirement of citizenship of the Union; and b) the requirement of residence.

3. Citizenship

The concept of citizenship is clarified by the Maastricht Treaty. According to Article 8 of the EC Treaty, every person holding the nationality of a Member State shall be a citizen of the Union. Furthermore, according to the "Declaration on nationality of a Member State" annexed to the Maastricht Treaty, whenever reference is made in the EC Treaty to nationals of the Member States, the question of whether an individual possesses the nationality of a Member State is to be settled by reference to the national law of the Member State concerned.

4. Residence

Unlike the concept of Union Citizenship, the concept of residence is not clarified in the Maastricht Treaty. Moreover, the Directive does not provide a uniform definition of residence. However, according to the Commission, in the absence of any alignment of the legislation of the Member States in this respect, leaving the concept of residence undefined enables the principle of equal conditions for national voters and Community voters to be complied with more effectively, while avoiding any interference in this area with Member States' electoral systems.

The Directive also refrains from determining either the voting age (though in all Member States it is currently 18 years) or the minimum age for standing as a candidate, which age varies between 18 and 25 years in the framework of the Member States.

5. Voting rights

Article 4 of the Directive provides that Community voters can exercise the right to vote in the elections to the European Parliament, either in the Member State of residence or in their home Member State, introducing simultaneously the principle of 'a single vote and a single candidature'. As elections to the European Parliament are intended to produce a single Community institution, no person may vote more than once at the same election or may stand as a candidate in more than one Member State at the same election.

Article 5 of the Directive provides that if in order to vote or stand as candidate, a national of the Member State of residence must have spent a certain minimum period as a resident in the electoral territory of that State. Community voters and Community nationals entitled to stand as candidates shall be deemed to have fulfilled that condition where they have resided for an equivalent period in other Member States, including their home Member State.

6. Ineligibility and Disqualification from Voting

Ineligibility for standing as a candidate is dealt by Article 6 of the Directive. It concerns mainly the state of a Union citizen who has been legally barred from standing as a candidate at elections. Disqualification from standing as a candidate is a common feature of the laws of the Member States, though the situation is far from uniform. In certain Member States, criminal convictions can lead to disqualification. Such is the case *inter alia* in Belgium, Greece or Germany. According to the European Parliament, the preservation of its reputation makes indispensable the provision of certain conditions of ineligibility for the voters. Accordingly the Directives employs two principles:

a. the extra-territorial effect of disqualification; and
b. the principle of concurrent application of disqualification.

In the framework of the Community, court decisions of the home Member State disqualifying persons from standing as candidates under civil or criminal law of that Member State are not normally enforceable outside of that Member State. Employing the principle of extra-territorial effect of electoral disqualification, Article 6 of the Directive provides that any citizen who resides in a Member State of which he is not a national who, through an individual criminal law or civil law decision, has been deprived of his right to stand as a candidate under the laws of his Member State of origin, shall be precluded from exercising that right in the Member State of residence in elections to the European Parliament. The same condition applies in the case of deprivation of the citizen's right to stand as a candidate under the laws of the Member State of residence due to an individual criminal or civil law decision of that Member State.

The Directive also employs the principle of concurrent application of disqualification by providing that both sets of rules are to be applied concurrently. As the risks of Parliament's reputation being undermined are much smaller in the case of disqualification from voting, the Directive has pursued a more flexible approach. To this end, Article 7 provides that the discretion rests with the Member State of residence to check whether the citizens of the Union who have expressed a desire to exercise their right to vote there have not been deprived of that right in the home Member State through an individual civil law or criminal law decision.

Applying the principle of freedom of choice, Article 8 of the Directive provides that a Community voter may exercise the right to vote in the Member State of residence only if he has expressed the wish to do so. In such case, if voting is compulsory in the Member State of residence, Community voters who have expressed the wish to do so shall be obliged to vote. Community voters wishing to vote in the Member State of residence must have registered with the electoral roll sufficiently in advance of polling day.

7. Derogations

Lastly, the Directive provides for two sets of derogations. Though not mentioned expressly, derogations concern on the one hand, British citizens living in Ireland and Irish citizens living in Britain and on the other hand, a certain small Member State of the Union where non-nationals citizens of the Union of voting age form an extremely high proportion (29%) of the total potential electorate.

In the first case, UK and Irish citizens will not be subject to the formalities applying to other Union citizens eligible to vote or stand as candidates for the elections to the European Parliament in the UK or Ireland respectively, as they already enjoy such rights. In the second case the situation appears more complex.

It is obvious that the Maastricht Treaty has paved the way for the introduction of certain derogations. For example, Article 8(2) of the EC Treaty provides that Community legislation implementing its provisions may provide for derogations where warranted by problems specific to a Member State. According to the Directive, such specific problems may arise in a Member State in which the pro-

portion of citizens of the Union of voting age, who reside in it but are not nationals of it, form more than 20% of the total electorate. Accordingly, Article 14 of the Directive provides that in such a case, the Member State concerned may, by way of derogation from Articles 3, 9 and 10 of the Directive:

1. restrict the right to vote to Community voters who have resided in that Member State for a minimum period, which may not exceed five years; and/or
2. restrict the right to stand as candidate, to Community nationals entitled to stand as candidates who have resided in that Member State for a minimum period which may not exceed ten years.

These derogations are without prejudice to appropriate measures which the Member State concerned may take with regard to the composition of lists of candidates and which are intended in particular to encourage the integration of non-national citizens of the Union. The latter provision of Article 14 was justified by the Directive as an attempt to avoid any polarisation between lists of national and non-national candidates.

When, pursuant to Article 8(2), the European Parliament was consulted on the Directive, it expressed its disagreement both as to the issue of the composition of lists of candidates and the derogation to the right to vote; the Parliament proposed that the relevant subparagraphs be deleted from the text of the Directive. According to the Parliament, any limitations on the rights of citizens to stand for election necessarily call in question a fundamental freedom, and not merely an electoral procedural rule.

According to Article 17 of the Directive, Member States were obliged to adopt laws, regulations and administrative procedures necessary to comply with this Directive no later than 1 February 1994. Apart from any shortcomings (in particular, with regard to the derogation of Article 14), the application of the Directive marks a new stage in the creation of a Union of the peoples based on solidarity, cohesion, social justice and active political participation.

B. The Right to Vote and Stand as a Candidate in Municipal Elections

Article 8b(1) of the EC Treaty provides that every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that state.

This right shall be exercised subject to detailed arrangements which were to be adopted before 31 December 1994 by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament. These arrangements may provide for derogations where warranted by problems specific to a Member State.

1. The Council Directive

On 31 December 1994, the Council issued Directive 94/80/EC, laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals.[7] This Directive is basically the same as Directive 93/109/EC.

The general principle of Directive 94/80/EC is not to call into question the electoral systems of the Member States, either from the point of view of procedures or of the conditions under which citizens are granted electoral rights. Directive 94/80/EC is based on the principles of subsidiarity and proportionality; it lays down the standards which are strictly necessary for the attainment of the objectives provided for by Article 8b(1)

Furthermore, according to the drafters of Directive 94/80/EC, it implements the right of Union citizens to participate, on the basis of the principle of equality, in the administration and government of the basic unity of local government. Unfortunately, this principle, set out in Article 6 of the EC Treaty is undermined in several articles of the Directive.

2. Derogations

Following a recent amendment of the French Constitution which prevents citizens of the Union who are not French nationals from holding the office of mayor, the European Council decided that Member States may exclude elected members of municipal Councils from the office of mayor or deputy mayor.[8] The justification of this provisions was based on the fact that in some Member States, the mayor also exercises governmental functions or participates in elections of a political nature.

More precisely, pursuant to Article 5 of Directive 94/80/EC, a Member State may provide that only its own nationals may hold the office of elected head, deputy or member of the governing college of the executive of a basic local government unit, if elected to hold office for the duration of his mandate. Further, a Member State may require that the temporary or interim performance of the functions of a head, deputy or member of the governing college of the executive of a basic local government unit be only conducted by its own nationals.

Moreover, having regard to the Treaty and to general legal principles, a Member State may take appropriate, necessary and proportional measures to ensure that the foregoing restrictions are only implemented by its own nationals. Member States may also stipulate that citizens of the Union elected as members of a representative council shall neither take part in the designation of delegates who can vote in a parliamentary assembly, nor in the election of the members of that assembly. According to the European Parliament, this provision is contrary to

7 *Official Journal* L368, 31/12/1994.
8 Article 5, Directive 94/80/EC.

the principles of Article 6 of the EC Treaty.[9]

Likewise, the provision is contrary to the case law of the European Court of Justice, in particular to the judgment of 20 October 1993 (cases C-92/92 and C-326/92) which prohibits any discrimination based on nationality and demands absolute equality in the treatment of the nationals of the Member State involved for all persons in a situation subject to Community law. Thus, the exclusion of other nationals of Member States on such a broad scope, from taking part in the exercise of official authority is inconsistent with Community law.

Another derogation occurs with respect to Article 12 of the Directive: if, on 1 January 1996, the proportion of Union citizens of voting age in a given Member State, who reside in that Member State but are not nationals of it, exceeds 20% of the total number of Union citizens of voting age residing in that Member State, the Member State may, by way of derogation from this Directive:

a. within the scope of Article 3 of the Directive, restrict the right to vote to voters who have resided in that Member State for a minimum period, which may not be longer than the terms for which the representative Council of the municipality is elected; and/or
b. restrict the right to stand as a candidate to persons entitled to stand as candidates within the scope of Article 3 who have resided in that Member State for a minimum period, which may not be longer than twice the term for which the representative Council of the municipality is elected; and/or
c. take appropriate measures with regard to the composition of lists of candidates to encourage in particular the integration of non-national citizens of the Union.

The Kingdom of Belgium may, by way of derogation from the provisions of Directive 94/80/EC, apply the above-mentioned derogations to a limited number of local government units, the list of which it shall communicate at least one year before the local government unit elections for which it intends to invoke the derogation.

III. NON-JUDICIAL MECHANISMS FOR THE PROTECTION OF THE RIGHTS OF UNION CITIZENS

A. Introduction

Non-judicial protection of citizens' rights is a well-known concept in the majority of the Member States. The models already followed comprise either Committees on Petition of the national parliaments or national ombudsmen, or both. Accordingly, the functioning of national ombudsmen does not exclude (in principle) the parallel functioning of the Committees on Petition of the national Par-

[9] See Doc A4 - 0011/94, Report of the Committee on Legal Affairs and Citizen's Rights, on the proposal for a Council directive laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals.

liaments. On the contrary, the national ombudsman provides an effective system of protecting citizens' rights.

The main objective of both the ombudsmen and of the Committees on Petition is to guarantee the extra-judicial protection of the rights of the citizens. This model of dual protection was adopted by the Maastricht Treaty, which provides for both the right to petition the European Parliament and the right to apply to the European Ombudsman.

Pursuant to the first paragraph of Article 8d EC Treaty, every citizen of the Union has the right to petition the European Parliament in accordance with Article 138d. Furthermore, according to the second paragraph of the same article, every citizen of the Union has the right to apply to the Ombudsman established in accordance with Article 138e. As a result, a non-judicial protection mechanism for individuals has now been institutionalised by the Maastricht Treaty.

According to the European Parliament,[10] by introducing proceedings which are flexible, easily accessible and free of charge, the Maastricht Treaty enables individual citizens to call on the institutions democratically representing them to defend their interests. In addition, this system enables the European Parliament to extend its control over Community activities, to become acquainted with the impact of its activities on the day-to-day life of European citizens, and to establish an on-going political dialogue with them.[11]

B. Petitioning the European Parliament after the Maastricht Treaty

The right to petition the European Parliament, which has now been formally embodied in the Treaties, is henceforth an integral feature of Union Citizenship. The right enables European Parliament to establish close relations with the citizens it represents. Petitions have become a channel of direct Union citizen involvement with the activity of the Community.

According to Article 138d, any citizen of the Union and any natural or legal person residing or having his registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Community's field of activity and which affects him directly.

As stated by the European Parliament itself,[12] because the right of petition has been embodied in the Community Treaties, the general public has an ever greater right to expect thorough consideration of petitions. Interestingly, the number of petitions and the number of persons petitioning the European Parliament has increased, while the range of issues raised has also expanded. This in-

[10] See Report of the Committee on Petitions on the work of the Committee on Petitions during the Parliamentary year 1993-94, Doc A3 - 0158/94, 21-3-1994, PE 208. 029/fin, p. 7.

[11] *Ibid.*

[12] *Ibid.*, p. 4.

crease has proved extremely helpful for the European Parliament, as petitions provide it with a picture of the concerns and needs of individual citizens, highlight weaknesses in legislation or administrative action, and reflect public opinion on current political issues.

The major issues which the European Parliament has faced since the Maastricht Treaty has entered into effect are the following:

1. Establishing the boundaries between the Committee on Petitions to the European Parliament and the European Ombudsman;
2. Re-examining working methods and practices; and
3. Re-establishing its relations with the Commission in regard to petitions on the basis of which the Commission is obliged to institute proceedings under Article 169.

1. The Committee on Petitions and the European Ombudsman

The relationship between the Committee on Petitions of the European Parliament and the European Ombudsman has been previously addressed.[13] In this context the potential danger of an overlap in the competencies of these two bodies was quite evident.[14] It was proposed that the activities of these two respective bodies should complement each other.[15] More precisely, it was argued that political matters should essentially be handled by the Committee on Petitions. The same should apply to the political assessment of an instance of maladministration.[16]

On the other hand, the European Parliament could also forward to the European Ombudsman those petitions which it believes could be addressed more effectively by him.[17] Lastly, for his part, the European Ombudsman could refer to the Committee on Petitions those complaints which he considers as being outside his jurisdiction.[18] In conclusion, it was argued that any overlap of competences between these two bodies should not be to the detriment of the citizens of the Union. On the contrary, the collaboration of the Committee on Petitions with the European Ombudsman and vice-versa is essential for the protection of the rights of the European citizen.

The European Parliament considered its relationship with the European

[13] See E. Marias, 'The Right to Petition the European Parliament after Maastricht', Vol 19 *ELR* (1994), no 2, pp. 169 - 183, at p. 181. See also, E. Marias, 'The European Ombudsman Competences and Relations with the Other Community Institutions and Bodies', in E. Marias (ed.), *The European Ombudsman,* Maastricht: EIPA (1994), pp. 71-92, at p. 74.

[14] Marias, *op. cite.* note 13, at 182.

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.*

Ombudsman in March of 1994.[19] The Parliament particularly focused on the distinction between complaints to the Ombudsman and petitions to the European Parliament.[20] The Parliament stated that the creation of the European Ombudsman should be a help and not a hindrance to citizens. Consequently, a system of 'communicating vessels' must clearly be established between the Ombudsman and the Committee on Petitions. Thus, petitions which basically take the form of complaints, in so far as they concern maladministration in the activities of the Community institutions, would automatically be referred by the Committee on Petitions to the Ombudsman.[21]

In the autumn of 1994, the Committee on Petitions submitted a report outlining the relationship between the two institutions.[22] This report was followed by the Annemarie Kuhn report[23] which confirmed the European Parliament's previous position as regards co-operation with the European Ombudsman. According to this report, the basic principle of co-operation will be to establish without frictional losses, an effective system for the protection of citizens' interests in their relations with the Community institutions and as appropriate, with the national authorities concerned.

2. *Working methods and practices of the Committee on Petitions*

a. Admissibility of Rationae Materiae. The admissibility of *rationae materiae* needs no analysis in the context of this chapter.[24] After the coming into effect of the Maastricht Treaty, the Committee on Petitions continued to apply the criteria laid down by its previous reports[25] in considering whether petitions fell within the sphere of activities of the European Communities.[26] This action of the Committee on Petitions confirms previous arguments[27] according to which petitions should be ruled admissible where:

a. they concerned the contents of the Treaties of the three Communities, including their Preambles;

19 *Op. cite.* note 10.

20 Marias, *op. cite.,* note 13. As regards a comparison between petitions to the European Parliament and complaints to the European Ombudsman, see E. Marias, 'Mechanisms of Protection of Union Citizens Rights', in A. Rosan and E. Antala, *In Search of a New Order.*

21 *Op. cite.,* note 10, p 9.

22 See Newman Report, Doc A4-0083/94.

23 See Annemarie Kuhn Report, on the deliberations of the Committee on Petitions during the parliamentary year 1994-95, Doc A4-0151/95, 22-6-1995, PE 212. 500 Ifin.

24 See Marias, *op. cite.,* note 13, pp. 177 - 178. See also, E. Marias, *op. cite,* note 20.

25 See the R. Chantere report in the parliamentary year 1988/89, Doc A2-79/89, PE 130. 219/fin, and the V. Reding Report in the parliamentary year 1989/1990, p. 9.

26 See report of the Commitee on Petitions on the work of the Committee during the parliamentary year 1993-94, Doc A3-0158/94, 21/3/94, PE 208. 029/fin. p. 10; and the A. Kuhn Report, A4-0151/95 p. 10.

27 See especially Marias, *op. cite.,* note 13, pp. 177 - 178.

b. they concerned secondary Community legislation;
c. they concerned subjects which, though not connected with the letter of individual provisions of Community law, were of relevance to the construction of the Community in the light of its probable development; or
d. their subject was connected with action by a Community institution or body.

b. Locus Standi of the Petitioner. According to Article 138, the issue of the petition addressed to the European Parliament must affect the petitioner directly. To this extent, the Maastricht Treaty has added a new requirement for the admissibility of petitions.

As neither the Maastricht Treaty nor the Rules of Procedure of the European Parliament indicate under which circumstances a matter contained in the petition affects the petitioner directly, it has been argued that because petitions constitute a means of contributing to the democratic running of the Community, the Committee on Petitions should not be expected to narrowly interpret the *locus standi* of the petitioner.[28]

On the contrary, it has been argued that the wording of Article 138 does not mean that the petitioner should have to prove a material or moral personal interest in the matter contained in the petition,[29] especially in petitions concerning issues such as civil war in Bosnia-Herzegovina, apartheid in South Africa, or organ transplants.

During the Parliamentary period 1993-1994, the Committee on Petitions declared admissible certain petitions which concerned problems of general interest.[30] This decision was further confirmed by the Committee on Petitions the following year.[31] Accordingly, mass petitions 481/93 and 486/93 on peace in former Yugoslavia and on human rights violations in Bosnia-Herzegovina, signed by 1,850 and 13,440 petitioners, respectively;[32] mass petition 322/93 on the ill treatment of animals signed by 362,797 petitioners; or mass petition 1034/94 on the transport of horses for slaughter signed by 3,286,647 petitioners; were among the petitions treated as admissible.

c. Article 169 EC Treaty. The most interesting of the procedures concerning consideration of petitions in substance, is when the Committee on Petitions forwards a request for action or information to the Commission. In such a case, if the Commission considers that the Member State concerned has breached its Treaty obligations it can institute proceedings under Article 169.[33] Reporting to

[28] *Ibid.*, pp. 179 - 180.
[29] *Ibid.*
[30] *Op. cite.*, note 10, p. 10.
[31] Kuhn Report, *op. cite.*, note 23, p. 11.
[32] See also the mass petitions on Yugoslavia, No. 529/93, signed by 1,207 petitioners; No. 553/93, signed by 1,540 petitioners; or No. 559/93, signed by 6,022 petitioners.
[33] As a result of Petition No. 56/85, the Commission used Article 169 against the Netherlands because Dutch legislation obliged nationals of other Member States entering the country to give information regarding the purpose of their trip and the economic means

the European Parliament on this issue, Barbara Schmidbauer[34] argued that Commission procedures relating to proceedings for the infringement of Community law arising from petitions should be made more rapid and effective. According to the European Parliament, the reluctance being shown by the Commission to institute proceedings under Article 169 is only serving to undermine the public's confidence in the European Union.

In this framework, a specific problem arose during the implementation of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.[35] Furthermore, the European Parliament has insisted that the Commission monitor very carefully the Member States' compliance with provisions of Community law and to be guided safely by the interests of the Community when initiating proceedings for infringement of the Treaty pursuant to Article 169.

C. Complaints to the European Ombudsman

1. Introduction

The right to apply to the European Ombudsman is explicitly provided for in the Treaties establishing the European Communities, as amended by the Maastricht Treaty. According to Article 8d of the EC Treaty, every citizen of the Union may apply to the Ombudsman, whose position was established in accordance with Article 138e. Article 138e grants the right to apply to the European Ombudsman beyond European citizens, to other categories of persons as well. Accordingly, the European Ombudsman is empowered to receive complaints from any natural or legal person residing or having his registered office in a Member State, concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

for their subsistence. Furthermore, as a result of Petition Nos. 198/86, 397/87, 270/88 and 43/89, submitted by several Belgian nationals complaining that France refused to recognize physiotherapy diplomas obtained in another Member State, the Commission instituted proceedings under Article 169 against France. The same legal situation occurred against Greece, Italy and Spain when petitions were submitted against them, complaining that nationals of the other Member States were charged higher entrance fees to Greek, Italian and Spanish museums than Greek, Italian and Spanish nationals, respectively. After the submission of Petition No. 686/88 expressing serious concern about the preservation of a lake in Greece, the Commission instituted proceedings under Article 169 against the Hellenic Republic. In Petition No. 126/89, a cultural institute in Belgium complained that the Belgian customs authorities levied charges on small packets from other Member States containing samples of non-commercial value (books and records). The Commission found that this practice was in breach of Article 5(6) of the 6th VAT Directive and commenced proceedings under Article 169 against Belgium.

34 *Op. cite.*, note 10.

35 *Ibid.*

Thereafter, in its November 1993 plenary session, the European Parliament adopted a Resolution on the aforementioned Interinstitutional Agreements, approving *inter alia* the Decision on the regulations and general conditions governing the performances of the Ombudsman's duties.[36]

Following the Council's approval of this decision on 7 February 1994,[37] the European Parliament instructed its President to sign the Decision and to publish it in the Official Journal of the European Communities.[38]

According to Article 2 of the aforementioned Decision, any citizen of the Union or any natural or legal person residing or having his registered office in a Member State of the Union may, directly or through a member of the European Parliament, refer a complaint to the Ombudsman in respect of an instance of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and Court of First Instance acting in their judicial role. As soon as the complaint is referred to him the Ombudsman is under an obligation to inform the institution or body concerned.

2. *Instances of Maladministration*

As there is no indication either in the EC Treaty or in the European Parliament Decision on the European Ombudsman's duties (hereinafter the 'European Parliament Decision') as to the possible meaning of the expression 'instances of maladministration', we could state that the relevant experience of the Member States should be taken into account. Without underestimating the difficulties which such an approach could involve, as the experience in the Member States is far from uniform, we could state that the term 'instances of maladministration' could comprise *inter alia*:

1. Actions taken by the Community administration without proper authority or on irrelevant grounds or erroneous information;
2. Administrative irregularities;
3. Abuse of power by the Community administration or its officials;
4. Administrative actions or practices based on illegal procedures;
5. Administrative practices which are discriminatory or contrary to the principle of fair and sound administration;
6. Administrative actions taken as a result of negligence;
7. Administrative omissions;
8. Malfunction, incompetence, delay or non-response of the Community administration in its relations with the citizens of the Union; or
9. Administrative actions which violate notions of equity.

On the other hand we could argue that the following do not fall under the term 'instances of maladministration':

[36] See Article 138d of the EC Treaty and Article 156, para. 1 of the Rules of Procedure of the European Parliament.

[37] *Official Journal*, L54 25-2-1994, p. 25.

[38] European Parliament Minutes of 9-3-1994, Part II, Item 6, Pe 180. 578, p. 18.

1. Political decisions taken by the institutions of the Community; or
2. Legislative acts issued in the framework of Articles 189a-c. Legislative acts could come under the Ombudsman's scrutiny if their application creates inequitable consequences for the citizens of the Union. In such a case, the Ombudsman could propose their amendment when submitting his annual report to the European Parliament.

Furthermore, the interpretation to be given to the term 'instances of maladministration' should also take into account the relevant powers of the Committee on Petitions of the European Parliament. The way in which the European Ombudsman and the Committee on Petitions of the European Parliament establish the boundaries of their competences remains to be seen.

As it is not always very easy to establish the exact limits between the political and the administrative acts of Community institutions, I would like to make a few preliminary comments:

i. An expansive interpretation of the expression 'instances of maladministration' could lead to an overlap with the competences of the Committee on Petitions of the European Parliament.
ii. When examining the admissibility *rationae materiae* of a complaint, it is the content and not the form of the referral that should determine the European Ombudsman's decision. This means that several referrals entitled 'complaints' and addressed to the European Ombudsman may in fact, be petitions. In this case, the European Ombudsman should advise the person lodging the complaint to address it to the Committee on Petitions of the European Parliament.
iii. The Committee on Petitions of the European Parliament is mainly a political organ. It can and should retain its quasi-judicial role regarding petitions of the European citizens on every matter, except where pure instances of maladministration are involved. These petitions should be referred to the European Ombudsman.
iv. The European Ombudsman on the other hand, should refrain from involvement with complaints that concern either broad political subjects or the political control of the functioning of the Community institutions.

3. Community Institutions or Bodies

Determining which Community institutions or bodies can be scrutinised by the European Ombudsman does not pose any serious problems. The institutions provided for in Article 4 of the EC Treaty, i.e., the Council, the Commission, the European Parliament and the Court of Auditors, form the first category. The Court of Justice and the Court of First Instance, when not acting in their judicial role, form the second category.

The Economic and Social Committee, the Committee on the Regions, the European Central Bank and the European Investment Bank are also under the surveillance of the European Ombudsman. Lastly, the same applies to the European Monetary Fund, to the *Centre Commun de Recherche* and to all the other Community bodies.

4. National Authorities Implementing Community Law

The question of whether national authorities responsible for implementing Community law could also be placed under the surveillance of the European Ombudsman is very important, as there are plenty of Community competences exercised by national authorities.

According to the Committee on Petitions of the European Parliament, the Treaties prevent the European Ombudsman from investigating the actions of the national authorities, even in cases where they are responsible for implementing Community law.[39] Moreover, pursuant to the first paragraph of Article 2 of the European Parliament Decision, the actions of only those authorities or persons referred to in Article 138e may be the subject of a complaint to the Ombudsman.

5. Time Limits and Exhaustion of Relevant Administrative Procedures

According to Article 2, para. 4 of the European Parliament Decision, a complaint should be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint. Further, pursuant to Article 2, para. 4 of the same Decision, the complaint must be preceded by the appropriate administrative approaches to the institution and bodies concerned.

Lastly, the European Ombudsman does not have the right to examine complaints regarding labour relations between the Community and its officials and other servants, should the procedures referred to in Articles 90 (1) and (2) of the Staff Regulations not have been exhausted by the persons concerned and if the deadline for the appropriate authority's reply has not expired.[40]

6. Factors Limiting the Action of the European Ombudsman

Apart from the above conditions, the action to be undertaken by the European Ombudsman may be limited in the following two circumstances:

1. Pursuant to the third paragraph of Article 1 of the European Parliament Decision, the Ombudsman may not question the soundness of a Court's ruling.
2. According to Article 2, para. 7 of the European Parliament Decision, the Ombudsman is under the obligation to declare a complaint inadmissible or terminate his consideration of it, if he learns that the facts to which it refers have been subject to legal proceedings which are in progress or have been concluded. In

[39] See Opinion of the Committee on Petition for the Committee on Institutional Affairs on the results of the Intergovernmental Conference and the Treaty on European Union, Doc A3 - 123/92 Part II, PE 155. 444 fin 125.

[40] See Article 2, paragraph 8 of the European Parliament Decision.

this case, the outcome of any enquiries he has carried out up to that point will be definitively filed.[41]

7. Consideration in substance

a. Enquiries. If the complaint has been declared admissible, the European Ombudsman must inform the person lodging the complaint without delay in writing of the action he has taken on it.[42] According to Article 2 of the European Parliament Decision, the Ombudsman must:

a. help to uncover maladministration in the activities of the Community institutions and bodies referred to in Article 138e; and
b. make recommendations with a view to putting an end to it.

In this framework, the European Ombudsman has the right to conduct *enquiries* which he deems necessary to clarify the instance of maladministration which is the object of the complaint. Moreover, the Ombudsman is obliged to inform the institution or body concerned of such action. In such a case, the institution under question may submit any useful comment to the Ombudsman.

It is worth mentioning at this point that the Ombudsman can also undertake the same action on his own initiative. In this case, an action on the European Ombudsman's initiative could be justified if he learns of certain instances of maladministration via the media or a resolution of the European Parliament.

We could describe this first stage of action as *a preliminary investigation*. The main purpose of this stage is to gather the information required in order to draw a preliminary conclusion on whether or not the alleged instances of maladministration have taken place.

b. Duty to Co-operate. Community institutions and Member States are obliged to co-operate with the Ombudsman in order to help him in the performance of his duties. The exact scope of this duty is clarified by the Treaties and by the European Parliament Decision.

c. Obligations of Community Institutions. The Ombudsman's powers to have access to the files concerned was a matter of disagreement between the European Parliament and the Council. The issue was finally resolved on 25 October 1993 with the signing of the Interinstitutional Agreement on the Ombudsman's duties.[43]

41 One should note that according to Article 1, para. 7 of the Draft European Parliament Decision on the European Ombudsman's duties (Doc A3 -0298/92 PE 200. 788/fin), the Ombudsman had the right to inform the European Parliament of the outcome of his investigation up to that point.

42 Article 2, para. 9 of the European Parliament Decision.

43 See European Parliament, Session Documents 27 October 1993 PE 164. 781 and Bulletin of the European Communities 10/1993, pp. 118 - 119.

According to Article 3 of the European Parliament Decision, the Community institutions and bodies concerned are obliged: 1) to supply the European Ombudsman with the requested information; and 2) to give him or the members of his secretariat access to the files concerned.

One should note that in this instance, Community institutions and bodies have the right to refuse only on duly substantiated grounds of secrecy. Yet, they are obliged to provide access to documents which originate in a Member State and which are classified as secret by law or regulation, only where that Member State has given its prior agreement. With respect to other documents originating in a Member State, Community institutions or bodies will only give the Ombudsman access after the Member State concerned has been informed.

d. Obligations of Member States. The determination of the relations between the European Ombudsman and the authorities of the Member States was also an issue of disagreement between the European Parliament and the Council. The agreement reached on this point by the Parliament and the Council is laid down in the third paragraph of Article 3 of the European Parliament Decision.

Pursuant to this paragraph, the Ombudsman may ask (via the Permanent Representations of the Member States to the European Communities), the authorities of the Member States for any information that may help to clarify instances of maladministration by Community institutions or bodies. In such cases, the Member States' authorities are obliged to provide the information requested. The Member States can only refuse if the information is covered by laws or regulations on secrecy or by provisions preventing it from being communicated.

8. Report of the Ombudsman

The main purpose of the European Ombudsman is to seek a solution with the institution concerned in order to eliminate the instance of maladministration and to satisfy the request of the person lodging the complaint. Should the Ombudsman find that there has been maladministration, he must inform the institution or body concerned and may suggest ways of remedying the matter. The Ombudsman may also inform the Community institution or body concerned, of facts calling into question the conduct of a member of their staff, from a disciplinary point of view. The institution thus informed, is obliged to send the Ombudsman a reasoned opinion within three months.

For each case of maladministration found, the European Ombudsman must send a report to the European Parliament and to the institution concerned. The Ombudsman may propose solutions and measures to be taken in the future. Furthermore, the Ombudsman must inform the person lodging the complaint of the outcome of the enquiries, of the opinion expressed by the institution concerned and of any recommendations he has made. At the end of each annual session the Ombudsman must submit a report on the outcome of his enquiries to the European Parliament.

The Ombudsman and his staff are obliged not to divulge information or documents which they may obtain in the course of their enquiries. They are also obliged to treat with confidentiality any information which could harm the person lodging the complaint or any other person involved. If, in the course of the enquiries, the Ombudsman learns of facts which he considers might relate to criminal law, he must immediately notify the competent national authorities, via the Permanent Representation of the Member States to the European Communities. If appropriate, the Ombudsman must notify the Community institution with authority over the official or servant concerned, which institution may then apply the second paragraph of Article 18 of the Protocol on the Privileges and Immunities of the European Communities.

IV. THE ROLE OF THE EUROPEAN COURT OF JUSTICE

A. Actions Undertaken by the European Parliament

According to paragraph 4 of Article 3 of the European Parliament Decision, should the Ombudsman request assistance which is not forthcoming, he must inform the European Parliament, which will then make appropriate representations. Unfortunately, the Decision does not specify the meaning of the term 'representations'. Arguably, the European Parliament, apart from formal representations toward the defaulting Member State or Community institution, might resort to the adoption of a resolution as a final action in the political field, in order to persuade the respective Member State or Community institution to abide by its obligations and co-operate with the European Ombudsman.

Moreover, appropriate action in the judicial field should not be excluded.

a. Against the defaulting Member State, this could take the form inter alia of an official demand by the European Parliament to the Commission under Article 175, asking it to institute proceedings against the defaulting Member State, pursuant to Article 169. In this case, should the Commission fail to act, the European Parliament could apply to the Court of Justice in order to obtain a judgment on this failure to act. This approach is of course, not without reservations, as various scholars of Community law have argued that the Commission cannot be sued for failure to act under the terms of Article 169.[44]

Yet, as the Court's case law in this area mainly concerns actions brought by non-privileged applicants,[45] one should not exclude the future possibility of a decision by the Court which limits in a certain case and under certain circumstances, the wide discretion currently enjoyed by the Commission to decide whether it will institute proceedings against a Member State under Article 169.

[44] See D. Wyatt and A. Dashwood, *European Community Law*, 3rd edition, p. 113 and p. 139, note 12. To the contrary, H. Schermers envisages an action against the Commission in the framework of Article 170, should the Commission fail to issue an Opinion on whether a Member State has failed to fulfill its obligations under the Treaty. See H. Schermers, *Judicial Protection in the European Communities*, 5th edition, p. 315.

[45] See Case 247/87 *Star Fruit* v. *Commission* [1989] ECR 291.

b. Against the Commission and the Council, this action could take the form of a complaint under Article 173, provided that the European Parliament could prove that the violation of the European Ombudsman's prerogatives amount to a violation of the European Parliament's prerogatives. In addition, the European Parliament could use Article 175 to bring an action against the Commission or the Council for failing to co-operate with the European Ombudsman. This solution appears more sound from a legal point of view, as the European Parliament is not obliged to prove any specific interest in the case.

B. Actions Undertaken by the European Ombudsman

One may wonder whether paragraph 4, Article 2 of the European Parliament Decision could restrict other rights of the European Ombudsman, which might arise indirectly under the Treaties. In other words, is the European Ombudsman obliged in all cases to preserve his prerogatives only through the European Parliament, or can he do it on an independent basis? Moreover, can this question be answered differently if the European Parliament fails to protect the prerogatives of the European Ombudsman?

Could one maintain that the European Ombudsman should have standing before the European Court of Justice under Article 173 in order to defend his prerogatives against acts of other Community institutions (including the European Parliament)? Such an evolution cannot in principle be excluded and falls in line with the relevant case law of the European Court of Justice regarding analogous issues, such as the preservation of the European Parliament's prerogatives.[46]

Furthermore, could the European Ombudsman use Article 175 against the European Parliament, the Council or the Commission, should these Institutions of the European Union fail to co-operate with the Ombudsman? One could argue that this is not permitted under Article 175 because it grants this right only to the institutions of the Community defined in Article 4(1).[47] As the Ombudsman is not included among these institutions his action will probably be dismissed by the Court as inadmissible.

In the foregoing case, could the Ombudsman's action then qualify under paragraph 3 of Article 175? Having regard to the case law of the Court, one could claim that in principle, this might be a potential action to be undertaken by the Ombudsman, from a legal point of view. However, it is unclear as to whether it would be appropriate from a political point of view, as it would amount to the diminution of the Ombudsman from a Community body to a mere legal person, on the same level as other legal or natural persons.

[46] See Case 70/88, *European Parliament* v. *Council* [1990] 1 ECR 2041.
[47] See Case 13/83 *European Parliament* v. *Council* [1985] ECR 1588, para. 17.

C. The European Ombudsman as a Defendant

Another very important question is whether the Ombudsman could be brought before the European Court of Justice; this possibility might arise under Article 178. According to Article 4 of the European Parliament Decision, the Ombudsman and his staff are bound by the following articles: 214 of the EC Treaty, 47(2) ECSC and 194 EAEC.

The Ombudsman and his staff are, in particular, obliged not to divulge information or documents which they obtain in the course of their enquiries. Furthermore, they are required to treat as confidential, any information which could harm the person lodging the complaint or any other person involved, without prejudice to paragraph 2 of Article 4 of the European Parliament Decision. This is particularly the case when the person lodging the complaint has requested that his complaint should remain confidential.[48]

Should the complainant suffer any damage as a result of the violation of the Ombudsman's obligation to respect his duty of confidentiality provided for under Article 214 of the EC Treaty and Articles 2(3) and 4 of the European Parliament Decision, the complainant can sue the Community for damages under Articles 178 and 215.[49] One could argue to the contrary, that Article 215 does not apply in this case, as the Ombudsman is not included in the Community institutions referred to in this article. This argument should not be accepted, as it would be contrary to the intention of the founders of the Community if it could escape the consequences of Articles 178 and 215, in cases of damage caused by the Ombudsman, for the latter constitutes a Community organ established by the Treaties and authorised to act on its name and on its behalf.

Accordingly, the term 'institution' employed by Article 215(b) should be interpreted for the purposes of non-contractual liability, as comprising not only the institutions referred to in Article 4, but also other Community organs such as the Ombudsman.[50] Of course, one should realised that, as has happened frequently whenever a vacuum has existed in Community law, the Court of Justice of the European Communities will be the final arbiter.

The European Ombudsman is an institution which, if used properly, can provide the citizens of the Union with an important and cost free means with which to defend themselves against Community bureaucracy. This is very important for the consolidation of transparency, which is a very essential element for the development of mutual trust between the Union and its citizens.

48 See Article 2, para. 3 of the European Parliament Decision.

49 See Case 145/83 *Adams* v. *Commission* [1985] ECR 3585-3590 and 3592, especially paras. 34 and 53.

50 See Case 370/89, *SGEEM et Roland Etroy* v. *Banque européenne d'investissement*, [1992] ECR, I-6211 at I-6248.

V. THE APPOINTMENT OF THE EUROPEAN OMBUDSMAN

In September 1994, the Committee on Petitions received six applications from the President of the European Parliament, pursuant to Article 159(3) of the Rules of Procedure of the European Parliament. Having interviewed the applicants, the Committee held a closed meeting to consider the qualifications of the various applicants.

The vote on the applicants took place at the meetings of 3, 4 and 9 November 1994, and resulted in a tie between two candidates, with each receiving 12 votes. In view of this result, and as Article 159 of the European Parliament rules of procedure required one candidate to be submitted to Parliament, the European Parliament, after facing a painful deadlock, finally decided to amend Article 159 of its rules of procedure. This amendment took several months, but finally lead to the appointment of the Mr. Jacob Soberman as the first European Ombudsman. Mr. Soberman took up his duties on 27 September 1995.

The workings of the European Ombudsman have yet to be seen as until now, no official report has been handed over by him to the European Parliament. In a press release issued by the European Ombudsman on 29 January 1996, the total number of complaints received at the end of 1995 was 298 while, by the end of January 1996, the number had risen to 380. Out of 298 complaints registered, only 20% were admitted by the European Ombudsman. From the 29 complaints considered admissible, 21 letters of notification were sent to the Presidents of Community institutions; 16 letters were sent to the President of the European Commission; 3 were sent to the President of the European Parliament; and 2 to the President of the Council of Ministers. The geographical origin of all complaints according to the place of residence of the complainant are as follows:

Country	*Number of complaints (approx.)*	*Percentage (approx.)*
UK	57	19 %
Germany	48	16 %
Spain	40	13.5 %
France	32	11 %
Italy	29	10 %
Belgium	24	8 %
Netherlands	14	4.5 %
Sweden	11	3 %
Portugal	10	3 %
Finland	7	2 %
Greece	6	2 %
Ireland	5	2 %
Austria	4	1.5 %
Denmark	4	1.5 %
Luxembourg	1	0.2 %
Others (USA, Africa, Switzerland etc. ...)	6	2 %

Non-admissible complaints included, among others: complaints against national authorities (complaints 293 and 330); against the Swedish foreign office (case 197); and against Spanish legislation (complaint 198/95).

Admissible complaints concerned, among others: refusal to give access to documents (complaints 26 and 180); recruitment (complaint 299); the European School (case 199); delays in payments by the EC Commission (case 236); recruitment of trainees by the Community Institutions (complaint 111/95); and discrimination against an Italian company on behalf of the European Commission (complaint 308/95).

CHAPTER XV
EUROPEAN CITIZENSHIP: WHAT IT IS AND WHAT IT COULD BE

Vincenzo Lippolis

I. A COMMON CITIZENSHIP?

In creating the European Union, the Maastricht Treaty endowed it with its own citizenship, different from that of its Member States. The idea of a common citizenship was debated for quite some time within the process of European integration. Today, in addition to the economic dimension, European integration is also finding a political dimension within the framework of the Union.

'We do not want a coalition of States, we want a union of people', Jean Monnet once said and the resolve to create an ever closer union among the European peoples is enshrined in both the Rome and Maastricht treaties. A common citizenship can therefore be the logical outcome and it can be one of the forms of such a union, but the status of European citizen is different from 'citizenship' as we know it.

National citizenship is the legal status of those who belong to the people of a state. It expresses the relationship, the political bond whereby one becomes a member of that community. National citizenship is a legal status giving rise to specific rights and duties of a given group of people towards the state.

However, the European Union is an entity which is not a state - or in any case not a state as we know it - an entity which has some of the aspects of a federation, some of a confederation, but which is *not* a state. The European Union nevertheless has to interact with its Member States which, even though they have transferred some of their sovereignty to the Community institutions, have not foregone their sovereignty completely. The Member States are still sovereign states and still have one of the distinguishing features of sovereignty, namely that of drawing the boundaries for their nationals; the nationals still have their own distinct citizenships.

It is for these reasons that European citizenship has its special features - first, because of its relationship with the national citizenship; and second, because of its content in terms of *legal status*. Let us take a look at these two aspects.[1]

[1] This article draws upon and summarises a much broader study: V. Lippolis, *La cittadinanza europea*, Bologna: il Mulino (1994).

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 317-325.

II. THE SPECIAL FEATURES OF EUROPEAN CITIZENSHIP

As far as the European citizenship's relationship with the national citizenships of Member States is concerned, it should be noted that the two citizenships coexist. In fact, the European citizenship, far from impinging upon the national one, is additional and complementary. The European citizenship in no way limits the citizenship of individual Member States; indeed it confers upon EEC citizens new entitlements and a new legal status.

This additional and complementary nature of European citizenship is highlighted by the fact that no special requirements to obtain it are set out in the Maastricht Treaty, as is the case with Member States and the national citizenships. All citizens of the Member States have the European citizenship. Therefore, holding the nationality of a Member State opens the gate to the European citizenship.

A citizen of a Member State of the EU is a European citizen and the requirements for the national citizenship are the same as those for the European citizenship. If the requirements are fulfilled and an individual is a national citizen, both citizenships produce their effects simultaneously and concurrently. Conversely, the same link applies in case of loss of citizenship.

The two citizenships are therefore interlinked and not separable, yet the European citizenship is not an autonomous status, but dependent and conditional upon the citizenship of a Member State. The national citizenship is the primary and original status, whereas the European citizenship which derives from it, is a secondary citizenship. This means that being a European citizen does not entitle one to become a citizen of one of the Member States. The European citizenship is ultimately a 'satellite' citizenship with respect to the national one.

This type of relationship can also be found at the beginning of a federative process between the federated States and the federal State. In the process of federative aggregation, we do not find a system of dual citizenship in the confederation stage: confederations as they developed through the ages never had their own citizenship. Confederations only had the citizenships of the individual confederated States. It is with the rise of federations that we see the emergence of an institution which entails a greater involvement of the populations and a direct relationship with the citizens of the individual states. We thus see the emergence of a common citizenship, namely a federal citizenship superimposed over the citizenship of the individual state, which continues to exist.

What seems particularly germane to our analysis is Switzerland's experience, in which the relationship between the two citizenships appears clearly defined from the very beginning of the federative process: in the transition from the confederation to the actual federation, the citizenship of the lesser community (the cantonal *indigénat)* is the primary citizenship through which one gains access to the federal citizenship, which derives from the *indigénat* and has therefore a secondary nature.

Similar elements can also be found in the original text of the American Con-

stitution of 1787 which made a distinction between National and State citizenship. But in the United States, the relationship between the two citizenships was compounded by the problem of the freed black slaves and it is not possible to observe the phenomenon as clearly as in Switzerland. As the Swiss central power was later consolidated over that of the Member States, the balance was tilted: the local citizenship slowly faded into the background until it become little more than a residence, while the federal citizenship took on the value of the primary citizenship.

Is this what is going to happen to the European citizenship? For the time being it does not appear likely for two reasons. First, because the key to tilting the balance between the two citizenships in a federation lies in the fact that the central authority sets the rules whereby one becomes or ceases to be a citizen. The second factor is the existence of a constitutional rule which requires that each individual member territory give the citizens of the other territories the same legal treatment as its own citizens when they are in its territory.

Today, the rules whereby one becomes a citizen of the European Union remain established by the Member States, and in fact are a sign that the sovereignty of the Member States still exists. Further, the non-discrimination principle does not cover the individual's legal status in its entirety but it is functionally linked to the competences of the Community. It should be noted however, that in its case law, the European Court of Justice has provided momentum for the extension of this principle; in fact, the only two areas where this principle has not been applied are political rights and rights to social security. At the same time, the Court of Justice has ruled that each Member State must set the rules for its citizenship in compliance with Community law. In other words, the Court has established an implicit constraint, without however, drawing specific conclusions.[2]

III. THE *LEGAL STATUS* OF EUROPEAN CITIZENSHIP

As to the second aspect we mentioned above, that is to say the content of European citizenship in terms of *legal status*, it should be noted that the rights linked to it are limited. In addition to the general statement that every European citizen has the rights and duties laid down in the EC treaty, the European citizen has the following rights that are specifically listed: the right to move within and to reside freely within the territory of each Member State; the right to vote and to stand as a candidate in municipal elections in his/her place of residence; the right (regardless of the national citizenship) to stand as a candidate in the elections for the European Parliament; the right to petition the European Parliament; the right to apply to the European Ombudsman; the right to protection by the diplomatic authorities of the Member States of the Union when a European citizen is in the territory of a third country in which his Member State does not have a diplo-

[2] *Micheletti*, Case 365/90 (1992).

matic representation.[3] Moreover, the role of the European political parties in promoting integration within the Union is laid down in Article 138A. Yet, no specific duties are laid down for European citizens.

While the rights resulting from the European citizenship do not enhance the legal status of people within their country of origin, but they do so in other ways. First of all, European citizenship provides freedom of movement and residence, and voting rights at municipal level, within the legal systems of the other Member States; in these cases, EC citizens are treated as nationals. In this regard, it is worth remembering that in connection with voting rights the principle of 'national treatment' is now, for the first time extended to political rights.

Second, the rights deriving from the European citizenship do add to the individual's legal status within the Community's legal system, as is shown by the right of petition to the European Parliament and the possibility to apply to the Ombudsman.

Third, the right of active and passive vote for candidates to the European Parliament has more facets: Article 8 B.2 of the Treaty lays down this right for all European citizens in their place of residence, even if it is not in the Member State of origin. This right has an impact on the composition of a Community body; when a common procedure is adopted in all Member States for general and direct elections (as provided in Article 138.3 of the Treaty), the electoral procedure must also be in compliance with Community legislation. However, the right to vote and to stand as a candidate for European elections is enshrined in national legislation. Indeed, electoral procedures are currently regulated by national laws. Still, even the future harmonised procedure shall require the adoption of national legislative acts (Article 138.4).

It may therefore be concluded that the rights under Article 8B.2 of the Treaty are also enforceable within the national legal systems; one should bear in mind however, that the exercise of such rights does not only determine as a final outcome. The composition of the European Parliament also has an impact at national level because it may affect the make-up of the lists of candidates and the voting population in a given Member State. Lastly, Community citizens have a higher degree of protection in international relations via the common diplomatic protection.

It is therefore evident that the European citizenship as thus far described is quite different from the traditional citizenship as we know it. Jurists, historians and sociologists have shown that the *status civitatis* has undergone several development stages in modern times: from the proclamation of civil rights (which we now call fundamental or human rights) in the 18th century to that of political rights (the *status activae civitatis,* which the revolutions of the end of the 17th century, and especially the French revolution declared as inherent in the status of *citoyen;* that is to say an individual who takes an active part in the life of his/her community) - up to the most recent stage of social rights in the 20th century. A large part of this pattern of development cannot be found in the European citi-

[3] Article 8A-8D, EC Treaty.

zenship.

This chapter does not dwell upon the complex problem of respect of fundamental or human rights by the Union (as clearly laid down in Article F of the Maastricht Treaty), as these rights are not peculiar to the legal status of citizenship, but are recognised - by national constitutional provisions or by international conventions - to individuals as such and not to citizens only.

What is typical of the status of citizen, in addition to the freedom to reside permanently outside the territory of the Member State to which he belongs, are political and social rights and this is where the European citizenship shows evident limitations.

Electoral rights, though important and significant, do not give rise to a new and robust dimension of political participation for European citizens. On the one hand, electoral rights only apply at municipal level, i.e., in the sphere of local autonomy, not of sovereignty, and their only aim is the integration of individuals within their community of residence (the same right has already been granted to foreigners in a number of countries). On the other hand, the link between voting rights for the European Parliament and the place of residence does not cancel completely the relationship between the Parliament itself and the Member States, in that seats are allotted via national quotas and the elections are based on different national systems, rather than on a uniform procedure, as the Treaty requires. A step forward has been made by changing the principle of representation of the European Parliament, but no single European body of voters has been created: such a notion has gained visibility, but has not been fully implemented.

Furthermore, given the European Parliament's limited powers, we cannot affirm that the place of residence has been linked to voting rights that have a direct and tangible impact on the Community. Prior to the Maastricht Treaty, it had already been suggested that in order to give to the European citizens residing in another Member State the possibility to shape the life of the Community through voting rights, such rights ought to be granted with respect to national general elections, because it is the national governments that make the relevant decisions within the Council.[4] The Treaty has given the Parliament broader powers, but not to such an extent as to fundamentally alter the Community's institutional set-up.

Without underestimating the importance of going beyond the traditional link between nationality and the exercise of voting rights, it may be concluded that the latter can be viewed as an extension of the freedom of movement rather than as the recognition of a political dimension for European citizens residing in another Member State, in the sense that such freedom of movement would be too limited if it entailed giving up the exercise of voting rights.

It can thus be maintained that while historically the notion of national citizenship grew out of the individual's political rights, that of European citizenship

[4] A. Evans, 'Nationality Law and European Integration', *European Law Review* (1991), p. 194.

seems to be evolving on the basis of free movement, almost as an extension or projection of the same.

Interestingly, the Treaty does not include any reference to social rights of the European citizen, in particular the right of destitute people to be supported and to receive social security, a right that the more advanced doctrines consider as being part of the notion of citizenship. This is a significant limitation which may affect the freedom of movement and of residence itself.

Nor is there any specific mention in the Treaty of the duties of a European citizen, except for a general reference to duties under the Treaty. More specifically, there is no mention of a European citizens' duty of allegiance to and defense of, the Community. Yet, in the mid-70's, Raymond Aron stressed that, 'The citizen can demand that the state respect his rights because the state can demand that the citizen fulfil his duties (among them *la défense de la patrie,* to use the going French expression)'.[5]

IV. THE EXCLUSIONARY ASPECT OF EUROPEAN CITIZENSHIP

Another significant feature of the traditional notion of citizenship is that of exclusion: while on the one hand, it determines that a given individual belongs to the people of a state, it also entails that non-citizens are excluded from enjoying the status of citizens.

The European citizenship does contain this feature of exclusion in that it reserves to the citizens of Member States the enjoyment of the rights related thereto (except for the right of petition and that of applying to the Ombudsman). Such rights are not granted to nationals of non-EU countries, even if the nationals have their legal residence within the territory of the Union. However, this exclusion has been criticised with respect to its consistency and legitimacy in terms of equal treatment.

At this point it might be useful to return to the subject of voting rights. With respect to municipal elections, the right to vote has been granted to European citizens residing in a State other than that of origin so as to enable them to become fully integrated in their local community. There is no reason why such a right should be denied to residents originating from countries outside the Community, even more so because in a number of countries a prolonged period of residence entitles foreigners to participate in these municipal elections. Furthermore, such a provision is explicitly contained in the Council of Europe's 'Convention on the Participation of Foreigners in Public Life at Local Level', of 5 February 1992.

With regard to elections to the European Parliament, it has been stated that it appears unjustified to exclude therefrom individuals who, because they reside within the European Union, are subject to all its rules and yet are barred from

[5] R. Aron, 'Is Multinational Citizenship Possible?', *Social Research* (1974) p. 638.

representation.[6] As a conclusion, as voting rights are granted to European citizens when outside their Member States of origin, on the basis of their residence, there is no reason why such rights should not also be granted to residents from non-EU countries.

In this perspective, the European Parliament has recently supported the granting of some citizens' rights to nationals of non-EU countries who are legally residing within the European Union.

V. THE PECULIARITIES OF EUROPEAN CITIZENSHIP

Thus, citizenship of the European Union has its own very peculiar features: as Lord Brittan, former Commissioner, put it, it has a symbolic value.[7] And actually, even though symbols should not be underestimated, the relationship that has been established between the Union and its citizens is still very different from that between these citizens and their respective Member States.

It is indeed within the realm of the nation-state/Member State that citizens have their deepest roots, despite the increasing pervasiveness of Community rules. Sovereignty is still fundamentally anchored to Member States, however much it may have receded to the benefit of Community institutions, and only at that level does the notion of citizenship retain its full value.

The contents and substance of European citizenship depend on the degree of integration of the Union, which is imperfect as compared to that of a Member State. Regardless, as the Community is in a process of evolution, the European citizenship, too may grow more robust in the future: the Maastricht Treaty itself envisages such a development in the so-called 'evolutionary clause'.

New proposals aimed at expanding the status of the European citizen have also been put forward within the framework of the 1996-1997 Intergovernmental Conference. It is thus worthwhile to give a brief outline of such proposals.

First it is proposed that European citizens who live in a Member State other than that of origin will enjoy the same rights as the citizens of that Member State, except for those limitations and exceptions explicitly envisaged by the Treaty. This would basically mean an extension of the 'non-discrimination on the basis of nationality' clause which is already part of Community legislation, albeit being functionally limited to the competences of the European Community.

Second, a proposal has also been made to change the rules for elections to the European Parliament, creating 'European constituencies' alongside national ones and allotting to them a proportion of the seats, while the remaining seats would

6 H.U. Jessurun d'Oliveira, 'Union Citizenship: Pie in the Sky?', in A. Rosas and E. Antola (eds.) *A Citizens' Europe. In Search of a New Order*, London: Sage Publications (1995), p. 58. On the issue of non-EU nationals, see also, D. O'Keeffe, 'Union Citizenship', in: O'Keeffe and Twomey (eds.), *Legal Issues of the Maastricht Treaty* (1994), p. 87.

7 L. Brittan, 'Institutional Development of the European Community', *Public Law* (1992) p. 574.

be allocated within individual Member States. A single European body of voters could thus emerge, thereby fostering the formation of political parties at European level.

Accordingly, the political rights that exist at national level should be explicitly established at European level, such as the freedom of expression; of assembly; of association; and in particular, of creating political parties and trade unions at European level. This last freedom would make it possible to overcome the constraints which the Constitutions of some Member States impose upon the political activity of foreigners and which are also applicable to citizens of other Member States.

A third proposal envisaged is to permit people's initiatives to introduce Community legislation, as well as the right to participate in referenda held at municipal level in the Member State of residence.

Lastly, European citizens should also have access to information and to the documents related to the functioning of the European Union as well as to acts of the Union that concern them. Basically, all of these proposals mean enshrining the principle of transparency of the European Union.

As far as duties are concerned, some form of European 'civilian' service should be envisaged.

It is difficult to foresee whether these proposals will be implemented. At any rate, they are nonetheless steps along the narrow path whose boundaries are marked on the one hand, by the will to develop a common status, and on the other, by the predominance of national citizenships. These proposals do not aim to give the European citizenship the same characteristics as national citizenships, nor to replace the latter, since it is realistically recognised that the European Union is not a Super-State.

To my mind, the extension and strengthening of the European citizenship are however, threatened by possible differentiated developments in individual Member States. I am thinking of such hypotheses as 'variable geometry', 'flexible integration' or a 'Europe *à la carte*'.[8]

These are different hypotheses: still, underlying them all is the idea that Member States should be free to decide whether or not to adhere to certain Community policies. It is obvious that this could undermine the establishment of an effective European citizenship, unless a core of common policies is developed that is sufficiently broad and robust. Over and above these problems, it should be clear that for the European citizenship to not be confined to the mere protection of some individual rights within the framework of free movement and the expansion of trade, something more is required.

Thomas H. Marshall, who in the 1950s helped define the modern concept of citizenship, wrote that it requires a direct perception of belonging to a community on the basis of the allegiance to a civilisation that represents a common

[8] On this issue see, *Flexible Integration. Towards a More Effective and Democratic Europe*, London: Centre for Economic Policy Research (1995).

heritage.[9] It is probably unrealistic to assume that such a feeling of partaking of a shared destiny will develop in the short term, that feeling which characterised the notion of citizenship that evolved around the nation-state in the 19th century.

The ties among the European peoples are not yet perceived as denoting a single community. This perspective remains in the background of the process of European integration and the creation of European citizenship should try to bring it closer.

At the very least, European citizenship ought already to be perceived, as Antonio La Pergola put it, as the foundation of a deeper sense of European Unity, of Europe as an evolving 'polis' capable of meeting the needs of the human community on which it rests.[10] This perspective is quite different from the position of those who, noting that the European Union is not a State, that European societies are multiethnic and cannot be held together by a set of common values, believe that the core of a modern notion of citizenship can be identified in the competence to regulate differences.[11] In this connection, it is proposed not to try to create a European citizenship along the lines of national models, but rather to extend it to residents originating from non-EU countries. This European citizenship would become, as it were, the prototype of a procedural notion of cosmopolitan citizenship.

This solution might appear both realistic and fascinating. It would not be desirable however, for solving only the issue of extending some individual rights to be enjoyed on a merely 'selfish' basis, in the absence of broader and stronger unifying underpinnings.

It is not easy to forecast which model will prevail in the long run. I will confine myself to expressing the opinion that radical solutions do not seem likely in the near future and that the only realistic approach for the idea of European citizenship not to fade away, is to progressively expand its contents. Only thus will it become a *factor* capable of fostering the European Union's development and not merely a *consequence* of it.

9 T.H. Marshall, *Citizenship and Social Class*, Cambridge: Cambridge University Press (1950).

10 A. La Pergola, *L'Unione attraverso la cittadinanza europea. Una proposta della Commissione di Venezia.*

11 Jessurun d'Oliveira, *op. cite.*, note 6, pp. 82 ff.

CHAPTER XVI
A EUROPEAN CITIZENSHIP WITHOUT WOMEN?

Éliane Vogel-Polsky

I. INTRODUCTION

The recognition of a European Citizenship by the Maastricht Treaty introduced a novel legal institution into the European construction, hitherto unknown in international law. However, in its current form, it offers very limited prerogatives. Nevertheless the possible development of a concept of European citizenship, founded on the recognition of the fundamental right of equality between the sexes and general parity has the potential to act as a powerful tool for democratic change, to benefit women and European society in general. Up until now in the work carried out by the European forum, the status of European women as partial citizens has not appeared as a central issue in the debate. However, the lack of women in the political, economic and social decision making arenas directly challenges the legitimacy of a 'democratic' political system which declares itself to be based on the equality of its citizens. Given that this issue concerns half of the population, at the very least it deserves to be addressed and debated.

I intend to define and deal with the problem using four approaches.

1. The subject matter: European citizenship according to the Maastricht Treaty.
2. Why discuss women? Do they have specific problems in the context of European citizenship?
3. Some lessons to draw from the critical examination of one of the basic foundations of European citizenship: equal treatment in the Community legal order.
4. What is to be done? The reconstruction of European citizenship according to democracy based on parity.

II. THE SUBJECT MATTER: EUROPEAN CITIZENSHIP ACCORDING TO THE MAASTRICHT TREATY

A surprising preliminary observation: It seems to me somewhat remarkable that the majority of commentaries written on European citizenship make very little reference to the substantive values to which the Treaty refers when grounding the concept of citizenship. On the level of constitutional principles, the concept of European citizenship is defined by article B.3 of the Common Provisions in an exceptionally large and dynamic way - its aim being to strengthen the protection of rights and interests of the nationals of its Member States through the introduc-

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 327-343.

tion of a citizenship of the Union'. The viability of this form of citizenship according to the Treaty, then, depends on:

1. Substantive values: These are listed in Articles F.1 & F.2 of the Common Provisions. Respect for the democratic principles of the systems of government of Member States, respect for fundamental rights and respect for the constitutional traditions common to Member States; and
2. Their procedural instrumentalisation: 'The Union shall provide itself with the means necessary to attain its objectives and carry through its policies' (Article F3). This definition of the objectives of citizenship can only be understood from within the legal and institutional framework of the Union. We can, of course, discuss citizenship in more general terms, but we should always be aware of the relevant provisions affecting the debate.

A. How can European Citizens make the Protection of Their Rights and Interests Actually Count (Article B)?

Within its institutional framework, the European Community has developed a unique supranational legal system, set up so as to regulate the transfers of sovereignty from Member States to the institutions of the Community, which have principally taken place in the economic and financial domains (free market competition, free movement of goods, agriculture, free movement of people, services and capital, EMU, transport etc.). In the political and social domains the transfer of sovereignty has been more limited and partial. The modalities of European Community decision making are extremely complicated, they are embedded in the various types of competence (exclusive, concurrent or reserved to Member States) and subjected to the requirement of subsidiarity. The mechanisms of popular control for supervising the system are more or less non-existent, despite the fact that at the present time around 80 per cent of the Member States' economic and social policy is affected by Community acts and decisions.

The rights and interests of European citizens both directly, at Community level, and indirectly, at national level, do not benefit from procedural guarantees conforming to the common constitutional traditions of the Member States. The doctrine of separation of powers is ignored by the Community system. Both the legislative and the executive powers are concentrated within the Council. The European Parliament, the only organ legitimated by universal suffrage, only has limited competences in the legislative domain, and more or less non-existent powers in so far as control of the Council is concerned. The Court of Justice has the task of interpreting, and ensuring respect for, Community law, as well as judging the legality of acts adopted by the Community institutions which have legal effect. Nonetheless the specificity of the Court's role has led it to differentiate between the fundamental rights recognised by the Treaty, respect for which it has a duty to guarantee, and fundamental rights recognised by other instruments of international law or by the constitutions of Member States, which can only

inspire its interpretation of Community law. Moreover, it should be noted that European citizens do not have any direct recourse to the Court of Justice, except against an individual decision which concerns them directly (an exceedingly rare case).

To summarise, the democratic deficit of the European Community, which has often been condemned, has very substantial impact on the efficacy of a European citizenship designed to 'strengthen the protection of the *rights and interests* of the nationals of its Member States'. These 'rights' are those which are derived from the Treaties and the acts of Community institutions as well as the national rights which they affect. Thus, for example, one has recently been able to observe how the constitutional rights to education and health have been affected in one or another Member State by budgetary reductions motivated by the convergence criteria of the EMU

On the question of which 'interests' are foreseen by article B, it seems that while they are not explicitly defined by the Treaty they refer back to the general framework of Union objectives (Articles A-F) and the principles and goals of the European Community (Articles 2-7). Among the objectives which have implications for the interests of citizens, we can include

- the promotion of balanced and sustainable economic and social progress;
- the strengthening of economic and social cohesion;
- the establishment of economic and monetary union;

Among the goals, and the spheres of action of the European Community which directly 'interest' the citizen, one might include; a high level of employment and social protection; the raising of the standard of living and the quality of life; the free movement of people; a policy in the social sphere comprising a European social fund; a policy in the sphere of the environment; a contribution to the attainment of a high level of health protection; a contribution to the education and training of quality and to the flowering of the cultures of the Member States; a contribution to the strengthening of consumer protection. Certainly, one could continue to cite other policies and competences but the ones listed above are those which directly address citizens.

It is therefore necessary to examine whether there are guarantees for European citizens to participate in, and control, the elaboration of decisions which effect their rights and interests as provided for within the institutional and procedural framework established by the Treaty. We refer readers to the Working Paper distributed by the European Forum[1] and only reiterate here its conclusion which ended with an examination of the possible guarantees offered by the Community system for the protection of the rights and interests of European citizens: It is clear that in their present state the texts are incapable of guarantee-

[1] E. Vogel-Polsky, 'Les femmes, le citoyenneté et le traité de Maastricht', paper provided as background reading material for the conference *European Citizenship: An Institutional Challenge*, June 13-15, 1996, European Forum, European University Institute, Florence.

ing the prerogatives attached to European citizenship. It is absolutely essential that the 'Union' provides itself with the means necessary to attain its objectives and carry through its policies with respect to European citizenship. In the present state, European citizenship is both passive and virtual for everyone, men and women alike.

III. WHY DISCUSS WOMEN? DO THEY HAVE SPECIFIC PROBLEMS IN THE CONTEXT OF EUROPEAN CITIZENSHIP?

To talk of the issue in this way raises a substantial difficulty: It can lead to a presentation of women as constituting a monolithic group and to defending a homogeneous set of interests or claims. Their sex becomes the common denominator which renders anonymous their particularities, their social, economic, cultural and familial differences. Certainly, women are not a homogeneous group, however, what they do share is an existential experience and an identity constructed on the basis of gender which globally structures all the spheres of life in society. An analysis of representations and social institutions in terms of gender clearly shows how, from the remotest times until the present day, the teachings of masculine supremacy have been deeply embedded in our mentalities.

This is what we learn from anthropologists. The field of gender studies has largely contributed to drawing our attention to the types of differentiation that result in a given society from practices linked to the division of the sexes. Among the social sciences, two disciplines seen impervious to the conceptual tool of gender, these are law and political science. However, as we reach the end of the millennium there has never been so much written, debated and theorised on the subjects of citizenship, democracy, equality and universality in Europe, as now. Equality is, on the one hand, the central theme of democratic theory (be it liberal, social democratic or republican) but, at the same time, equality also expresses a feminist utopia, the critique of male domination and the emergence of a new equilibrium between men and women. To consider the relationship between democracy, citizenship and women is to bear witness to the penetration of social relations based on sex into the arenas of political power and the interdependence of social and economic mechanisms of inequality which work against women, in their status as women.

Now, women do not constitute an oppressed, homogeneous group in the same way as historically oppressed groups (such as slaves, blacks, Jews, aborigines, foreigners, ethnic minorities, homosexuals, etc.). The fact that the members of these groups were not recognised and considered as citizens was a direct result of their difference vis-à-vis the particular model of 'the citizen' in use throughout a given period. Their exclusion was principally of cultural (and not natural) origin, even if they were often subjected to a double socio-economic exclusion. As with all human groups, these categories are sexed: in each group there are both men and women and in all groups it is possible to observe patterns of social relations based on sex which work to the detriment of women. This is why it is pos-

sible to talk of women in general, in order to refer to this half of mankind which still does not have the whole status of citizen, as a direct result of the social relations based on gender at work in *all* societies. In a democratic regime, *universality, liberty, equality and transitivity* - the functions and the responsibilities of the systems of power - never have the same significance and content for women as they do for men. This is because the institution that comprises the whole of society constructs and organises power relations by anchoring them in the social division of work and roles between sexes; the separation of public and private spheres, the intrinsic structure of the public domain and the concept of citizenship.

A. The Scandinavian Model, an Eden of Equality?

The outcome of the under representation of European women in the political, economic and social decision making spheres, as much at national level as at the level of European Union institutions, is well known, documented and analysed. The results are overwhelming and point to a considerable imbalance. Women represent more that half of the population of the European Union (51.3 per cent) but they are marginalised in, or denied entry to, the political, social and economic arenas of power in which the decisions which effect the totality of the citizens, and thus, a good number of women, are made. It is impossible for them to defend, in terms of *a general interest held by society*, those interests which the socialisation and the construction of gender relations have defined as being specifically women's interests, and in particular those interests which concern what is known as the 'private sphere' and issues related to reproduction. The statistics all confirm that despite the considerable improvement in the place of women in contemporary society (education, access to work, health) and in particular the incontestable legal advances in terms of formal equality between men and women, gender relations continue to fashion and reproduce inequalities and imbalances between the sexes.

The most characteristic manifestation of this phenomenon in the majority of European Union Member States is the quasi-exclusion of women from the political decision making arenas.

Even in the Scandinavian countries where women have been able to break through 'the glass ceiling' to achieve the status of politically active citizens, one notes that the persistence of their social and economic inferiority in terms of the segregation of the work place according to sex, the disparity between the salaries of men and women and their participation in unstable forms of work, the concentration of women in a limited number of activities, in junior positions and less powerful sectors is as clear as in the other Member States of the Union. The accomplishments of Swedish and Scandinavian women relative to their participation in the political system have not led to a real change in the social relations between the sexes. As in all neo-corporatist systems, the Scandinavian welfare states have replaced the traditional arenas for the management of social conflicts. They

have institutionalised forms of corporate decision making by according to certain interests (syndicates, employers' organisations, industries) a veritable monopoly of representation and management in economic and social decision making and in these arenas women are considerably under-represented. Moreover, the choice of direction as to welfare policies is discussed within government agencies and the representative bodies of diverse interest groups (consumers, the church, social workers etc.), who have played the role of transmission belts for the policy of integration of women in the work force and the socialisation of reproductive work and concerns. Similarly, in these enclaves, men dominate. According to Borchorst and Siim, the Scandinavian welfare systems have reinforced the subordination of women in the public sphere by moving away from a patriarchal structure void of women towards a statal structure, while the sexual segregation still evident in the economic sphere has considerably limited women's capacities to be real actors in social negotiation. There is no Scandinavian 'exception' which is capable of providing a new model of relations between the sexes founded on a real equality of men and women in all the spheres of society.

In Scandinavian countries as well, women are not seen as 'ordinary' citizens, but as politically 'sexed' subjects to whom specific, or sectoral, policies are directed. In this sense, the State constitutes them as a group 'with problems', meriting particular protection. The presuppositions behind such a concept of 'integration' tell one a good deal about a vision of equality which is neutral and assimilationist.

The central core of social policies in favour of women has resided in policies which strive for women's integration into a world of work dominated by an organisation which is based on masculine references and models. The welfare state has not been neutral towards the sexes. On the contrary, it has tolerated the fact that women work more than men, that they are poorer and less protected by social security. The direct control by the State of some responsibilities connected to reproduction does not replace the family. The specific relationship of women to domestic obligations is still implicit in the formulation of social policy. The case of Sweden, in particular, shows how difficult it is, within the family, the work force and the public institutions, to change the social relations based on sex and the role of women as the principal instrument of social reproduction.

The experience of these Scandinavian countries is extraordinarily important in so far as it poses the question of limits to the problematization of equality of the sexes, in the form in which it has prevailed and still does prevail in those countries which are most firmly committed to it, which have agreed to considerable budgetary efforts, such as transfers of social revenue, the allocation and redistribution of resources, active policies on the work force, and the changing of mentalities through education, the media, and publicity campaigns. Within the Nordic Council, ministerial councils meet regularly and deal with equality of the sexes as a central political objective. Sweden has introduced, at national level, no less than seven institutional mechanisms, whose task is to act in matters relating to sex equality, to co-ordinate governmental policy, to promote both theoretical and empirical research. The ombudsman for equality of opportunity has the

authority to voluntarily apply the law on equality of women and men in employment. But this law is auxiliary to the collective agreements. Its sprit is to recommend equality, but not to impose it. In other words, unequal pay is not, effectively, forbidden. A large number of experts and Scandinavian researchers consider that the limits to equality legislation and policy lie, above all, in the fact that Swedish women participate only peripherally in the determination of the nature of equality of the sexes and how it should be achieved.

B. The Failure of Policies on Equality, or the Limits of State-Feminism

Since the 1970's all European countries have been equipped with equality laws and have put in place a network of institutions charged with the specific task of promoting equal treatment and equal opportunities for the sexes, be it in all the sectors of societal life, or be it in specific sectors (work, education, family). Within governments, this responsibility has similarly been conferred upon ministers, either as their principal task, or in conjunction with other tasks, most often connected with the family and youth (Germany) or with employment (UK, Ireland, Belgium etc.).

Their actions have been anchored in an anti-discriminatory approach to equality of the sexes and in policies of integration of women, in so far as they constitute a specific disadvantaged group. The span of a quarter of a century since their creation serves to demonstrate the very relative achievements of these equalisation processes, in both formal and substantial terms. Social and sexual segregation still persists in all spheres of life and society. Moreover, it mutates and takes on new forms as a result of social transformations (poverty, one parent families) and reorganisation of the process of production (flexibility and the precariousness of status).

The permanence and recurrence of systematic mechanisms of sexual inequality ought to be considered by those with political responsibility as indicators of the weakness and problematic nature of equality of the sexes, such as it is today conceived of everywhere in Europe. It is this which raises precisely the question: Why, after more than half a century of 'State-feminism', has progress been so fragmentary, unbalanced, fragile and temporary. The evidence is blindingly obvious; equality of the sexes has not been achieved. Certainly, throughout the twentieth century women have taken their fight to ever more diverse domains: access to information, equality in education and training, access to work in all professions and in all sectors, equal treatment and conditions of work, equal pay, the right to voluntary and wanted motherhood, sexual mutilations, peace, emancipation form misery and poverty.

All the spheres of life in society constitute women's battlegrounds - their terrains for struggle, analysis, victory and defeat. Because this equality has never been completely achieved for women, it has an accessory character, and must ceaselessly be legitimated, justified, defended and reconquered.

IV. SOME LESSONS TO DRAW FROM THE CRITICAL EXAMINATION OF ONE OF THE BASIC FOUNDATIONS OF EUROPEAN CITIZENSHIP: EQUAL TREATMENT IN THE COMMUNITY LEGAL ORDER

In order to illustrate the stumbling blocks and conceptual weakness of the contemporary legal construction of equality between the sexes, it is interesting to examine equality between people in terms of its variable geometry within the structure and the organisation of Community law.

This analysis allows one to grasp the importance of adopting a totally new legal basis for equality between the sexes, which would have the strength of a fundamental right and would no longer operate in the circumstantial and fragmentary way which it now does. Community law recognises three different types of equal treatment of persons; equal treatment of Member State nationals, free from discrimination on the grounds of nationality; equal treatment of migrant workers from Community Member States; equal wages for the same work for male and female workers. Equal treatment on the basis of nationality is based on a quasi-constitutional principle of 'equality before the law and within Community law', while equal treatment of migrant workers is based on one of the pillars of the Community edifice 'free movement of people'. Given their respective ends and their legal bases, these equality norms have received a particularly extensive teleological interpretation by the Court of Justice in favour of the categories of person to whom they are addressed. But this is not the case for equal treatment of male and female workers.

A. Equality of Member State Nationals Without Discrimination on the Grounds of Nationality, Within the Scope of Application of the Treaty (Article 6)

The conditions of application of this principle are defined by Article 6 EC, first there must be a right or interest which falls under the scope of application of the Treaty and second it must be contested that its application has a discriminatory effect on the grounds of nationality. On this basis the Court of Justice has developed a completely remarkable line of case law by recognising the direct effect of Article 6 and forbidding a Member State from treating a national from another State more rigorously, or placing him in a legal or factually disadvantageous situation relative to the way a Member State national would be treated in the same circumstances.

Most remarkable of all is, however, the interpretation which the Court has given to the field of applicability of this provision; 'the scope of application of the treaty'. Thus, the Court held that Article 128 EC (as was) which provided that the Council establish 'general principles for implementing a common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market' implied that the

scope of application of the Treaty penetrated the law regarding vocational training for nationals of Member States.

In a series of famous cases concerned with payment of tuition fees, increased funding for students coming from Community Member States to the level of that for national students (academy of design, access to university courses in veterinary medicine and medicine, etc.) the Court actually enlarged the notion of vocational training to cover university education. However Article 128 was implemented in 1963 by the adoption in Council of a 'decision fixing the general principles'. This decision had a collective, and not an individual, character and did not fall under the jurisdiction of Article 189 of the Treaty which defines the Community's instruments of secondary legislation. Moreover it was not certain that the decision had an obligatory character for Member States. The Member-States affected by these pending cases certainly argued a good case that fixing the level of fees was a part of education fiscal policy which did not fall within the scope of application of the Treaties but was, instead, a competence reserved to the Member States and that the higher costs for non-nationals from rich countries reflected a legitimate objective. However the Court considered that all discrimination based on nationality was illegitimate and found against those States party to the actions, holding that the prohibition of discrimination elaborated in Article 6 carried an obligation of result to the benefit of Community nationals.

It will be shown below that, conversely, where equality between the sexes has been concerned the European Court of Justice has considered discrimination against female workers as justified when shown to be motivated by the general social policy objectives of a Member State.

B. Equal Treatment of Migrant Workers

An entire chapter of the Treaty is devoted to the free circulation of workers, and equal treatment, as defined by Article 48 EC, has been established as one of the most important principles with which to realise this pillar of Community architecture. In contrast, equal treatment of male and female workers is limited to the same salary for identical work, without reference to the conditions of work. Its status is not clear.

From its inception, equal treatment for migrant workers has been *inseparably linked* to the principle of equal pay. It is based on a general conception: to assure the equal treatment in one Member State of a national from another Member State in all aspects directly and indirectly linked with professional activity.[2] Rights linked to employment have been taken into account from both their individual and collective aspects, the latter comprising 'rights and liberties'. 'Article 48 EC, and Community acts taken under it, implement a fundamental principle of the Treaty which national jurisdictions must safeguard and which must pre-

[2] See Council Regulation 1612/68 relating to free movement of Community workers.

vail over all contrary national norms'.[3]

The free movement of persons constitutes one of the foundations of the common market and gives an exceptionally strong legal basis to the principle of equal treatment of employees and their families. In effect Council Regulation 1612/68 clarified the content of the right to equal treatment; while the European Court of Justice developed the fundamental principles. As a result equal treatment entails the integration of migrant workers in two senses:

1. The extension of rights of workers to include rights and advantages which are not directly linked to the carrying out of a profession.
2. The extension of the right to integration into the host country to members of the worker's family (housing, support from public authorities, fiscal advantages, social advantages - whether or not they are linked to the employment -, contract, transport, large families, guaranteed old age pensions, certain civil and political rights).

But the extensive interpretation given to the right to equal treatment of migrant workers by the Court is based on teleological reasoning: to accomplish the treaty goals. Let us emphasise here the difference in the treatment (*without playing word games*), under Community law, of the equal treatment of migrant workers and the equal treatment of workers according to their sex. The implementation of equal treatment of migrant workers, which stems out of the essential Community pillar of free movement, is principally carried out by the adoption of regulations, that is, by an instrument of Community law which is totally supranational, having general application, obligatory in all its elements and directly applicable in all Member States (Article 189 EC). In contrast, the corpus of Community instruments whose aim is the realisation of professional equality between the sexes is made up of directives, that is, instruments which are binding only as to the result obtained and which leave to national authorities the choice and form of methods.

For example, it follows from this that Article 7(iv) of Regulation 1612/68 causes to be void under the law all those clauses in collective or individual agreements or contracts, and all other regulations, which affect access to employment, employment, pay and other conditions of work and licences where they provide for, or authorise, discriminatory conditions with regard to migrant workers. Whereas Article 3(ii)b of the Directive 76/201 EC is limited to providing only that Member States take all the necessary measures for achieving the same result.

C. Equality of Pay: the Implementation of Article 119

For female workers, equal treatment only first became an element of Community law eighteen years after the adoption of Article 119. The development of legal

[3] Case 118/75 Court of Justice, 7 July 1976; case 77/82 Court of Justice, 23 March 1983.

bases and justifications was a slow process of which the Court of Justice was the principle artisan. Moreover, the legal culture underlying professional equality between the sexes differs profoundly from that which underlies equal treatment for migrants.

The evolution of the Community law construction of professional equality between the sexes illustrates the constraints which result from an insufficient legal basis. Equality of men and women does not constitute an autonomous fundamental right: but is, instead, fragmented, diachronic and conjectural. Its very nature is denied. Can we really think of it as a right?

For the majority of Member States and for the Commission which abstained from any bringing any actions for failure to act for more than 15 years, Article 119, it seemed, was a provision with purely programmatic character, whose vulnerability stemmed from the fact of its position in the Treaty - in the weakest chapter dealing with the subsidiarity of social policy. For others, very few, and by and large ignored, Art 119 was, on the contrary, a directly applicable provision of Community law.[4] It should be noted that this was *the only provision which was the object of a treaty violation by Member States* by the adoption of a Resolution on 30 December 1961 which modified Article 119 without observing the revision procedure laid out in Article 236 of the Treaty.

The Resolution of 1961 switched equality of pay from being a directly applicable provision in the sphere of European social law to the sphere of social policy. This led to a substantial delay in the application of this principle and disparity in application between Member States. A situation which was hardly compatible with the fundamental character of the principle of equality later confirmed by the Court of Justice in 1976.

It was necessary to wait until the second *Defrenne* decision in 1976[5] for the Court to recognise that equal pay as laid out in Article 119 was binding and embodied two goals, economic and social. The Community legislation relating to equality of the sexes is often understood as the mainstay of European social policy. However a critical examination of Community law and Court jurisprudence in this area reveals some conceptual defects in the principle of non-discrimination which prevail in the current legal system. Equality of the sexes has a negative content, as such it prohibits discriminatory treatment but it does not permit the recognition of an autonomous right to equality of men or women. The prohibition against discrimination certainly serves to eliminate intentional, direct discrimination based on sex, but it does not allow the elimination of indirect inequality, resulting from social relations between the sexes. Now, instances of the latter are much more plentiful. When equality between men and women is legally instrumentalised, by a system which proclaims in an abstract manner, a formal equality of treatment for all legal subjects, where these are defined as ex-

[4] See Vogel-Polsky, 'L'article 119 du traité de Rome peut-il être considéré comme self executing?' in *Journal des Tribunaux*, No. 4570, 15 April 1967, pp. 233-237.

[5] Case 80/70 *Defrenne* v. *Belgium* [1971] ECR 445 and Case 43/75 *Defrenne* v. *Belgium* [1976] ECR 455.

tra-societal individuals, as interchangeable people, and when it chooses the principle of non-discrimination as a tool to break down inequalities, the system in some ways programmes in its own inefficacy. If one has to show that discrimination is principally motivated by sex, this obliges the victim to provide the proof, while the discriminator can defend himself by alleging that his motivation was independent from sexual discrimination, that this was only a secondary unintended consequence - because he can, for this purpose, introduce objective reasons which may be economic or social or other.

An analysis of jurisprudence in various different legal systems, Anglo-Saxon, Scandinavian, or Romano-Germanic shows the extent to which the characteristic of sex, as motive for discrimination, is constantly being reinterpreted and is dependent on the dominant conceptions and the societal values at a given moment in history. Among all the differences in treatment that have been discussed before courts and tribunals in Europe, never has equality of the sexes been understood as a *fundamental right* reflecting the egalitarian values of society, the non respect of which would be inadmissible. On the contrary, the presentation of the respective roles attributed to the two sexes is far more often used to justify 'objectively' some form of indirect sexual discrimination. There has been abundant literature published on this point and we refer the reader to it. The political and social consensus on the objective of equality between the sexes seems unanimously agreed upon, but the machine clamps up as soon as it becomes a question of recognising equality between men and women as a fundamental right.

From the perspective of the definition of a form of European citizenship whose aim is to assure the 'rights and interests' of nationals of Member States which are to be found within the treaty, we would note the extent to which the right to professional equality for men and women, although recognised by Community directives adopted on the bases of Articles 119 and 235 of the Treaty, is badly organised and badly applied. The principle criticisms which should be addressed to the Community system are the following:

1. Equal treatment established by the Directive 76/207 EC is defined in a formal and abstract manner. The prohibition of discrimination does not take account of 'gender'. All discrimination can be justified when the following motives are admissible, the objective interests of the business, business necessity, general objectives of social policy or personnel management. The prohibition of discrimination has no direct effect and imposes no obligatory result as, in contrast, does Article 6 EC (examined above).
2. The jurisprudence of the ECJ breaks the logic of equality because it maintains that Community law on equality of the sexes strives towards the objective of progressive equalisation but cannot have immediate results in terms of equality.[6]
3. The right to equality between the sexes is subordinated to economic objectives, it is contingent and fragmentary.
4. The Community has not been provided with the 'necessary means' to achieve these goals. One can observe the extent to which the Community system of equality is simply a copycat version of the most outdated form of State femi-

[6] See Case 450/93 *Kalanke* (17 October 1995) Rec. I-3051.

> nism, whose agenda is the integration of women as a 'group at risk' in economic life and the world of work. This approach leads to a series of policies inspired by strategies of the assimilation and conciliation of professional and domestic responsibilities of individual women, which inevitably serve to reinforce the social relations between the sexes in terms of sexual segregation of roles, tasks, responsibilities and division of labour. Within the Community administrative apparatus, the mission of watching over sexual equality is conferred upon an island of 'femocrats' with no real power, and de facto far removed from the real decision making arena. Finally, a new stage has just been reached with the marked wish of certain Member States, most notably Germany, to submit Community programmes addressing equality of opportunity for women to the principle of subsidiarity. As a result, the budget proposed by the Commission for the IVth programme of action has been reduced by half and there has been a substantial cut in the envisaged spheres of action because of a claimed lack of sufficient legal basis in the Treaty.

This disturbing backlash has been accompanied by a new rhetoric of equality. The new proposed strategy is inspired by 'mainstreaming': sexual equality ought to play a role in all the decisions, policies and acts of the Community (the policy of immersion). How? And how will this be supervised? No one knows. Immersion will at least make it possible to challenge specific measures and to reinforce the merely proclamatory national and Community policies on equality, since everybody is obliged to practice immersion without any training or consciousness as to the way to achieve it.

V. WHAT IS TO BE DONE? THE RECONSTRUCTION OF EUROPEAN CITIZENSHIP ACCORDING TO DEMOCRACY BASED ON PARITY

If equality between men and women really does constitute an essential foundation of democracy, it should be compulsory to ensure, when taking legal or institutional measures, that they conform to this fundamental objective. The political exclusion of women, their absence from the decision making forums, their minimal representation in government and economic authorities, has never been analysed and understood for what it is: an inadmissible failing of democracy. And the European Union, in its understanding of equality of the sexes and its institutional functioning simply compounds the collective hypocrisy of the democratic regimes in place in the Member States. Now, the Maastricht Treaty has introduced a new institutional reality: European citizenship. On this base, the institutional developments within the European Union may be able to revolutionise western democracies by introducing the question of gender into the heart of its citizenship and its democratic procedures

The recognition of an - autonomous - right to equality of women and men in the Treaty on European Union would make it possible to overcome the hitherto insurmountable contradiction between formal equality and real equality. Sexual equality would be constructed on new foundations, and in imposing an obliga-

tion as to effective result, would move beyond the constraints and weaknesses resulting from an anti-discriminatory approach.

Respect for the human dignity of both woman and man would no longer be limited to a pious wish with a purely abstract dimension. It would be anchored on the equal status of the two sexually differentiated components of humanity, and on parity, as the organising concept underlying political and power relations between the sexes. If, during the course of the 1996-1997 IGC, our proposal is adopted, Europe will play a pioneering and founding role in creating complete citizenship for women.[7]

Moving from the notion of European citizenship inscribed in the Union Treaty, it is necessary to reconstruct the approach towards citizenship taking into account its two dimensions: a system of values (or a system of expectations) (I) and a way of organising legal rules and procedures within the terrain of the political system (II).

A. Substantive Values of Democracy: Equality of Citizens

As a central value of democracy I propose a revised concept of equality of women and men. Above all, it is a question of guaranteeing , through parity, 'the inherent dignity and [...] the equal and inalienable rights of all members of the human family'.[8] Equality of the sexes must give meaning to people's lives, to human groups, to their activities, to the society in which they live. The equality of woman and man as human persons is a social, historically situated, institution, it is capable of evolution. It is far from having always existed, no more than has equality between human beings. From a legal point of view, this equality between the sexes must, in the framework of principles and fundamental rights, receive an expression, a content, an interpretation and a practice. These characteristics are not absolute, but, at this time, constitute the societal actualisation of fundamental values and democracy.

Parity is not just confined to a problem of women's participation in the spheres of power. Instead, it answers an earlier, more fundamental question: Who is the human being referred to in the 1948 Universal Declaration of Human Rights? In legal terms, this question becomes 'who is the subject of inalienable fundamental rights?' All lawyers know the law does not have an immutable character.[9] Law is necessarily a contextualised creation whose aim is to create and apply norms relating to the values and the human relations in the society which it governs. There is nothing ontological about the law. When we say, today, that

7 For an exhaustive analysis see, E. Vogel-Polsky, J. Vogel, and V. Degraef, *Les Femmes et la citoyenneté européenne*, Commission (1994), V/233/94 FR.

8 First paragraph of the preamble to the Universal Declaration of Human Rights adopted by the United Nations 10 December 1948.

9 See N. Rouland, 'Penser le droit' in Vol. 10, *Droits* (1989), p. 77. 'le droit est moins un objet aux contours immuables qu'une façon de penser les rapports sociaux' ['law is less an object with immutable contours than a way of thinking about social relations'].

sexual equality must be based on parity if it is to be effectively guaranteed, this is neither shocking nor impossible. When we affirm that the human being is 'gendered', that the legal subject and the citizen are 'gendered', we are simply expressing in legal terms the universal character of sexual duality and the social relations based on sex which this produces.

Such a definition facilitates the introduction of gender into the structure of law and the legal system, because it is not possible to have a legally abstract person. The legal subject is always defined by virtue of his belonging to a sphere addressed by the law: he is a taxpayer, an employee or self employed, retired, married (although both spouses will not have the same status), a parent (but parental authority and subordination of the mother) etc.. The law defines the categories to which it applies. However sex, itself, does not constitute a socio-legal category. Gender plays another role in the legal system, where either the fact of being female is sufficient to exclude women from the status under consideration (this is born witness to by the long exclusion of women from political rights entirely on the basis of their sex) or the fact of being female justifies a different treatment within the same socio-legal category governed by a specific area of law, for example, private law, labour law etc. The legal context varies according to sex and operates only upon the basis of a rule of similarity or identity between legal subjects of the same sex and always reflects social relations based on sex.

The sex of a person is a permanent characteristic which one could qualify as structural. Since equality constitutes a primordial value of democracy, it is not enough simply to prohibit discrimination on the grounds of sex. The anti-discrimination approach will never put an end to social relations based on sex. To simply introduce an abstract equality between non-sexed legal subjects is to fail to understand the importance of the sexual division of tasks, roles, resources and powers between women and men. Instead, because the construction of a person's social identity and their particular place in the economic, political, social and civil orders is based on a biological difference of sex, it is necessary to technically insert gender into the definition of the legal subject.

It is necessary to take account of this universal and objective 'given' if one is to materially guarantee equality between men and women. The right to respect and dignity encompasses every person. For this respect to have some meaning in the contextualisation of legal institutions, it implies the requirement to establish an equal status for both components (men and women) of humanity, who are the holders of these fundamental human rights.

Parity is legally expressed by equal status for women and men. Equal status is contextual, as is everything within the domain of the law. Status is more than simply an ensemble of formal legal provisions. Equal status imposes an obligation of result upon all political and social institutions, that is, it consists of an 'obligation to act' on the public authorities (executive, administrative, legislative and judicial) who must take the compulsory measures to fulfil their obligations.

B. Parity in Democracy

1. Democracy as a Regime

Democracy is the materialisation of a concept of society as free and as just as possible which guarantees the autonomy of the individuals which comprise it. But the autonomy of individuals is impossible without the autonomy of the collectivity.

The realisation of liberty and equality for human beings implies specific institutional provisions which comprise formal and procedural provisions. Up until now, on the level of procedural rules concerning composition, functioning and identification of institutions, our democracies have managed to achieve only a theoretical equality, the equal enjoyment of political rights without discrimination based on sex.

2. A Joint [Paritaire] Democracy as Procedure

What is necessary is to introduce at the level of policy, and binding on political actors, an obligation to equal status as to representation in, participation in, and the work of, institutions in the three public powers. It should no longer be an issue of women painfully striving to attain, often through insulting methods, a certain threshold, or a certain critical mass, in the assemblies and chambers, governmental institutions and organs of power, through the means of quotas. The citizen as legal subject is 'gendered'. The population is composed equally of both men and women (he and she). The carrying out of politics must be based on parity. All social relations are gendered and one cannot build a democracy which is not, itself, gendered.

Democracy is founded on the equal participation of each citizen, or legal subject, in the exercise of the three State powers. The requirement of a substantive value of equality for all individuals necessitates i) putting an end to the sexual division of both the exercise and application of power but also ii) from the perspective of shaping the future, to recognise the gender of citizens and to implement an equal participation of the two genders in political institutions. Democratic procedures must be considered in this spirit. The democracy of tomorrow must introduce tangible conditions, allowing all gendered legal subjects to effectively exercise their political, economic and social rights. To adopt representative regimes based on parity is to transcend and move beyond the representation of given groups. Where it is a question of socio-legal categories (nationals, people over the age of majority, linguistic groups, minorities etc.) we should remember that all legal categories are, without exception constituted by gendered individuals (of one or other sex) acting within the dynamics of social relations between the sexes.

Women do not represent women, just as men do not represent men. In a system based on parity, they represent 'the people', the entire body of citizens.

Respect for the dignity of the human being demands that through the medium of immediately obligatory legal rules, the balanced sharing of power on a

basis of parity is concretely guaranteed in order to ensure that the prerogatives of social, economic and political citizenship can be actively and fully exercised.

The methods of appointing representatives of the people and of the nation, electoral rules etc. are specialised rules. As such, they must conform to principles of democracy and to the fundamental right to equality between the sexes.

Imposing parity would entail a procedural reform, historically acceptable today. It is no longer acceptable to argue that it would threaten the freedom of choice of the electorate or of political parties. Their freedom has always been restricted by specialised organisational rules and by legal conditions which have evolved over the course of centuries. The fact that specialised rules, which appear sexually neutral, lead to the systematic monopolisation of the public authorities and democratic institutions by one sex alone is sufficient to show why they must be changed to give to female legal subjects, to female citizens, the political power and responsibilities which are essential for the establishment of a true democracy.

VI. CONCLUSIONS

During the preparation for the intergovernmental conference a symbolic discussion on the need to reinforce European citizenship in the new treaty met with a large degree of consensus among the Member States, the Commission and the European Parliament. Emphasis was placed on the importance of safeguarding fundamental rights. Our proposition is directly anchored within this framework but re-conceptualises and transforms it into a vision of European democracies based, in terms of parity, on the right to equality of women and men in all the domains of life in society.[10]

[10] See E. Vogel-Polsky, 'Donne, cittadinanze europea e trattato di Maastricht' in A. Del Re, and J. Heinen (eds.), *Quale cittadinanza per la donne? La crisi dello stato sociale e della rapresentanza politica in Europa.*

PART IV

Citizenship and European Democracy

CHAPTER XVII
CITIZENSHIP AND DEMOCRACY: ELEMENTS FOR A THEORY OF CONTEMPORARY CONSTITUTIONAL DEMOCRACY

Gustavo Gozzi

I. DEMOCRACY AND FUNDAMENTAL RIGHTS

The aim of this article is to clarify certain important changes in the meaning of the concept of contemporary 'constitutional democracy'. To this end, I think that analysis of the problem of citizenship must be accorded special importance in view of the relations existing between this concept and that of democracy. The remarks that follow will refer mainly to the current debate in Germany.

According to K. Hesse, 'no other juridical-constitutional concept has been as subject to different interpretations as that of democracy'.[1] Suffice it to think, for example, of the various approaches that have been developed by what might be termed a 'constitutional theory' of democracy, aiming to highlight the democracy/constitution relationship, or by a 'realistic theory' of democracy, which tends, instead, to evidence the ongoing changes in the political system.[2]

The reflections I wish to develop here take their place within the perspective of a 'constitutional theory'. In this perspective, analysis of the relation between democracy and fundamental rights is undoubtedly of special importance in any attempt to clarify the changes democracy is presently undergoing. Nevertheless, I am of the opinion that despite the important developments accomplished, the dogmatic of fundamental rights, as pursued in Germany since World War II, appears particularly obsolete precisely where the relation with democracy is concerned: this can be evidenced above all through analysis of the change in the meaning of the concept of citizenship. Briefly: analysis of the problem of citizenship can provide useful criteria of interpretation for redefining the relation between rights and democracy.

On the democracy/fundamental rights relation, E.W. Böckenförde has stated

1 K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 14. Aufl., Heidelberg (1984), p. 50.

2 An instance of 'realistic theory' is the one developed by D. Zolo in *Il principato democratico*, Milano (1992). In this connection, see the contributions by R. Escobar, 'Il luogo chiuso della sicurezza', and by G. Gozzi, 'Teoria costituzionale e teoria realistica della democrazia', in *Scienza & Politica* (1994).

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 347-368.

that,

> fundamental rights acquire their sense and principal meaning as constituent factors of a free democratic process, i.e., of a production of the State, from the bottom upward therein lies their fellowship with the doctrine of integration[3] and of a democratic process of shaping of the political will.[4]

The democratic principle is a form of political authority that consists in 'the self-determination of the people',[5] as can be deduced from arts. 20 and 21 of the *Grundgesetz* (the Fundamental Law).

With respect to the democratic shaping of will, fundamental rights represent precise limits. Freedom may come into conflict with majority decisions; and fundamental rights therefore represent, firstly, forms of guarantee for minorities[6] (above all, freedom of opinion[7] and association). In this sense, rather than a process of 'people's self-determination' the democratic political process should be conceived as a form of co-determination *(Mitbestimmung)*,[8] which finds its legitimation only in so far as it is based on the participation of majority and minority.[9]

This vision of democracy incorporates the conception of a *free* participation with *equal* chances by all in the shaping of the community (*Gemeinwesen*) in the political process.[10] This interpretation of the democratic principle is

3 The reference to the doctrine of integration seems especially significant. It explicitly recalls the work of R. Smend, who located the expression of a people's fundamental values in rights. In other words, the (formal) constitution sanctions the system of values of a political community. There exist therefore a *pre-constitutional level* and, through the constituent process, the acknowledgement of a precise 'system of values'.

4 E.W. Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation, in Staat, Gesellschaft, Freiheit*, Frankfurt/M (1976), p. 253.

5 See H.-P. Schneider, *Eigenart und Funktionen der Grundrechte im demokratischen Verfassungsstaat*, in J. Perels (ed), *Grundrecht als Fundament der Demokratie*, Frankfurt/M (1979), p. 23.

6 See G. Folke Schuppert, *Grundrechte und Demokratie*, in EuGRZ, 12. Jahrgang 1985, p. 526. See also J.P. Müller, *Grundrechte in der Demokratie*, in EuGRZ, 10 Jahrgang 1983, p. 338 and 340. But on the function of protecting minorities expressed by fundamental rights see above all the essay by H. Kelsen, 'Essenza e valore della democrazia (1920/21)', in *La democrazia*, Bologna (1981), p. 94.

7 In the debate on the democratic principle in the Grudgesetz conducted at Speyer in the Vereinigung der Deutschen Staatsrechtslehrer on October 8 and 9 1970, W. von Simson equated the degree of democracy with the level of freedom of opinion attained: see W. von Simson, 'Das demokratische Prinzip im Grundgesetz', in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, Heft 29, Berlin (1971), pp. 6-7.

8 See P. Graf Kielmansegg, 'Demokratiebegründung zwischen Menschenrechten und Volkssouveränität', in J. Schwartländer (Hrsg), *Menschenrechte und Demokratie*, Kehl am Rhein Strassburg (1981), p. 107.

9 On this point, see again Müller, *op. cite.*, p. 341 and Folke Schuppert, *op. cite.*, note 6, pp. 527-528.

10 Schneider, *op. cite.*, note 5, p. 29. Schneider recalls the principle of equality proclaimed in the Grundgesetz: '... No one may be the object of prejudice or favour on account of

specified in a sentence of the Bundesverfassungsgericht *(BVerfG)*, the Federal Constitutional Court, which emphasises that 'fundamental rights are granted to citizens (*Staatsbürger*) not to do with as they please, but in respect of their condition as members of the community, and therefore in the public interest'.[11] But who is a citizen? What is to be understood by 'community'? And above all, what meaning should be given to the concept of public interest in the framework of a pluralistic society with conflicting values ? Here we reach the nub of the problem of contemporary constitutional democracy.

In an article couched in a subtly polemical tone, J. Isensee remarks that society is the arena of difference, whereas the people is the totality of citizens who are equal among equals.[12] In this sense fundamental rights constitute society, but in Isensee's view, the will of the people is not grounded in democracy by these rights. Hence, in describing democracy as a form of State Isensee can assert, on the basis of the distinction between people and society, that while the fundamental rights of aliens (in Germany) are safeguarded, they have no right to decide as to the representation of the people to whom they do not belong.[13]

I think that an analysis of the concept of citizenship can significantly help to clarify certain problems of present-day constitutional democracy - guarantees for minorities, concept of 'people', questions of legitimation - and thus enable the probable lines of development of a theory of contemporary democracy to be identified.

II. THE PROBLEM OF PLURALISM: MINORITIES AND CITIZENSHIP

I shall first address the problem of minorities - in other words, the question of pluralism, which has received new solutions in the constitutions of the *Länder* recently incorporated into the *Bundesrepublik Deutschland* (BRD). These constitutions suggest that democracy cannot be grounded on the principle of a nation, but must rather be constructed on a variety of principles belonging to a plurality of ethnic, linguistic and cultural communities.

Hence, several articles of the constitutions of the new *Länder* proclaim the protection of ethnic-cultural minorities, both alien ones[14] and those belonging

sex, birth, race, language, nationality or origin, faith, or political or religious opinions' (art. 3, III).

11 *BVerfGE* 14, 21 (25).

12 J. Isensee, 'Grundrechte und Demokratie', in *Der Staat* (1981), p. 166.

13 *Ibid.*

14 In the Constitution of Saxony, art. 5, clause 3, we find: 'The Land respects the interests of alien minorities, whose members legally reside in the Land', in *Verfassung des Freistaates Sachsen* (1992), quoted in P. Häberle, *Die Verfassungsbewegung in den fünf neuen Bundesländern Deutschlands 1991 bis 1992*, in JöR, Vol. 42 (1994), p. 275. Art. 37 of the Constitution of Saxony-Anhalt states: '(1) The cultural specificity and the political participation of ethnic minorities are placed under the protection of the Land and its communes. (2) Recognition of membership (*Das Bekenntnis*) of a cultural or ethnic mi-

to peoples of German origin.[15] This is clearly a constitutional movement (Verfassungsbewegung) that reveals the need for a common citizenship no longer grounded on nationalistic principles.[16] In this sense it can be argued that the norms laid down by the constitutions of the new *Länder* embody perspectives of constitutional change that are highly innovative as compared to the principles stated in the *Grundgesetz*.

At federal level, on the other hand, the possibilities of changes in the Constitution have remained extremely restricted. This is quite clear from the outcome of the work of the *Gemeinsame Verfassungskommission*, set up on 16 January 1992, shortly after the two Germanies had been reunited. The *Gemeinsame Verfassungskommission* was charged with the explicit task of making proposals for amending the constitution. The Commission concluded its work with a series of *Empfehlungen* (recommendations), among which - indicated by art. 20b *Grundgesetz* - is the obligation to respect minorities. The text reads, 'The State respects the identity of ethnic, cultural and linguistic minorities'.[17] In specifying the reasons underlying this proposal to modify the *Grundgesetz* , reference is made to German constitutional history - from the *Paulskirche*, to Weimar, to the international treaties accepted by the German *Bundestag*.[18]

In the opinion of those proposing modifications, it was necessary to insert a rule explicitly respecting minorities *(Achtenklausel)* in the *Grundgesetz* , and not merely in the constitution of the *Länder*, since this would provide a common criterion also for those *Länder* where none of the traditional national minorities resided.

Respect for the identity of minorities is tantamount to expressing the principle of protecting human dignity as referred to minorities. It should be valid for all ethnic-cultural groups irrespective of citizenship[19] The final version of

nority is free; it does not involve *exemption from the general obligations of citizens,' Art. 37 of the Verfassung des Ländes Sachsen-Anhalt* (16 July 1992), in P. Häberle, p. 296.

15 The Constitution of Saxony, art. 5, clause 2 reads: 'The Land safeguards and protects the rights of national and ethnic minorities of German citizenship to guarantee their identity and protect their language, religion, culture and traditions', in *Verfassung des Freistaates Sachsen*, *op. cite.*, note 14, p. 275. Art. 18 of the Constitution of Mecklenburg-Vorpommern states: 'The cultural specificity of ethnic and national minorities of groups of citizens belonging to peoples of German citizenship is placed under the special protection of the Land', in *Verfassung des Landes Mecklenburg-Vorpommern vom 23. Mai 1993*, quoted in P. Häberle, *Die Schlußphase der Verfassungsbewegung in den neuen Bundesländern*, in JöR, Vol. 43, 1995, p. 421.

16 In this connection, see E. Denninger, 'Vielfalt, Sicherheit und Solidarität: Ein neues Paradigma für Verfassungsgebung und Menschenrechtsentwicklung?', in *Menschenrechte und Grundgesetz*, Weinheim (1994,) pp. 36 ff.

17 *Bericht der Gemeinsamen Verfassungskommission*, Deutscher Bundestag - 12. Wahlperiode - Drucksache 12/6000, p. 15.

18 See the Paulskircheverfassung of March 28 1849 - Abschnitt VI (Das Grundrecht des deutschen Volkes) - Art. XIII; art. 113 of the Weimar Constitution of 1919; art. 27 of the International Pact on Civil and Political Rights of 16 December 1966, etc.

19 *Bericht der Gemeinsamen Vefassungskommission*, *op. cite.*, note 17, p. 74.

the article formulated by the *Gemeinsame Verfassungskommission*, however, did not embody the proposal that had been put forward by the SPD, demanding not only respect for, but also protection and 'promotion' (*Förderung*) of ethnic groups and national minorities of German citizenship.[20] The viewpoint of the SPD was based on the representation of a multicultural society,[21] demanding not integration but rather the mutual coexistence of different cultures.

The commission's refusal to introduce the principle of 'promotion' (Förderung) of minority groups, not only those of German citizenship, but alien ones as well, in order to enable them to become fully equal with the majority, must surely be seen as the refusal to alter the German principle of citizenship.

Actually, in the debate within the Commission it was proposed that citizenship be grounded no longer on *ius sanguinis* - as is currently the case according to the *Reichs- und Staatsangehörigkeitgesetz* of 22 July 1913 - but rather on *ius soli*. This was indeed the principle embodied in the proposal advanced by the Hesse region, which ran as follows: 'German citizenship is acquired if the person was born where the *Grundgesetz* is in force and one of the parents has a certain right of residence or when one parent has German citizenship'.[22] But the proposal was rejected by the representatives of the CDU/CSU in the *Bundestag* and the *Bundesrat*.

The reason given for this rejection lay in the objection that even a partial insertion of the *ius soli* principle would seriously alter the German law of citizenship, in other words the principle of nationality (*Staatsangehörigkeitsrecht* - literally 'the right of membership of the State') based on the *ius sanguinis*.[23] For in Germany, the acquisition of citizenship, by birth or naturalisation (*Einbürgerung)* is based on the idea of entry into the national community:[24] Citizenship therefore represents the strongest tie between State and citizen.

But, in present-day Germany, what are the legal foundations and political implications of this relationship, and what could they or should they be in a multicultural society ?

III. LEGAL ASPECTS OF CITIZENSHIP IN GERMANY

It is necessary then, to identify some important implications embodied in the concept of citizenship: a first aspect regards the legal connotations of the con-

20 The SPD had suggested the following formulation: 'Der Staat achtet die Identität der ethnischen, kulturellen and sprachlichen Minderheiten. Er schützt und *fördert* Volksgruppen und nationale Minderheiten deutscher Staatsangehörigkeit' (emphasis added), *ibid.*, p. 72.

21 *Ibid.*, p. 74. For further details on this aspect see Denninger, *op. cite.*, note 16, p. 41.

22 *Bericht der Gemeinsamen Verfassungskommission*, *op. cite.*, note 17, p. 112.

23 One should distinguish between *ius sanguinis*, which is the right descending from being born of parents of a certain nationality, and *ius soli*, which is the right descending from being born in the territory of a certain state.

24 *Ibid.*, p. 113.

cept; a second aspect is linked with the political function of citizenship in the democratic constitutional State.

In an important case of 21 May 1974, known as 'Spanien Beschluss', the *BVerfG* underlined the legal principles of citizenship right. The ruling primarily addresses the problem of transmission of citizenship in relation to gender equality, but it also develops the complex set of legal relations embodied in the concept of citizenship.

The ruling refers to art. 4 of the *Reichs- und Staatsangehörigkeitsgesetz* of 22 July 1913, which stated: 'By birth, the legitimate child of a German male citizen obtains citizenship from the father, the illegitimate child of a German woman from the mother'.[25] In the judgment of the Constitutional Court, this article of the law of 1913 on citizenship was in conflict with art. 3, clause 2 *Grundgesetz* establishing equality between the sexes, since it differentiated acquisition of citizenship according to the two parents.[26] Following this ruling, the law of 20 December 1974 was passed, which established that the offspring of German women are also entitled to German citizenship.[27]

But in its ruling, the Constitutional Court also highlighted the multiple privileges involved in the status of citizenship. For this represents the condition of membership of the state community and, hence, of enjoyment of rights confined to German citizens alone (the so-called 'German rights'[28]): art. 8 (freedom to hold meetings); art. 9 (freedom of association); art. 11 (freedom of circulation); art. 12 (freedom of profession); art. 16, clause 2 (ban on extradition); art. 20, clause 2, second sentence and art. 38 (on the right to active and passive vote); and art. 20, clause 4 (right of resistance against the state).

In this connection, the *BVerfG* also emphasises how the lack of citizenship is the reason for the adverse conditions of the *Ausländer* as compared to German citizens, as regards both the right to work (due to the need to request a work permit) and the entitlement to welfare (*Sozialhilfe, Ausbildungsförderung*).[29] Citizenship, then, introduces a clear element of differentiation within

[25] Ursprüngliche Fassung des RuStAG, 22 July 1913 (RGB1. 583), in K. Hailbronner and G. Renner, *Staatsangehörigkeitsrecht - Kommentar*, Munich (1991), p. 514.

[26] *BVerfGE* 37, 217 (240).

[27] Gesetz zur Änderung asylverfahrens-, ausländer-und staatsangehörigkeitsrechtlicher Vorschriften vom 20. Dezember 1974 (BGB1. I. 3714), where art. 4, first clause, is formulated as follows: '(1) Birth shall give entitlement to citizenship to: 1. legitimate offspring, when one parent is German, 2. illegitimate offspring, when the mother is German', in Hailbronner and Renner, *op. cite.*, note 25, p. 533. In this connection, see the remarks of H. Rittstieg, 'Staatsangehörigkeit und Minderheiten in der transnationalen Industriegesellschaft', NJW (1991), Heft 22, p. 1384. The Reichs- und Staatsangehörigkeitsgesetz was partly modified by the law of 30 June 1993 (BGB1. I, p. 1062). See the present formulation in *Verfassungs- und Verwaltungsgesetze*, mit einer Einführung von R. Stober, Munich: Verlag C.H. Beck (1995), pp. 465 ff.

[28] See R. Grawert, 'Staatsangehörigkeit und Staatsbürgerschaft', in Vol. 23 *Der Staat* (1984), p. 189.

[29] *BVerfGE*, 37, 217 (242). In this context, see also the essay by K. Sieveking, 'Ausländerrecht und Ausländerpolitik', ZERP - DP 4/91, Bremen (1991), pp. 54 ff.

society and reveals certain specific features of present-day German democracy.

The essence of citizenship, 'from a democratic point of view' - as the Federal Constitutional Court states - consists not of the fact that the person is subject to the authority of the State, but of the fact that he contributes to the form of the State community and the citizen has therefore an interest in his children's becoming citizens *(Bürger)* of this community and enjoying its protection.[30]

Legislatively, the basis of citizenship has been grounded in the *Abstammungsprinzip* (principle of birth), openly acknowledging a *ius sanguinis*. But this has two implications: on the one hand, it constitutes a tie not only with the family, but also and foremost, with the State. On the other hand, as if recalling an organic conception of Hegelian origin, the *BVerfG* remarks that the tie with a certain State community represents one part of the close links between adults and offspring and thus contributes to strengthening relationships in the family.

To sum up, the *Abstammungsprinzip* - established by legislation - constitutes a legal relation closely linking individual, family and State, by introducing precise differentiations within the context of German society. It is therefore necessary to define the 'political nature' of this relationship.

IV. THE POLITICAL NATURE OF CITIZENSHIP

The political content embodied in the contemporary German conception of citizenship emerges very clearly from certain rulings of the *BVerfG* regarding the electoral right of the *Ausländer*.

In the decision of 9 February 1989 regarding electoral law in the communes and districts of Schleswig-Holstein, the *BVerfG* introduced two specific political issues referring to the notion of 'people' and the concept of 'democratic legitimation'. According to the decision, the law is in contradiction with art. 28, clause 1, sentence 2 *Grundgesetz* , on the basis of which 'the people must have a representation arising out of general, direct, free, equal and secret ballot'.

By people is meant the German people, according to the Constitutional Court, and therefore the *Ausländer* cannot be acknowledged to have a right to vote in the commune.[31] According to the ruling, the people from whom the whole authority of the state emanates,[32] is made up of German citizens and thus membership of the people of the German Federal Republic is mediated by citizenship.[33]

In this perspective, citizenship represents,

30 *BVerfGE* 37, 217 (246).

31 *BVerfGE* 83, 37 (52). Urteil des Zweiten Senats, 31 Oktober 1990 aufgrund der mundlichen Verhandlung vom 26. Juni 1990.

32 As per art. 20, clause 2, sentence 1 *Grundgesetz*.

33 See *BVerfGE* 37, 217 (239, 253). The ruling is reported in *BVerfGE* 83, 37 (51).

> the legal premise (rechtliche Voraussetzung) for the equal status of citizen which is the basis for equal duties, on the one hand, but on the other is also, and foremost, the basis for the rights through which the exercise of authority by the State in the democracy is legitimated.[34]

Herein lies the political function of citizenship.

The question of democratic legitimation is also addressed in a ruling of the *BVerfG* regarding the law of the city of Hamburg of 20 February 1989, which provided for electoral rights for aliens for the district assemblies *(Bezirksversammlungen).* The ruling states that the legitimation of the authority derives solely from the totality of the citizens - in other words, from the people.[35]

The *Bezirke*, created on the basis of art. 4, *Abs.* 2 *HmbVerf*,[36] *exercise a state authority*[37] *and therefore require democratic legitimation. In the judgment of the Constitutional Court, the inclusion of aliens among those having the right to vote in elections for the Bezirke* representatives would run counter to the democratic principle laid down in arts. 20 *Abs.* 2 and 28 *Abs.* 1 *Satz* 1 *Grundgesetz*, in which the (German) people are made the basis of authority, at both federal and regional level. Hence, the Constitutional Court concluded, the entitlement of aliens to vote in the communes and districts (in Schleswig Holstein) and in the *Bezirke* (in the city of Hamburg) would deprive the elected representatives of their democratic legitimacy.[38]

The foregoing remarks on the political elements of citizenship - the concept of 'people' as the totality of German citizens and the idea of legitimation that derives from this as the foundation of the authority of the State - help to give a precise vision of democracy.

The rulings of the *BVerfG* probably betray a popular-democratic (*volksdemokratisch*) - orientation, expressed in a conception of democracy underpinned by a homogeneous idea of people - in other words, the German people. For this reason, the Constitutional Court questions the right of legislators to give the right to vote to all local components of the population instead of to the German people alone.

This representation of the people as a homogeneous reality anterior to the

34 *BVerfGE* 83, 37 (51).
35 *BVerfGE* 83, 60 (72).
36 The Verfassung is the Constitution of Hamburg.
37 *BVerfGE* 83, 60 (76).
38 *Ibid.* However, the *BVerfGE* does not rule out that a right for aliens to vote in communal elections, which had already been discussed at EC level, might be allowed through a constitutional amendment according to art. 79 Abs. 3 *Grundgesetz*.
In this connection, it may be noted that, following the rulings of *BVerfGE* 83, 37 and 83, 60 of 31 October 1990, a constitutional amendment was passed with the *Gesetz zur Änderung des Grundgesetzes* of 21 December 1992, which ruled that art. 28 should include the following principle: 'For district and communal elections, entitlement to vote and to be elected, in line with European Community law, shall also include persons having citizenship of a Member State of the European Community', BGBl. (1992), I, p. 2086.

State embodies the idea of citizenship as expression of *ius sanguinis*. This popular-democratic conception of democracy still corresponds, as Brun-Otto Bryde remarks,[39] to the sovereign national State of the nineteenth century. And the integration of broad strata of the population viewed as 'alien to the people' - from Catholics, to Socialists, to Jews - was impeded by this very conception, from the *Kaiserreich* onward.

Actually, it is very doubtful that the concept of people stated in art. 28 *Grundgesetz* can be interpreted as 'German people', since 'the representative bodies mentioned therein are chosen not by the German people, but by the populations of the region, the communes and the districts'.[40] Thus the democracy of the *Grundgesetz* appears to be a construction achieved from the bottom upwards, rather than a hierarchic polity legitimated by the whole people - that is, on the basis of the homogeneity of the people.

Indeed, the solemn declaration of fundamental rights in art. 1 *Grundgesetz* is the condition that enables a democracy without homogeneity: art. 4 allows religious non-homogeneity; art. 5 a cultural one; art. 3, clause 3 rejects discrimination and provides for the coexistence of individuals differing by birth, race, language, nationality, faith, and political or religious opinions[41] This interpretation is also confirmed by certain rulings of the first senate of the *BVerfG*, which proclaim 'the free self-determination of all' (*freie Selbstbestimmung aller*).[42] But the conception of citizenship centred on the *Abstammungsprinzip* stands as an insuperable obstacle to the achievement of this democracy without homogeneity.

To the contrary, the idea of a 'homogeneous democracy' is also affirmed in the 12 October 1993 ruling on the Maastricht Treaty of the second senate of the Constitutional Court. The Court stated that the legal bond of the European citizenship created by the Maastricht Treaty has not the same force as the citizenship of the national States.[43]

According to the ruling of the Constitutional Court, this European Citizenship depends on the reality of democracy, which is not a formal principle since it consists of a political process through which the people legally express what binds democracy from a spiritual, social and political point of view. In this connection, the Constitutional Court supports its argument with reference to the essay by H. Heller, Politische Demokratie und soziale Homogenität,[44] but it seems to me that the Court alters the meaning of the essay, since Heller actually rejects the foundation of democracy on the concept of nation.

Basing itself on the premises set forth, the Constitutional Court refuses the

[39] B.-O. Bryde, 'Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie', in *Staatswissenschaften und Staatspraxis*, no. 3 (1994), p. 323.

[40] *Ibid.*, p. 319.

[41] *Ibid.*, p. 322.

[42] *BVerfGE* 44, 125 (142); see also *BVerfGE*, 85 (147). On this point, see further Bryde, *op. cite.*, note 39, p. 322.

[43] *BVerfGE* 89, 155 (184).

[44] H. Heller, 'Politische Demokratie und soziale Homogenität', in *Gesammelte Schriften*, Vol. 2 (1971), pp. 421 ff.

hypothesis of the expansion of tasks and functions of the European Community, because this would weaken democracy at the level of the State. In a previous ruling of 22 October 1986, the Constitutional Court had affirmed that international law cannot supersede the identity of the constitutional order of the Federal Republic of Germany. In particular, it must respect the inviolable principles that underpin the German Fundamental Law and the section of it dealing with fundamental rights, especially in view of the fact that the European Community has no catalogue of fundamental rights.[45]

We can therefore say that in these rulings the contrast between the constitutional order of the national State and the Community law emerges very clearly. We can also observe the resistance to overcoming what may be called the idea of a 'national democracy'.

V. CITIZENSHIP AND LOYALTY TO THE STATE

As we have remarked, the idea of citizenship based on the *Abstammungsprinzip* is tantamount to the conception of a 'homogeneous democracy.' According to this principle, the concept of citizenship is expressed in German by *Staatsbürgerschaft*, i.e., 'active citizenship in the State', and by *Staatsangehörigkeit*, i.e., the concept of 'nationality'.[46] One is then, a citizen inasmuch as one 'belongs' to the national State. To put it briefly: it is the conditions of membership of the State, determined by birth, that underpin the possibility of a citizenship participating in shaping the political will.

German citizenship has its roots in a kind of 'ethnic pre-comprehension' (*ethnische Vorverständnis*)[47] - that is, in the idea of an ethnic homogeneity that renders the process of naturalisation difficult for aliens. In the right to citizenship - or, more precisely, in the honour of having been born of German origin - lie the roots of *Deutschtümelei* (the ostentation of that which is German). 'This denotes aliens,' writes Frankenberg using a deliberately provocative language, 'to bodies in which false blood circulates'[48](!). Access to the political community is made hard for aliens; if achieved, they are required to assimilate, to integrate in the German life conditions.[49]

The law on aliens of 1990 set in motion, though in an extremely cautious way, the process of *Einbürgerung*,[50] but laid down that an alien could be natural-

45 *BVerfGE* 73, 339 (377).

46 G. Frankenberg, 'Zur Alchimie von Recht und Fremdheit. Die Fremden als juridische Konstruktion', in F. Balke et al., *Schwierige Fremdheit. Über Integration und Ausgrenzung in Einwanderungsländern*, Frankfurt/M (1993), p. 48.

47 *Ibid.*, p. 48.

48 *Ibid.*, p. 49.

49 *Ibid.* G. Frankenberg remarks critically: 'The timeless myth of a community of stock... has hitherto prevented the right of citizenship and naturalisation from being raised to the level of a democratically conceived society', *Ibid.*, p. 50.

50 Art. 85 of the *Gesetz zur Neuregelung des Ausländerrechts* of 9 July 1990 admits the natu-

ised only if he gave up previous citizenship. In this perspective, the hypothesis of *Mehrstaatigkeit*,[51] membership of more than one state community, is openly rejected. This orientation also figures in the *Einbürgerungsrichtlinien* (criteria for naturalisation) of 15 December 1977, formulated jointly by the Ministry of Internal Affairs and the Ministry of Foreign Affairs, which states that a person requesting naturalisation must accept the principles of liberal and democratic ordering of the BRD.[52] Acceptance of the institutional conditions of the State thus represents a necessary criterion for granting 'membership of the State', on which depends the exercise of active citizenship.[53] This criterion clearly reveals the relation between the sovereignty of the State and citizenship, which makes it necessary to link the analysis of the concept of citizenship closely with the enquiry into the ongoing changes in the form of the State.

The significance of the concept of citizenship embodies the principle of loyalty to the State. In other words, the acknowledgement of a determinate legal order, from which it follows that the possibility of a dual or multiple nationality is destined to put in question the certainty of the law, to the extent that it may give rise to conflicts of loyalty.[54] Such was the opinion of the *BVerfG*,[55] which has also emphasised that multiple nationality is not desirable[56] and that, in any case, it should be considered an irregularity.

ralisation of aliens who make application between their 16th and 23th year of age and have completed 8 years habitual residence in the Republic. Art. 86 allows this for all aliens with ongoing residence in the BDR for 15 years, having no criminal convictions and able to provide for themselves and their family members; see BGBl. (1990), I, p. 1375. The *Ausländergesetz* was partly modified by the law of 28 October 1994 (BGBl. I, p. 3186). See the present formulation in *Verfassungs- und Verwaltungsgesetze*, *op. cite.*, p. 771 et seq. See also, Article 2 of the *Gesetz zur Änderung des Strafgesetzbuches, der Strafprozeßordnung und anderer Gesetze. (Verbrechensbekämpfungsgesetz).* For more in-depth treatment of these topics see the contribution by R. Hofmann to this volume.

51 U.K. Preuß recalls that international law has constantly aimed at reducing multiple nationality in order to avoid conflict between States, in U.K. Preuß, 'Zum verfassungstheoretischen Begriff des Staatsbürgers in der modernen Gesellschaft', in *Idem* (Hrsg.), *Staatsbürgerschaft und Zuwanderung*, ZERP-Diskussionspapier 5/93, Bremen (1993), p. 22.

52 'Einbürgerungsrichtlinien vom 15.12.1977', in W. Bergman and J. Korth, *Deutsches Staatsangehörigkeits- und Paßrecht*- 1. Halbband: *Staatsangehörigkeitsrecht*, Köln-Berlin-Bonn-Munich (1989), Anlage, p. 42. In this connection, see Grawert, *op. cite.*, note 28, p. 196.

53 Ibid., p. 195.

54 W. Löwer, *'Doppelte Staatsbürgerschaft als Gefahr für die Rechtssicherheit', in Doppelte Staatsbürgerschaft - ein euroäischer Normalfall?*, Staatsverwaltung für Soziales, (Berlin) 1992, p. 152-153.

55 The Constitutional Court has remarked that States require that the obligation of loyalty *(Treupflicht)* on the part of citizens be certain and not jeopardised by possible conflicts with loyalty to alien States.

56 The Constitutional Court takes the view that dual or multiple nationality is an evil *(Übel)* that must be attenuated or overcome as much in the interest of the State as in that of the citizens, in *BVerfGE* 37, 217 (254).

This stance of the Constitutional Court plainly reveals an explicit acknowledgement of the sovereignty of the State, but this is a statement of principle which increasingly runs counter to the reality of international relations.[57] For the BRD is a member the European Community and has underwritten several international treaties: with regard to this condition, as has been noted, it is not easy to state that aliens were not taken into account.[58] Citizenship, as a premise for rights granted by a political community, is destined to enter into increasing contrast with the universalism of rights - in other words, with the acknowledgement by international law of every human being's entitlement to rights.[59]

Thus, art. 1 of the International Convention on the Elimination of Every Form of Racial Discrimination of 21 December 1965 provides for the equal treatment of aliens with regard to fundamental liberties, irrespective of their 'national or ethnic origin'.[60] Moreover, the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 guarantees freedom of speech (art. 10), and of meeting and association (art. 11) to 'every person'.[61] These liberties, as R. Grawert remarks, are not granted to the *status activus*, but to all people. We have, then, a sort of de-nationalisation of citizenship.[62]

However, it is not merely the principles of international law, but also the creation of a labour market characterised by cross-border mobility, that exert a determining influence on the changes in citizenship. The number of marriages between mixed nationalities is increasing and, as a result of the equalisation of father and mother in the transmission of citizenship,[63] the acquisition of dual citizenship is becoming practically inevitable.[64]

57 On the crisis of sovereignty see L. Ferrajoli, *La sovranità nel mondo moderno*, Milano (1995).

58 Frankenberg, *op. cite.*, note 46, p. 51.

59 See L. Ferrajoli, *Oltre la sovranità e la cittadinanza. Un costituzionalismo mondiale.* 17th IVR Congress, Bologna (1995). Ferrajoli stresses how, for the moment, the growth of a new world constitutionalism still remains at the legal-normative level and how, at present, there are no effective guarantees to assure rights established at international level. See also E. Denninger, *Der gebändigte Leviathan*, Baden-Baden (1990). However, Denninger emphasizes the persisting force of the sovereignty of the State, *Ibid.*, p. 265.

60 See the International Convention on the Elimination of Every Form of Racial Discrimination (New York, 21 December 1965), in E. Vitta and V. Grementieri, *Codice degli Atti internazionali sui diritti dell'uomo*, Milano (1981), pp. 280-282.

61 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), in Vitta and Grementieri, *op. cite.*, note 60, pp. 718-720. It should also be remarked that, following World War II, the international protection of human rights has entered a stage of increasing *regionalisation* and *specialisation*. Consider, for example, the American Convention on Human Rights of 1969, which introduced the rights of the family (art. 17), the right to a name (art. 18) and children's rights (art. 19). In this connection, see Denninger, *op. cite.*, note 59, p. 260.

62 Grawert, *op. cite.*, note 28, p. 199.

63 See note 26, *supra*.

64 Löwer, *op. cite.*, note 54, p. 152. At international level, the phenomenon of dual or multiple nationality is tending to spread, above all where the States of origin are eager for remittances by their migrants and facilitate dual nationality or have introduced the right

These changes can probably be adduced as the source of recent legislation in which a rigidly nationalistic basis for citizenship was eschewed. These bills, presented in 1993 by the *Bundesrat*[65] *and by the parliamentary SPD in the Bundestag,*[66] *outlined the possibility that ius soli*[67] may be recognised alongside the *Abstammungsprinzip* and that the process of *Einbürgerung* may be facilitated above all by acceptance of *Mehrstaatigkeit.*[68] The sense of these proposed laws lies in the *extension* of the criteria admitted - the *ius soli* and the possibility of preserving one's previous citizenship - in order to obtain 'membership of the State' (*Staatsangehörigkeit*), as a condition of access to the political dimension of citizenship (*Staatsbürgerschaft*), i.e., to the enjoyment of *political rights.*

With regard, instead, to the exercise of *civil rights*, which in Germany are currently linked with the possession of citizenship, I maintain that certain of them (right to associate and to hold meetings) should be the property of 'every person' and therefore should not depend on the condition of citizenship.

In these newly proposed laws one may recognise adequate responses to the problems involved in the changes in citizenship in the present situation. But, for a full understanding of the sense of these changes, a brief review of certain essential moments in the history of the concept of citizenship is necessary.

VI. HISTORY OF THE CONCEPT OF CITIZENSHIP. THE DEMOCRATIC PRINCIPLE VERSUS THE AUTHORITY OF THE STATE

Art. 6 of the French Declaration of 1789 proclaimed that all men were equal under the law;[69] this equality was a right deriving from natural law. The rights of citizens were the rights of man reflected, inasmuch as they expressed the right to the preservation of natural rights. In sum, 'the citizen was a citizen and had the rights of a citizen because he was entitled to the universal rights of man'.[70]

However, not all people were entitled to take part in the political sphere. Suffice it to recall the successive changes in the constitution during the revol-

to a kind of 're-naturalisation' *(Wiedereinbürgerung)*. Thus, alongside the *Wohnbürgerschaft* in the host countries, this produces an *Auswandererbürgerschaft* (citizenship of migrants) in the countries of emigration; see R. Bauböck, *'Staatsbürgerschaft und Immigration'*, in Preuß, *op. cite.*, note 51, p. 50.

65 BT-D 12/5684.

66 BT-D 12/4533.

67 According to the projected law of the Bundesrat, art. 4 of the RuStAg should also incorporate the following principle: '4. A child obtains citizenship... 2. by birth where this law has validity, if at least one parent holds an unlimited residence permit... and both parents habitually reside where this law has validity...', in M. Wollenschläger and A. Schraml, *'Jus soli und Hinnahme von Mehrstaatigkeit'*, in ZRP (1994), no. 6, p. 225.

68 *Ibid.*, pp. 225 ff.

69 Art. 6: 'La loi est l'expression de la volonté generale... Elle doit être la même pour tous... Tous les citoyens étant égaux à ses yeux...'

70 Preuß, *op. cite.*, note 51, p. 24.

utionary decade in France, from 1789 to 1799: for example, the census criteria introduced by the Constitution of 1791. The contrast is immediately made plain between the *universalism* of the rights of man - upon which the concept of citizenship was originally grounded - and the constitutional provisions made for the exercise of political role on the part of citizens. Also in Kant, who declared his 'enthusiasm' for the French Revolution, the concept of citizen *(Bürger or Staatsbürger as against Bourgeois)* referred only to those endowed with 'independence' *(Selbständigkeit)*,[71] i.e., persons enjoying property or education.

In Germany, the concept of *Staatsbürger* was introduced at the end of the eighteenth century. It was used in 1789 by Wieland and acquired a meaning similar to the French term *citoyen*.[72] With the advent of the constitutional era, the word *Staatsbürger* took on the meaning it has preserved till now: it denoted, as Weinacht says, one belonging to the territory of the *Land*, who claimed his own rights in constitutional awareness and who lived under the laws of the State in a condition of equality with everyone else.[73] From Kant's perspective, the concept of *Staatsbürgerschaft* marked the dividing line between those having the qualities for entitlement to political power and all the other members of the State (the other *subjects*).

The nineteenth century, on the contrary, featured a gradual suppression of the social exclusiveness of the status of citizen, inasmuch as the criteria that underpinned the *status* of citizen - linked with property, education, age and sex - were little by little eliminated.[74] This also meant that the twin principles of *Staatsangehörigkeit* and *Staatsbürgerschaft* , i.e., the principle of authority of the State and democratic authority, came into open conflict.[75]

The concept of citizen has become increasingly inclusive, but has certainly not been identified with the concept of 'man'.[76] The democratic principle has in-

71 I. Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* (1793), Frankfurt/M (1992), p. 46.

72 See P.-L Weinacht, 'Staatsbürger. Zur Geschichte und Kritik eines politischen Begriffs', in Vol. 8 *Der Staat* (1969), p. 42. In this connection, see M. Riedel, 'Bürger, Staatsbürger, Bürgertum', in O. Brunner, W. Conze and R. Koselleck, *Geschichtliche Grundbegriffe*, Bd. 1, Stuttgart (1972), p. 691. *Bürger*, instead, meant the city-dweller, whose private and public legal status depended on his relationship with the city corporation, *Ibid.*, p. 704.

73 Weinacht, *op. cite.*, note 72, p. 57. In this connection see, for example, the Constitution of Bavaria of 26 May 1818, which contains the expression 'selbstständiger Staatsbürger' (Titel VI, 12), in E.R. Huber, *Dokumente zur deutschen Verfassungsgeschichte*, Bd. I, Stuttgart-Berlin-Köln-Mainz 1978, p. 165. But these documents of the *Vormärz* attempted to bring together, in the figure of the *Staatsbürger*, both the subject *(Untertan)* and the citizen *(Bürger)* who was conscious of the new constitutional situation: see Weinacht, *op. cite.*, note 72, p. 58. On this point, see Titel X, 3 of the Constitution of Bavaria, which states: 'All citizens *(Staatsbürger)* are bound to take the following oath: 'I swear to be loyal to the king, to obey the law and to respect the consitution of the State...',' in Huber, *op. cite.*, p. 170.

74 Preuß, *op. cite.*, note 51, p. 26.

75 *Ibid.*, p. 29.

76 *Ibid.*, p. 31.

deed broken down the barriers of economic condition or social status for the exercise of active citizenship (that is, of *Staatsbürgerschaft*), but the sovereign power of the State determines the criteria of *Staatsangehörigkeit*, according to which the boundary lines between citizens and aliens are determined and access to full citizenship is rendered possible.

There thus emerges once again, the tension inherent in the concept of citizenship between its *political* and *social* dimensions. This tension now appears reversed with respect to the last century: whereas in the nineteenth century people were precluded from citizenship in virtue of social marginality, at the end of the twentieth century, the denial of membership of the State may also lead to a condition of social deprivation.[77] In this sense, as has been remarked, citizenship is not merely a legal status but also a 'social good' (*soziales Gut*) which represents a means of access to the life possibilities of the industrial societies.[78]

Following a sort of analytical *deconstruction* of the concept of citizenship, we thus reach the premises upon which to commence a *reconstruction* of this concept, with reference to the ongoing debate in Germany.

VII. THE SOCIETY OF CITIZENS

The concept of citizenship may be seen as embodying three dimensions: a) that of *nationality*, i.e. of membership of the State community; b) that of *Staatsbürgerschaft*, understood as active participation in the *political life* of a society; and c) the dimension of participation in the life of 'civil society'.[79] This last dimension is one for which German constitutional tradition provides no adequate concept.[80] But it is this last meaning of the concept of citizenship that would now appear to impose itself.

Whereas the society that emerged from the revolutionary period at the end of the eighteenth century - the *Staatsbürger* society - was characterised by the contrast of social inequality and political equality, contemporary society seems, on the contrary, to feature an extension of *egalitarian principles*, that govern the participation of citizens in the political and socio-economic spheres. According to Preuß, this tendency corresponds to the transformation of the *Staatsbürger* (citizen of the State) into a *Gesellschaftsbürger* (citizen of society) and to that of the

77 *Ibid.*, p. 37.

78 U.K. Preuß, 'Zum verfassungstheoretischen Begriff des Bürgers in der modernen Gesellschaft', in H. Däubler, Gmelin, K., Kinkel et al. (Hrsg.von), *Gegenrede. Aufklärung - Kritik - Öffentlichkeit*. Festschrift für Ernst Gottfried Mahrenholz, Baden-Baden (1994), p. 620.

79 Preuß, *op. cite.*, note 78, p. 21. On the renewal of the debate on the concept of 'civil society', see especially, in the abundant literature, J.L. Cohen and A. Arato, *Civil Society and Political Theory*, Cambridge, Mass. and London (1992) and K. Michalski (Hrsg. von), *Europa und die Civil Society*, Stuttgart (1991).

80 U.K. Preuß, 'Brauchen wir eine neue Verfassung?', in B. Guggenberger, U.K. Preuß and W. Ullmann (Hrsg. von), *Eine Verfassung für Deutschland. Manifest Text Plädoyers*, Munich-Vienna (1991), p. 15.

staatsbürgerliche Gesellschaft into a *Bürgergesellschaft* (society of citizens).[81]

This society, which takes its place alongside the political sphere of the citizen, can be glimpsed in the forms of co-determination (*Mitbestimmung*) within the economic enterprise, which was originally thought to be inaccessible to the democratic principle, or in the subjection of economic relations to criteria of ecological, ethical and social responsibility.[82]

These transformations are also recognised in the rulings of the *BVerfG*. Consider, for example, the ruling on the right to free choice of profession (art. 12 *Grundgesetz*). On this point, the Constitutional Court acknowledges the need for the State to intervene in the training stage (*Ausbildungswesen*) - seen as an essential condition for a free choice of profession[83] - with the aim of redressing the unequal distribution of the market.

Citizens' rights are no longer confined to the political sphere of the State alone; they also affect the private relationships of society. They are no longer merely rights of protection versus the authority of the State, but also with respect to the manifold forms of power inherent in social relations. Here we have a *politicisation* of society. In the light of this politicisation, the obsolescence of the concept of *Staatsbürger* may be said to loom large: it belongs, in fact, to the doctrine of the *Rechtsstaat* of the nineteenth century. Since it was formulated as a concept expressing the relationships of the State sphere as separate from those of civil society, it turns out to be a fictitious political concept,[84] inasmuch as the reality to which it refers is still that of the last century.

With respect to this configuration of social relations - that is, the representation of individuals as members of definite groups - a distinction can be drawn between *primary rights*, belonging to persons *qua* persons, and *secondary rights*, belonging to the citizen as member of a community and enabling the effective safeguard of primary rights.[85]

The outline, then, emerges of a new political model based on the representation of a social pluralism that is quite different from the idea of pluralism as social organisations competing for political power. In this model, the identity of individuals is achieved no longer exclusively on the basis of membership of the national State, but rather because the individuals belong to definite communities that regularly 'require of their members obligations of loyalty that compete with

81 U.K. Preuß, *Revolution, Fortschritt und Verfassung. Zu einem neuen Verfassungsverständnis*, Erweiterte Neueausgabe, Frankfurt/M (1994), pp. 141 ff.

82 *Ibid.*, p. 145.

83 *BVerfGE* 33, 303 (330-331). In the ruling we find, 'The more the modern State addresses social security and the educational promotion of the citizen *(Bürger)*, the more clearly the complementary requirement for a guaranteed benefit from State intervention must be manifest in the relation between citizen and State, alongside the original postulate of a fundamental right to guarantee of liberty versus the State.' *Ibid.* The ruling also states: 'Entitlement to benefit from State intervention is, by the same token, a necessary premise for the exercise of fundamental rights', *Ibid.*, p. 332.

84 Weinacht, *op. cite.*, note 72, p. 63.

85 Preuß, *op. cite.*, note 81, p. 168.

those of the egalitarian-universalistic nation and not infrequently conflict with these'.[86] The political sphere of the *Staatsbürger* has split into a number of social realities, for which an adequate concept of 'political' is lacking: 'the *Bürgergesellschaft* could be this concept', says Preuß.[87] In this 'society of citizens' the idea of citizen no longer rests on nationality, i.e. membership-of-the-State, but rather on membership-of-society and the manifold definite communities of which it consists.

This significant turning-point demands a reworking of the theory of contemporary constitutional democracy. With respect to the theories of democracy developed in the first decades of this century - e.g. the important version of Kelsen - the idea of *Bürgergesellschaft* enables the essence of democracy to be identified, not so much in the guarantee of rights of political minorities and in the compromise between them - to use Kelsen's well-known terminology - as in the guarantee of rights of ethnic, linguistic and cultural minorities and in their mutual acknowledgement.

Here, I think a new and significant relation between citizenship and democracy can be identified: democracy should be grounded on an idea of citizenship that embodies not only participation in the political sphere of the State but also the protection of the various cultural identities on the basis of common membership of one and the same social reality. This conception of democracy can impose itself only if the idea of national citizenship based on the *Abstammungsprinzip* is overcome.[88]

The project for a constitution presented by the *Kuratorium für einen demokratisch verfaßten Bund deutscher Länder*[89] of June 1991 includes an article (Art. 16a) that states, 'Ethnic minorities residing in the territory of the Bund are guaranteed the right to preservation and protection (*Pflege*) of their cultural specificities and of their language'.[90]

This article can only be rendered feasible by a new concept of citizenship: a concept expressed by the principle of mutual recognition of citizens as equals.[91]

86 *Ibid.*, p. 169.

87 *Ibid.*, p. 170. For a discussion of the concept of *Bürgergesellschaft* see I. Staff, 'Überlegungen zur Neukonstituierung einer Bürgergesellschaft', in Vol. 8 *Blätter für deutsche und internationale Politik* (1993), pp. 917 ff.

88 The end of 'national citizenship' necessarily involves - as Habermas has argued - the end of the 'national State' *(Nationalstaat)*: see J. Habermas, *Die Normalität einer Berliner Republik*, Frankfurt/M (1995), pp. 167 ff. This topic is the subject of a very lively debate in Germany. An opposite position to that of Habermas is taken by E.W. Böckenförde, who stresses the centrality of the idea of nation conceived as community determined by its own origin *(Abstammung)* and its own language. Böckenförde's argument is given in R. Schostack, *'Ein einig Volk aus was für Brüdern?'*, FAZ, 9 May 1995, p. 39.

89 Council for a Democratic Federation of German Länder.

90 Guggenberger et al., *op. cite.*, note 80, p. 128.

91 In the Verfassungsentwurf of the Kuratorium it is stated: 'All persons mutually recognise each other as equal in their dignity' (Art. 1 Abs. 1). The reference is not to equality, but rather to the equal dignity of all persons. Moreover, not only must the State recognise the equal dignity of persons, but each person acknowledges this in relation with all

According to this principle, citizens should be vectors of an equality that would stem, not so much from common ties of blood, as from common participation in the search for common solutions to common problems.[92] This concept definitively transcends the idea of an 'ineluctable community of destiny' (*unentrinnbare Schicksalsgemeinschaft*[93]) inherent in the historical mythology of the German national State.[94]

Further, this new concept of citizenship tends towards a limit at which the physical and social membership of a community can coincide.[95] Its constituent elements should be: a) the principle of *ius soli* (over and above the *Abstammungsprinzip*); b) the possibility of dual (multiple) citizenship, and c) the protection and implementation of the different cultural identities. But what *foundation* should be supplied for this conception of citizenship as something no longer 'nationalistic' - fitted to the pluralistic and culturally composite reality of contemporary democracy - proclaimed by the 'constitutional movement' which has found expression in the constitutions of the new *Länder*, in the work of the *Gemeinsame Verfassungskommission* and in the proposals for revising the constitution?

In order to reply to this question, my concluding remarks must transcend the juridical-doctrine and political-theory approach for the area of philosophy of law, where much research remains to be completed.

VIII. CITIZENSHIP AND HUMAN RIGHTS

Let us briefly review the history of the concept of citizenship. We have seen how, in the revolutionary period of the late eighteenth century, it was based on the 'rights of man', but also how this *universalist* content of citizenship[96] was ascribed, in the different constitutional realities, to a precise political class to whom the function of governing belonged. This tension between the *natural* rights of man and their reduction to the *positive* rights of citizenship persists even today, although in a different form, inasmuch as a whole series of fundamental rights, as we have seen, belongs solely to citizens of German nationality.

The German Fundamental Law of 1949 enshrines 'human rights' alongside 'fundamental rights', which are the traditional rights of liberty positivised. Hu-

others. See *'Denkschrift zum Verfassungsentwurf'*, in Guggenberger et al., *op. cite.*, note 80, p. 43.

92 Preuß, *op. cite.*, note 80, p. 15.

93 The expression is J. Isensee's, in *Veröffentlichungen der Vereiningung der Deutschen Staatsrechtslehrer*, note 32, (1973), pp. 58 ff.

94 Rittstieg, *op. cite.*, note 27, p. 1386.

95 Preuß, *op. cite.*, note 51, p. 37.

96 This universalism re-emerges in the Universal Declaration of the Human Rights of 1948 in art. 15, where it states: 'Every individual has the right to citizenship', in Vitta and Grementieri, *op. cite.*, note 60, p. 36.

man rights, upon which the dignity of the person is based,[97] are expressly mentioned in art. 1, clause 2 of the *Grundgesetz*. In the debate for the constitution these rights were conceived as a sort of 'positivised order of natural law' (*positivierte Naturrechtsordnung*).[98] However, the German constituent assembly, not content with ill-defined *Menschenrechte*, elected to affirm their protection through the *Grundrechte*, judicially positive and capable of being translated into legal practice.[99] In this relationship between natural law and positive law, a *normative* and *programmatic* character was attributed to human rights.

Some years ago, in a comment on art. 1, clause 1 of the *Grundgesetz* - referring to the inviolability of human dignity - Adalbert Podlech pointed out how the conditions of human dignity, as grounded on human rights, included equality before the law, and noted how the upholding of dignity was incompatible with the fact that women and men born abroad remain in a state of legal inferiority.[100] Furthermore, the upholding of dignity also embodies the safeguarding of human *identity* - that is, the possibility for all persons to preserve their own ethical-cultural self-representation. Deprivation of certain civil rights linked with citizenship undoubtedly conflicts with the protection of the person's identity. In the evolution of present-day pluralistic society awareness of this becomes all the sharper.

In virtue of these considerations, it seems hard to maintain that only the citizen can rely on certain civil rights (e.g. right of holding meetings and of association), as is the case in Germany today. They must be the property of all persons, as has been repeatedly proposed.[101]

The point is then: a) on the one hand, to extend the meaning of 'human rights' - that is, to transform into human rights those civil rights still reserved for citizens, such as the right to hold meetings and to associate in Germany, or the right of free movement and residence in Italy; and b) on the other hand, to broaden the concept of citizenship beyond the limits of nationality, according to the criteria set forth above.

However, this conclusion does not imply that citizenship should be brought back to an ahistorical right of man, for this would lead to an unsustainable identification of 'citizen' with 'human being'.[102] The distinction between human

97 See A. Podlech, Art. 1 Abs. 1, in *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland*, Bd. 1, Luchterhand (1989), p. 203. Podlech refers to the debate in the *Parlamentarischer Rat*.

98 Denninger, Art. 1, Abs. 2, 3, in *op. cite.*, p. 229. On the debate in the Parliamentary Council see K.B. von Doemming, R.W. Füsslein and W. Matz, 'Entstehungsgeschichte der Artikel des Grundgesetzes' in *Jahrbuch des öffentlichen Rechts der Gegenwart*, Neue Folge/Band 1 (1951), p. 41.

99 Denninger, *op. cite.*, note 98, p. 230.

100 Podlech, *op. cite.*, note 97, p. 210. On equality before the law as an expression of human dignity see *BVerfGE* 5, 85, 205.

101 Guggenberger et al., *op. cite.*, note 80, p. 42.

102 See U.K. Preuß, 'Citizenship and Identity: Aspects of a Political Theory of Citizenship', in R. Bellamy, V. Bufacchi and D. Castiglione (eds.), *Democracy and Constitutional Cul-*

rights and citizens' rights must therefore be preserved.

To be a citizen means to be involved in precise social and political relationships. The idea of citizenship needs thus to be *relativised* - that is, to be retraced to the different social and political communities to which each individual may belong. Every community is based on a common understanding of the rights and duties by which it is underpinned. The citizen of that community is the individual who shares, not so much the ties of blood, as that common understanding:[103] here then, is the basis for citizenship in the sense of a mutual acknowledgement of citizens as equals.

This 'mutual acknowledgement' needs to be more precisely specified, as Habermas has remarked, since it may produce two distinct levels of integration:

a. political integration, i.e. support for the constitutional principles of a given legal system;
b. ethical integration of groups and subcultures, i.e. support for the ethical orientation of a particular form of cultural life.[104]

IX. CONCLUSIONS

Some concluding arguments can be drawn from the foregoing analysis:

First, ethnic and cultural minorities can be asked to lend support only for the constitutional principles of the new community to which they belong, but certainly not to assume the ethical-cultural principles of life of that community, for, as Habermas warns, this would entail losing their own collective identity. Thus, the requirement is for the mutual co-existence of the different cultures, not for their integration.

Support for constitutional principles and mutual acceptance of the different cultures imply 'that, in complex societies, the body of citizens can no longer be held together by a substantial consensus on values, but only by a *consensus on the procedures* by means of which law is legitimately established and authority is exercised'.[105] In the same perspective as Habermas, Dworkin identifies three principles of so-called communitary (*gemeinschaftlich*) democracy: participation, equal consideration for the interests of all members, and independence of their moral judgment.[106] The second and third of these principles reinforce the protection of the group's identity. The principle of participation, in-

ture, London (1995), p. 117.

103 Preuß, *op. cite.*, note 102, p. 117.

104 J. Habermas, 'Lotte per il riconoscimento' nello Stato democratico di diritto', in *Ragion Pratica* (1993), n. 3, pp. 157-158.

105 *Ibid.*, p. 155 (my italics).

106 R. Dworkin, 'Gleichheit, Demokratie und die Verfassung: Wir, as Volk und die Richter', in U.K. Preuß (ed.), *Zum Begriff der Verfassung*, Frankfurt/M (1994), pp. 192 ff.

stead, is based on common acceptance of the legal order and contributes to shaping the awareness of a common membership.[107]

Second, in the context of the politics of law, *special norms* must also be introduced for ethnic and cultural minorities[108] or, as is the case in German private international law, account must also be taken, in the ambit of the law applicable (*Verweisungsrecht*). For example, within the framework of the legal order of the host country, the rules of other judicial systems are taken as given (*als 'datum'*).[109] These methods lend themselves to the protection of the person's cultural identity.[110] It must, however, be noted that the protection of a *social*

[107] E. Denninger, 'Der Einzelne und das allgemeine Gesetz', in Vol. 28 *Kritische Justiz* (1995), note 4, p. 436.

[108] In this connection it may be recalled that the doctrine has proposed the formulation of a code of family law that shall be valid for persons residing in Europe and belonging to the Islamic religion: see B. Menhofer, 'Islamisches Recht in westlichen Staaten', in *IPRax* (1990), note 6, p. 420. See also A. Facchi, *'Sovranità e migrazioni'*, Atti del XIX Congresso nazionale di Filosofia del diritto su Crisi e metamorfosi della sovranità, Trento 29 and 30 September 1994. On this problem, see further F. Belvisi, 'La crisi dell'universalismo giuridico come conseguenza del rapporto tra diritto e cultura', in *Diritto, cultura e libertà. Convegno dedicato alla memoria di R. Treves*, Milano, 13-15 October 1994.

[109] See E. Jayme, 'Diritto di famiglia: società multiculturale e nuovi sviluppi del diritto internazionale privato', in Vol. 39 *Rivista di diritto internazionale privato e processuale* (1993), p. 301. Jayme refers to the international-private theory of the two stages or two levels or two steps *(Die zweistufige Theorie des internationalen Privatrechts)*: 'The theory has been developed in Germany on the basis of American theories. The first step is to resolve a conflict of laws by appealing to one of the laws in conflict. The second step leads to taking account of, as given, of the law set aside, in the integration of the substantial law to which appeal was initially made.' *Ibid.* In this connection see also E. Jayme, 'Versorgungsausgleich mit Auslandsberührung und Theorie des internationalen Privatrechts', in H.F. Zacher (Hrsg. von), *Der Versorgungausgleich im internationalen Vergleich und in der zwischenstaatlichen Praxis*, Berlin (1985), pp. 424-425.

[110] Cultural liberty is recognised by the *Grundgesetz* as a fundamental right belonging to 'all persons' (art. 3, clauses 2 and 3), just as freedom of opinion (art. 5), freedom of belief and conscience (art. 4) and freedom to develop one's own personality (art. 2,1) are guaranteed to all. I. Richter remarks that the conception one may deduce from the *Grundgesetz* is incompatible both with the idea of State-of-culture *(Kulturstaat)*, based on the unity of State and culture, and with the doctrine of integration of R. Smend (which has deeply influenced the rulings of the *BVerfG*), inasmuch as it represents a pluralistic, but at the same time 'integrationist', model; see I. Richter, 'Verfassungsfragen multikulturellen Gesellschaften', in Däubler-Gmelin et al., *op. cite.*, note 78, p. 642.
I am of the opinion, however, that the rights in which the cultural liberty of the individual is expressed are guaranteed by the *Grundgesetz* only in principle, since the full exercise of this liberty is hindered by the reliance of civil and political rights on a persistently nationalistic conception of citizenship, as is currently the case in Germany. Thus, the idea of a national citizenship stands as an insuperable obstacle to the full enjoyment of the fundamental rights in which every person's cultural liberty is enshrined. The affirmation of the equal dignity of individuals belonging to the majority culture and the minority cultures can only be enabled by a conception of citizenship founded on mutual recognition and equal possibilities of promoting the different cultural realities.

group's cultural identity cannot be extended to the point where it runs counter to the essential content of human rights belonging to each *individual person*.

Lastly, there must be awareness that this mutual acknowledgement does not entail treating 'the equal in an equal way and the unequal in an unequal way', but rather that the difference in treatment must aim at promoting equality - in other words, at the attainment of an effective equality.[111]

Here, as also in the foregoing remarks on the political implications of citizenship, one may recognise certain useful elements for building an adequate theory of contemporary constitutional democracy.

[111] See C. MacKinnon, 'Auf dem Weg zu einer neuen Theorie der Gleichheit', in Vol. 77 *KritV* (1994), p. 373. As MacKinnon says, difference cannot justify inequality: *Ibid.*, pp. 367 ff.

CHAPTER XVIII
CITIZENSHIP BEYOND THE NATIONAL STATE? THE TRANSNATIONAL CITIZENSHIP OF THE EUROPEAN UNION

Joseph Marko

I. ON MEMBERSHIP AND RIGHTS

Under the Treaty on European Union[1] the new Article 8 of the EC Treaty establishes a citizenship of the Union. Thus, every person holding the nationality of a Member State shall (also) be a citizen of the Union. Articles 8a and 8b then grant certain rights derived from citizenship of the Union. In our context, three of these rights are particularly of special importance: Article 8a prescribes that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States; Article 8b guarantees to every citizen of the Union residing in a Member State of which he is not a national two specific political rights, namely, the right to vote and to stand as a candidate at municipal elections and to the European Parliament in the respective Member State.

Why are these rights so peculiar ? The right to move and to reside freely within the territory of the Member States requires a notion which is not self-evident for the assessment of the Member States as nation-states since it is no longer their ultimate power or 'sovereign' right to decide freely who is allowed to enter their territory and to stay there. In the traditional concept of the nation-state, however, this power is precisely one of the basic political decisions or core rights for the definition as a 'state.' Why ? As long as the state ought to be sovereign in order to 'be' a state, it must have the 'exclusive' power to exclude in order to remain the 'master' over its territory and its population. In the traditional concept of the nation-state, rights are connected then with membership so that 'nationality' *(Staatsangehörigkeit)* becomes a necessary requirement or even precondition for the 'citizenship' *(Staatsbürgerschaft)* of individuals in the sense of a bundle of rights they enjoy.

Hence, the question of who is able to decide on 'nationality' and the rights derived from it, is not only an essential question for the theoretical construction of political systems as such, but also for the model of their mutual relationship.

A political system is entirely closed, if membership is defined by so-called 'ascriptive' criteria like kinship, descent, race, etc. These criteria allow then for in-

[1] *Official Journal* C 224/1992.

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 369-385.

clusion and exclusion in terms of both membership and rights. This is the concept of the ethno-national state: a community of people is 'ethnically' defined by such ascriptive criteria as a nation which, after the nationality principle of one state for one people, forms its national state. The same ascriptive criteria and their so-called 'commonness' among people are decisive for both membership in the community and the granting of rights. Only people with the same characteristics are included into the community and thus granted the rights by the state, whereas all 'others' are excluded from membership and thus the specific citizenship rights. The legal instrument based on this code is *ius sanguinis.*

A political system, on the other hand, is entirely open if the state can no longer (via membership) determine the attribution of rights and duties in force in a given territory, and the individual can freely choose his residence and thus, the rights and duties to which he will be subject. Nevertheless, the distinction of membership and rights remains essential insofar as this is a necessary requirement to maintain system differentiation as such. But the boundaries, both in a territorial and symbolic sense, become permeable and relational and the individual no longer has to give up his language, religion, cultural heritage or the like in order to be accepted as a (legal) person. In a close approximation to this ideal type, French citizenship, under the Jacobin constitution of 1793, was granted to all 'foreigners' residing in France for at least one year.[2]

The alternative to these two models is not the anarchist solution of abolishing the 'state', but instead is the basic choice between an open-minded, inclusive human rights approach and a closed-minded, exclusive ethno-national approach in construing system differentiation. This alternative, however, must not be confused with the distinction of *ius sanguinis* and *ius soli,* which are both legal instruments of the same aspect, namely gaining access to rights via membership in a given community. The 'true' alternative thus, is rights conferred upon the individual by the state via membership and rights which are granted without membership-based on the person's free choice of where to reside.

Even if these constructive elements are closely intertwined in all naturalisation laws,[3] the element of membership, referred to as nationality, must be distinguished from the element of citizenship and its participatory function which is not necessarily limited to a 'state'. Only under the ethno-national concept of a 'pluriverse of nations,' i.e., the seemingly 'natural order' of the 'existence' of different peoples and different countries in terms of political entities which expressly excludes the 'universalist' notion of one 'mankind' as the point of reference for the construction of rights, is membership in a state the necessary requirement for the guarantee of rights so that the binary code of human rights and citizenship rights (and thus, legally institutionalised inequality) can be legitimised.

Hence nationality and not citizenship, is the code for inclusion or exclusion

2 G. Franz (ed.), *Staatsverfassungen*, Munich (1950) p. 355.

3 G.R. de Groot, *Staatsangehörigkeitsrecht im Wandel. Eine rechtsvergleichende Studie über Erwerbs- und Verlustgründe der Staatsangehörigkeit*, Cologne (1989).

which, by distinguishing members from non-members, nationals from 'aliens', constitutes the category of a 'people' as the personal element of the state. Therefore, the primary political function of the concept of nationality is the construction of 'difference' and, based on that category, the exclusion of individuals and groups from the rights which the nationals of the respective state enjoy. Exactly this can be seen from the 'invention' of nationality in Germany, when, after 1815, the thirty-nine German states used this concept as a legal instrument in order to exclude 'foreign' poor people from social benefits they enjoyed and, finally, to expel them from their territories.[4] The same ethno-national linkage of membership and rights became also the fate of the Jews. When they were, firstly, deprived of their rights as citizens, this obviously contradicted the principle of equality before the law. So they had to be deprived also of their nationality as members of the German people. Only then they were 'out-laws' (*vogelfrei* in Hannah Arendt's terms[5]) who could even 'legally' be sent to concentration camps for annihilation. This was and is the ultimate consequence of the ethno-national concept of citizenship.

From the ethno-national approach, based on the notion of autarky of the nation-state, membership of the individual in a certain state thus is an 'exclusively' enjoyed right so that, in the final analysis, every individual should belong to a certain state. The ultimate goal is not only to avoid statelessness, but also dual citizenship. Insofar as the ethno-national state not only grants rights via membership, but also requires loyalty as a legal duty, dual citizenship is thus contested not only for immigrants, but also for members of minority groups. However, as clearly remains to be seen, it is not dual citizenship per se which creates conflicts of loyalty, but the national state's claim for absolute loyalty which creates such conflicts.

Despite the fact, that social rights were-in the course of events connected with work migration during the last decades-extended in most states also to residents who were not nationals of the respective state, from the perspective of the ethno-national approach it is not conceivable to grant political rights, in particular to vote and to stand as a candidate, to individuals who are not members of the state. By conferring political rights upon foreigners, the function of exclusion, connected with the institution of membership, would no longer work to maintain the differentialist concept of the ethno-nation. If foreigners are granted the right to vote, the essence (*Wesensgehalt*-in order to use the dogmatic rhetoric of the German Basic Law-the *Grundgesetz*) of the differentialist concept of the national state is seriously affected.

This effect can be seen from two decisions of the German Constitutional Court concerning the right to vote at the municipal level, which was in the final

[4] R. Brubaker, *Citizenship and Nationhood in France and Germany*, Cambridge, Mass. (1992), in particular, pp. 50-72.

[5] H. Arendt, *Elemente und Ursprünge totaler Herrschaft*, Frankfurt/M. (1955), pp. 468 and 484.

analysis, found unconstitutional by the Court.[6] Two German *Länder,* Schleswig-Holstein and Hamburg, had adopted statutes providing the right to vote for foreigners at the municipal level. The complainants, all of them members of the CDU/CSU faction of the Bundestag, claimed that such a right to vote would not only violate Articles 20 and 28 of the *Grundgesetz*-guaranteeing the principle of democracy by 'federal homogeneity', but also the institutional safeguard of German nationality according to Article 16, par. 1 and Article 116 of the *Grundgesetz.* In order to substantiate their claim, the complainants equated the term 'people' of the principle of popular sovereignty with the 'German people' and argued that foreigners cannot be members of the German people. The notion of a people, according to the nationality laws, would be that of a political 'community of fate' *(Schicksalsgemeinschaft).* This existential solidarity would legitimise the fact that the right to vote is granted only to nationals insofar as they have to stand for the consequences of their decisions whereas foreigners could return to their home-country whenever they want. Moreover, the foreigners' right to vote would also violate the institutional safeguard of German nationality. Thus, if it were no longer necessary to be a national of the state in order to have the right to vote, the 'essence' of the legal institution of membership would be 'diminished' *(abgewertet).*

In defending the adopted statutes and dismissing these claims both Schleswig-Holstein and Hamburg, as *amici curiae,* referred to the democratic notion of the term 'popular sovereignty' and rejected the equation of the term 'people' with a German people. To the contrary they stressed, the model of democracy of the *Grundgesetz,* was founded on citizens, not on the 'collectivity' of a nation. This universalist concept would not allow the *Länder* to 'essentially' differentiate between *Staatsvolk* (body of citizens) and *Untertanenverband* (subjects). Hence, democracy requires that anyone who is subject to the laws of the state must also have a right to participate in the decision-making process.

In analysing this case, it is also important to note the different methodological approaches. Whereas the complainants used the essentialist fiction of a truly existing people in order to determine the 'substance' of the term 'popular sovereignty', the *amici curiae,* in arguing to uphold the statutes, referred to the political function of the electoral process, namely the legitimation of power, in order to interpret the term *Staatsvolk.* Seen this way, the very term *Staatsvolk* need not be identified with 'people' in the ethnic sense, but, depending on its function, may comprise a varying bulk of individuals. Thus, if subjected to the laws of a given state, even aliens or foreigners must be considered to be part of the *Staatsvolk.*[7] However, if the 'essence of democracy'[8] is participation in the decision-

[6] See the decision, *Wahlrecht für Ausländer bei den Gemeinde- und Kreiswahlen in Schleswig-Holstein and the decision, Wahlrecht für Ausländer zu den Bezirksversammlungen der Freien und Hansestadt Hamburg, Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* 83, 37-59 and 60-81.

[7] See, in particular, Hans Kelsen, *Allgemeine Staatslehre,* Berlin (1925), p. 160.

[8] I borrow the term from Hans Kelsen, *Vom Wesen und Wert der Demokratie* (2nd ed.),

making process, how is it possible to exclude a certain category of people in the very name of popular sovereignty ?

In the Constitutional Court's final analysis, this exclusion is achieved by transforming the principle of popular sovereignty into that of national sovereignty. Whereas the political function of popular sovereignty is the democratic legitimation of power, national sovereignty serves to postulate the unity of a 'nation' through differentiation. By equating these two principles the element and function of exclusion, inherent in the principle of national sovereignty, is transferred to popular sovereignty. This transfer however, requires an essentialist understanding of the term 'people' which can be connected with the element of membership of the state. Hence the *Staatsvolk* comprises only co-nationals as can be seen in the string of argumentation of the Court:

> It is not correct that the constitutional term people has changed its meaning through the evidently growing share of foreigners in the whole population of the federal territory. As a starting point, the democratic idea of a congruence of those who participate in the exercise of power and those who are subjected to it is certainly correct. However, this cannot dissolve the bond of being German and membership in the *Staatsvolk* as the ultimate source of power[9]

And the conclusion of the Court is:

> If, after the concept of the *Grundgesetz,* being German is the necessary condition for membership in the *Staatsvolk* as the ultimate source of power, then this quality is also a necessary requirement for the voting right through which, first of all, the people exercises its power.[10]

Thus the voting right no longer seems to be an individual right, but a collective right of the German people which is -- indirectly then -- exercised by the members of this collectivity. In this context-but only in this context, because of its exclusivity-the right of co-nationals to vote would be diminished indeed, if foreigners were granted voting rights.

II. NO POLITICAL UNION WITHOUT A 'PEOPLE'?

The same problem of a substantialised term 'people' was also raised by the German Constitutional Court in its ruling on the Maastricht Treaty[11] and by various German commentators in order to 'prove' that the European Union is not a federal state. Yet, why shouldn't the European Union be a 'state'? Insofar as an

Tubingen: Mohr (1929).

9 *BVerfGE* 83, p. 52 (my translations throughout).

10 *BVerfGE* 83, pp. 51-2.

11 *BVerfGE* 89, 155-178, *Europäische Grundrechtezeitschrift* (1993) pp. 429-446. For a short overview see also A. Oppenheimer, *The Relationship between European Community Law and National Law: The Cases*, Cambridge (1994), pp. 19-20.

inseparable link of the nation-state with sovereignty is pretended, the process of European integration is seen as a threat for the 'quality' or 'substance' of the Member States as states. Or in the wording of Paul Kirchhof, the judge *rapporteur* in the Maastricht case:

> A 'European Union' aims at a geographically limited European state (teileuropäischer Staat) in the being which degrades (herabstuft) the existing Member States to mere entities of the newly emerging state and thus abolishes their independence (Eigenständigkeit).[12]

However, the *Grundgesetz* would not permit the European state to threaten the quality of German statehood.

The Maastricht ruling of the Constitutional Court and the invention of the German term 'Staatenverbund'-namely a union which is neither confederation nor federal state, but something in between, a 'supra-national' set of institutions-must thus be understood to protect German statehood against the dynamics of European integration and the emergence of a new federal state. As one commentator, Bruno de Witte, has put it:

> Superficially, the Constitutional Court seems to be concerned above all with the need to protect fundamental rights and to guarantee the democratic nature of the European integration process. Yet, it is submitted that the 'hidden core' of the judgement is the wish to protect the sovereignty of the German state (emphasis in original).[13]

How then is the 'barrier' for the emergence of a European state created? In the Constitutional Court's ruling on the unconstitutionality of the foreigners' right to vote, the Court and other commentators take recourse to the substantialised idea of a people, this time the alleged necessity of a 'European people' which has to 'exist' in the literal sense in order to become the source of European power. Hence, the hypothesis established by Dieter Grimm, Paul Kirchhof, Peter Graf Kielmannsegg, Dimitris Tsatsos[14] and the Constitutional Court that the European Union requires a 'European people' in order to be a 'state' as such. But is 'unity' conceivable only on the basis of a given ethnic community so that not only social cohesion, but also political unity is created by the collectivity of the nation before the state comes into being? Is this the general course of European history as far as state-formation and nation-building are concerned?

12 P. Kirchhof, 'Der deutsche Staat im Prozeß der europäischen Integration', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Bd. VII, Heidelberg (1992), p. 858.

13 See B. de Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition', Vol. 2 *Maastricht Journal* (1995), p. 166.

14 See also D. Grimm, 'Braucht Europa eine Verfassung?', *Juristen-Zeitung* (1995), p. 585; P. Graf Kielmannsegg, 'Läßt sich die Europäische Gemeinschaft demokratisch verfassen?', *Europäische Rundschau* (1994), no. 2, p. 27; D-Th. Tsatsos, 'Die Europäische Unionsgrundordnung', *Europäische Grundrechtezeitschrift* (1995), p. 288.

A. State Formation and Nation-Building in Europe

The great German historian Theodor Schieder differentiated three phases and areas of nation-building in Europe.[15] During the first phase, monarchic absolutism in Western Europe had already levelled feudal *pouvoirs intermé-diaires* and created territorially concentrated and bureaucratically centralised nation-states that pretended to be ethnically indifferent. Their history on the other hand-if one thinks of the history of England and Wales, for instance[16]-was one of territorial expansion, ethnic suppression and assimilation at the same time. Political unity, therefore, existed in Western Europe before language nationalism became a mass phenomenon. The French Revolution's impact then was the democratisation of the *Ancien Régime* under the notion of people's sovereignty, thus revolutionising the inner order of the political system by changing the principle of legitimation for the exercise of political power. From a functional perspective, the 'peoples' of various political and legal documents such as the American Declaration of Independence and the French *Déclaration des droits de l´homme et du citoyen*, as well as the preambles of most constitutions are nothing else than an abstract category or 'personification' of the legitimation of political power and not a 'natural being'. Yet, keeping in mind the ethnic heterogeneity of France at that time, with more than 50% of the total population being unable to communicate in standard French-a fact which had been revealed by a report of Abbé Grégoire[17] for the National Convention-did something like a *peuple français* really exist?

During the second phase, in the course of the 19th century, nationalism served a rather different function in the different political settings of Central Europe. Unlike Great Britain or France there was no politically unified territory in Central Europe, but rather a conglomerate of small principalities, regions and cities, either fighting each other under existing feudal auspices for predominance or co-operating under exclusively economic terms. The nationalist principle of 'one state for one people'[18] thus performed a rather different function, namely,

[15] See T. Schieder, *Nationalismus und Nationalstaat. Studien zum nationalen Problem in Europa*. O. Dann and H-U. Wehler (eds.), Göttingen (1991). See also S.N. Eisenstadt, S. Rokkan, Vol. 2 *Building States and Nations*, Beverly Hills, London (1973); C. Tilly (ed.), *The Formation of National States in Western Europe*, Princeton (1975); R. Bendix, *Nation-building and Citizenship*, Berkeley (1977); L. Greenfeld, *Nationalism. Five Roads to Modernity*. Cambridge, Mass., London (1992); M. Teich and R. Porter (eds.), *The National Question in Europe in Historical Context*, Cambridge (1993).

[16] See, for instance, D. Jenkins, 'Law and Government in Wales before the Act of Union', in J.A. Andrews (ed.), *Welsh Studies in Public Law*, Cardiff (1970), pp. 7-29.

[17] Abbé Grégoire. 'Rapport sur la nécessité et les moyens d'anéantir les patois et d'universaliser l'usage de la langue française', reprinted in M. Certau et al., *Une politique de la langue. La Révolution française et les patois: l'enquête de Grégoire*, Paris (1975), pp. 291-317.

[18] See, for instance, the formulation by Johann Gottfried Herder, *Ideen zur Philosophie der Geschichte der Menschheit, Zweiter Theil*, Carlsruhe (1790), at p. 315:
Die Natur erzieht Familien; der natürlichste Staat ist also auch Ein Volk, mit Einem Nationalcharakter ... Nichts scheint also dem Zweck der Regierungen so offenbar entgegen, als

that of unification in order to create a strong nation-state after the French model-without its democratic implications, however. The creation of the German national-state and the unification of Italy are the respective examples. In terms of institutionalising legal principles, however, there was a shift from the normative principle of individual freedom and democratic internal structures – founded on the separation of state and society and the notion of human rights – to the political necessity and even obsession to form a strong union by creating a nationally conscious collective identity. The legal status of individuals was to be founded on their membership in a certain ethnically defined community. Thus, not individual freedom and universal human rights in the original American/French concept of an ethnically indifferent and 'open' society, but political unity and collective identity become the basic tenets of the Central European idea of a so-called *Volksnation*.[19] This concept of a 'closed nation' is exclusive insofar as individuals and their legal status are defined by allegedly 'common' ascriptive characteristics of the collectivity, in contrast to the American/French concept of ethnic indifference by transcending group affiliations on the basis of citizenship. Such seemingly 'objective' common markers like skin-colour, language, religion or cultural heritage in the *Volksnation* concept are therefore decisive for membership in the community in order to be treated equally, whereas 'others' can be excluded and treated 'differently'.

The third, Eastern European phase of nation-building at the end of the 19th century and the beginning of the 20th century is structurally determined by the multi-national empires in this region, namely, the Ottoman Empire, the Russian Empire, and the Habsburg dual-monarchy. The ethnic mobilisation of the smaller nationalities against the dominant Russians, Germans and Magyars within these multi-national empires first led to the political quest for various forms of autonomy and then for secession in order to create a nation-state of their own. Not unification, but separation by secession was the primary political goal. All Eastern European states, namely, Serbia, Montenegro, Greece, Bulgaria, Rumania, Czechoslovakia and the Baltic states were formed by secession in the course of the breakdown of these empires.

B. The 'Naturalisation of Difference'

So far I have used the terms 'nation', 'people' or 'ethnicity' without any further elaboration. When we speak of 'different' peoples, or 'ethnically mixed' territories in Bosnia, we usually do not reflect the underlying normative assumptions of these phrases. Insofar as the 'difference' of skin-colour or language seems to be self-evident, and the fact of Muslims, Croats and Serbs living together in the same villages of Bosnia had created 'visible' evidence of ethnically mixed territo-

die unnatürliche Vergrößerung der Staaten, die wilde Vermischung von Menschen=Gattungen und Nationen unter einem Scepter.

19 This term stems from a typology that was elaborated by M. Rainer Lepsius, *Interessen, Ideen und Institutionen*, Opladen (1990) in particular pp. 235-238.

ries, we tend to assume that these facts are simply 'empirical' or even, in some way, 'naturally' determined. This precise phenomenon is what I call the 'naturalisation of difference' as an epistemological trap or 'naturalist fallacy' which is contained for ideological purposes in various forms of racism and primordial theories of ethnicity.[20]

However, are all these 'visible' traits of a biologically determined difference of the skin-colour or the pluriverse of different peoples and nations so evidently 'natural' as they seem to be at first glance?

Whenever one tries to define terms such as nation, *Volk,* or ethnicity by so-called objective criteria such as 'common' language, history, culture or religion, one will always find examples of 'different' peoples in spite of the same language, such as Serbs and Croats, the English and American, or people, to put it very carefully, speaking different languages and yet building one nation, such as the Swiss. What is a nation then, but the will of the people to live together, or, as Ernest Renan has pointed out, *le plébiscite de tous les jours?* This so-called subjective definition of a nation makes quite obvious that a nation or *Volk* is not a collective 'being' living on a certain territory, but a term to characterise a certain way of behaviour.

Co-operation or conflict are then the basic patterns of behaviour everyone has to choose in various situations almost everyday. Nevertheless, many ideologies try to reduce human behaviour, especially that of groups, to one side of this alternative. Such a one-dimensional reductionism can be seen in the Marxist *Klassenkampf* or in the racist version of an Austrian political scientist, in Ludwig Gumplowicz's *Rassenkampf.* And long before Samuel Huntington's 'clash of civilisations' it was the German *Staatsrechtslehrer* Carl Schmitt who wanted to fix the 'essence of politics', as he called it, in an 'anthropological' dichotomy of *Freund und Feind,* of friend and foe.[21] However, one must not forget that various anarchist-socialist theoreticians do fairly the same when they 'naturalise' the other ideal type of behaviour, namely co-operation or solidarity as if this were the 'natural order' of society.

As can be seen from all of these examples, the 'naturalisation of difference'

20 Cf see my analysis of three forms of this very same process in J. Marko, *Autonomie und Integration. Rechtsinstitute des Nationalitätenrechts im funktionalen Vergleich,* Vienna (1995), pp. 56-108.

21 See C. Schmitt, *Der Begriff des Politischen,* Berlin (1963), pp. 27-28:
Der politische Feind braucht nicht moralisch böse, er braucht nicht ästhetisch häßlich zu sein;... Er ist eben der andere, der Fremde, und es genügt zu seinem Wesen, daß er in einem besonders intensiven Sinne existentiell etwas anderes und Fremdes ist. ... Die Begriffe Freund und Feind sind in ihrem konkreten existentiellen Sinn zu nehmen, nicht als Metaphern oder Symbole. ... Ob man es für verwerflich hält oder nicht und vielleicht einen atavistischen Rest barbarischer Zeiten darin findet, daß die Völker sich immer noch wirklich nach Freund und Feind gruppieren, oder hofft, die Unterscheidung werde eines Tages von der Erde verschwinden, ob es vielleicht gut und richtig ist, aus erzieherischen Gründen zu fingieren, daß es überhaupt keine Feinde mehr gibt, alles das kommt hier nicht in Betracht. Hier handelt es sich nicht um Fiktionen und Normativitäten, sondern um die seinsmäßige Wirklichkeit und die reale Möglichkeit der Unterscheidung.

almost inevitably leads to the notion of biologically or culturally determined social and political behaviour. However, as we have seen already in Schieder's historic model of nation-building in Europe, the dialectics of personal liberty and collective unity, the normative dichotomy of inclusion/exclusion, as well as an analysis of political functions instead of the search for ontological essence, provide the 'true' understanding for all of these phenomena. Of course, skin colour is an objective, even natural factor in itself. But first and above all, it is a normative decision to give exactly that factor relevance in social and political behaviour. In trying to define people or a nation by so-called objective cultural markers such as language or religious denomination, one first has to make the decision that one of these factors should be the 'common' characteristic to be found in a certain amount of people, thus constituting an abstract 'entity', a category, and not a group in the sociological sense. Thus, it is a normative notion, and not only an empirical fact, that characteristics people have in common constitute a nation or 'Volk' in the binary scheme of identity/difference. The alleged identity of 'common' characteristics is nothing else, therefore, than the normative concept of equality with the demand to treat people with the 'same' characteristics, the 'common' language, religion or citizenship equally.

Accordingly, 'ethnicity' is not an inherent, natural trait of people(s) or territories, but a 'social construction of reality'[22] with the political function of exclusion or inclusion. It is exactly the political function of nationalism as an ideology to transcend the functional prerequisites and social construction of epistemological as well as political order. By pretending natural characteristics, the social and political construction of an 'entity', the normative decision of inclusion or exclusion and the legitimation of power will be concealed with the effect that all of these normative implications of the social construction of reality are immunised against permanent critique. Nevertheless, as long as the dichotomy of identity/difference is not transformed into the triadic structure of identity-equality-difference, then this binary code provides also the legitimation for treating 'different' people simply differently, i.e., unequally. Only when we no longer believe in the essentialist or naturalised determination of social and political behaviour, and when we do not confuse identity with equality, do we approach the, at least theoretical, opportunity to look for institutional arrangements of equality on the basis of difference as an 'essential' task of constructive constitution-engineering.

C. Ideal Types of Group Accommodation

The foregoing considerations[23] provide the basis for a typology of group relations that is based on the epistemological binary code of unity/diversity and the normative binary code of equality/inequality in order to explain different forms of relations between ethnic groups:

[22] H. Heller, *Staatslehre 1934*, Neudruck: Aalen (1963).

[23] See, in more detail, Marko, *op. cite.*, note 20, pp. 164-171.

	Equality	Inequality
Unity	Integration	Assimilation
Diversity	Autonomy	Segregation

1. Segregation within a Given State or Society by Exclusion from a Community

Although the American Supreme Court did establish the doctrine of 'separate, but equal' in *Plessy* v. *Ferguson*[24] as a legitimising formula, equality as a value cannot be separated from open social structures and institutions. Or, the other way around: segregation is based on the conclusion that the difference vis-à-vis the out-group, being at the same time the identity of the in-group, can be maintained only by the organisational exclusion of the out-group. This, however, implies a value judgement stating that others are unequal and therefore need not be included. Even a 'paternalistic pluralism'[25] which wants to preserve the culture of minorities because of their 'essential' difference expresses an underlying value judgement of tolerance which implies inferiority assessments. In particular, indigenous peoples are assessed to be preserved in 'reservations' because of their alleged inability to form one social and political community with the majority because of their 'entirely different' culture. Thus Indians[26] and Inuit are not accepted as partners in a dialogue to construct one social 'world' that is inhabited by majority and minority.[27] Segregation based on power relations, however, is not only a problem of dominant majorities. If the quest for autonomy is based on some sort of 'opposition-nationalism', it leads quite probably to a tendency of ghettoization and segregation by minorities with all the problems of 'reverse discrimination' and the protection of minorities within minorities, as can be seen, for instance, with the native Indians and third language groups in Quebec or the Roma in Eastern Europe.

2. Segregation via Expulsion from a Community

Segregation may also lead to exclusion from a given state or society by expulsion from its territory, i.e., 'ethnic cleansing' as it is called nowadays. This is not a social invention of the 20th century. Pogroms against Jews or the forcible transfer of Protestants as well as Catholics in accordance with the principle *cuius regio, eius religio* do have a long historical record.

[24] One should note that this ruling was later overturned in *Brown* v. *Board of Education* (1954).

[25] See, in particular Adeno Addis, 'Individualism, Communitarianism, and the Rights of Ethnic Minorities', Vol. 66 *Notre Dame Law Review* (1991), pp. 1219-1285.

[26] See R. Strickland (ed.), *Felix S. Cohen's Handbook of Federal Indian Law*, Los Angeles (1982) and S.L. Pevar, *The Rights of Indians and Tribes* (2d ed.), Carbondale (1982).

[27] See also W. Kymlicka, 'Liberalism, Individualism, and Minority Rights', in A.C. Hutchinson and L.J.M. Green (eds.), *Law and the Community-The End of Individualism?*, Toronto (1989), pp. 181- 204.

3. Assimilation

This is just another way to negate the 'other', as ethnic groups have to give up their different cultural and/or political behaviour in order to be treated equally. Very often the cultural norms of the dominant majority are declared to be 'neutral' and 'universal' standards by the fictional identity of majority and 'normality', as Martha Minow has pointed out:

> If to be equal one must be the same, then to be different is to be unequal or even deviant. But any assignment of deviance must be made from the vantage point of some claimed normality: a position of equality implies a contrasting position used to draw the relationship-and it is a relationship not of equality and inequality but of superiority and inferiority.[28]

Hence, the price for political and legal equality is the loss of cultural identity. The separate existence of an ethnic group in terms of a specific collective identity is dissolved. And the boundary of racism may even be transgressed when assimilation, the functional equivalent of 'baptism', is refused by the dominant majority.

4. Autonomy and Integration

Hence, only autonomy and integration allow for the institutional organisation of equality based on the recognition of difference and thus a 'real' pluralist approach. As Minow has pointed out, different cultures and different behaviour need not be perceived any longer to be 'deviant' from an unstated norm[29] as a rule of the ethnic majority, but do constitute legitimate aims. The recognition of difference, therefore, is a necessary precondition for group formation and requires at the same time the institutionalisation of some autonomy. The politics of autonomy and integration, however, have to be kept in a careful equilibrium, as there is, as already pointed out above, a constant danger of assimilation or ghettoization of ethnic groups.

Thus, autonomy *and* integration are functional prerequisites for the maintenance of different ethnic groups as well as an ethnically pluralist social and political system as such. This approach has to be differentiated from pluralist melting-pot theories as well as from hegemonistic and/or imperialist theories. It can-

[28] See M. Minow, *Making All the Difference. Inclusion, Exclusion, and American Law*, Ithaca, London (1991), pp. 50-51.

[29] Minow, *ibid.*, pp. 50-51:

> Second, we typically adopt an unstated point of reference when assessing others. It is from the point of reference of this norm that we determine who is different and who is normal. The hearing-impaired student is different in comparison to the norm of the hearing student-yet the hearing student differs from the hearing-impaired student as much as she differs from him.... Unstated points of reference may express the experience of a majority or may express the perspective of those who have had greater access to the power used in naming and assessing others.

not be said in theory, which of these models best serves the function of conflict resolution. The painful experience of the renaissance of ethno-nationalism throughout Eastern Europe and in the Celtic fringe of Western Europe provides striking evidence that the oppression of national feelings, either in the name of proletarian internationalism or of majority rule, produced just opposite results. What is left, therefore, on the one hand, is the American way of forging immigrants into the WASP pattern on the national level and in the political sphere, whereas they are able to maintain their folk-cultures and group behaviour at the communal level. Thus, little Italy and Chinatown are deemed no contradiction for the 'first new nation'.[30]

D. The 'European People': 'Multi-National' or Abstract 'Sum of Citizens'?

After this elaboration of two opposing concepts of how to conceive the relationship of state and nation, which might be termed state-nation on the one hand and nation-state on the other, we can return to the question of how to define a European 'people' despite of all the empirical evidence of different languages.

First of all, a closer look into the Spanish constitution reveals that this constitution -- unlike the French constitution after the ruling of the *Conseil constitutionnel,* which found the expression *peuple corse* (Corsican people) unconstitutional because of the 'unity' of a *peuple français*[31] -- recognises the 'existence' of a plurality of peoples-despite the link of the concept of popular sovereignty with the 'Spanish people.'[32] And Bruno de Witte, after having examined the rulings of different courts, tribunals and the House of Lords with regard to the Maastricht Treaty, draws a 'heretic' conclusion in order to set aside the traditional concept of state sovereignty: why not conceive the 'European people' as an aggregate of all the peoples of the Member States-forming, as such, a 'multi-national people'? The model for such a concept can be found in the Preamble and in Article 3 of the Constitution of the Russian Federation![33] Moreover, a hint for this notion can also be seen in the wording of Article A and the Preamble of the EC Treaty, stressing an 'ever closer union among the peoples of Europe' and Article F that 'the Union shall respect the national identities of the Member States.'

Another possibility sees the citizens of the respective Member States as the point of reference for the construction of a 'European people.' Why not conceive just the sum of all of these citizens to form the 'European people'? The introduction of direct elections for the European Parliament and, moreover, the institu-

30 S.M. Lipset, *The First New Nation: The United States in Historical and Comparative Perspective*, New York-London: W.W. Norton & Company.

31 See Décision no. 91-290 DC of 9 May 1991, *Journal Officiel de la République française* 14.5. (1991), pp. 6350-6354.

32 See the Preamble and Article 1 of the Spanish Constitution in Adolf Kimmel (ed.), *Die Verfassungen der EG-Mitgliedsstaaten, München* (1987), p. 357.

33 de Witte, *op. cite.*, note 13, p. 173.

tion of a European citizenship enables also a dogmatically-grounded conception transcending the notion that popular sovereignty is restricted to the level of nation-states.

But is dual citizenship of a Member State and of the European Union a contradiction? No, but only if and insofar as the Central-European concept of the nation-state is neither applied on the level of Member States nor on the level of the European Union. If some sort of European identity were constructed after the model of national identity, the implied function of exclusion would be transferred to the European level. The deconstruction of national identities would simply end in their reconstruction on the 'supranational' level with the same consequence. Nationality and citizenship would be confounded, European national identity would be exclusive, dual citizenship no longer allowed.

E. Nation-state = Democracy?

In a third string of arguments, in order to create a barrier to the formation of a European state, the concepts of the nation-state and democracy are equated. Thus, Peter Graf Kielmannsegg argues that only the 'common' identity of those affected by a majority decision allows us to assume the 'consent' of the governed in order to legitimise the majority principle. On the other hand, he points out, without such an alleged social identity, majority rule would remain some sort of foreign rule which could never be legitimised. The conclusion Kielmannsegg draws for the institutional set of the European Union:

> Exercising the majority principle in the Council, i.e., connecting majority rule and the principle of federal representation, means nothing less than the rule of states over other states. And this, in a community of nation-states different from an ethnically homogenous federal state, is a setting in which those who remain in the minority position will always feel dominated by foreign rule. Even if the parliaments of the Member States were given more influence on the legislative power of the Council to diminish the 'democratic deficit', this, in effect, could not change the situation.[34]

Yet, Dieter Grimm argues that, without a 'European people', the European Parliament is not a representative body.[35] This allows for one conclusion only: democracy is confined to the level and institutional setting of nation-states. Hence the European Union is *not* a state and, lacking a respective *Staatsvolk*, she is not a democracy either. Insofar as the strengthening of powers of the European Parliament would diminish the essence of the Member States as Paul Kirchhof[36] argues, democracy then, as the German Constitutional Court stated,[37] indeed seems to be a barrier to conferring more powers on the European level. The con-

[34] Kielmannsegg, *op. cite.*, note 14, p. 30.
[35] Grimm, *op. cite.*, note 14, p. 589.
[36] Kirchhof, *op. cite.*, note 12, p. 883.
[37] Cf. EuGRZ 1993, p. 438.

clusion that has to be drawn from the underlying formula *democracy = nation-state* leads to the assumption that, by conferring powers to the European Union, the loss of democracy can never be compensated at the European level.

III. AUTONOMY AND SUBSIDIARITY VERSUS SOVEREIGNTY

Yet, is the traditional concept of sovereignty still an adequate analytical tool to assess the process of European integration? Does the loss of national sovereignty really lead to the loss of the 'essence' of the 'state'?

A closer look into the American constitution reveals a rather different concept of the 'state' than the European notion, which is determined by monarchic absolutism. In particular the 10th Amendment offers an understanding of a Union as a federal state which closely resembles all the dogmas of European law as to why the European Union cannot become a federal state. The American clause that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the peoples' realises the same allocation of powers as do the Community treaties between the Union and the component states under the formula of 'limited specific attribution of powers' so that the Member States remain 'masters' of the Treaties. And similar to the 'necessary and proper' clause of Article 1, section 8, clause 18 of the American constitution, Article 235 of the EC Treaty allows the Community to handle many matters not specifically mentioned in the Treaty, thereby leading to the 'mutation' of the Community which Joseph Weiler has analysed so convincingly.[38] The subsidiarity principle, now firmly anchored as a general principle in Article 3b EC Treaty and the Preamble of the Maastricht Treaty, cannot be interpreted only as a limit for the exercise of powers by the Community, but has to be seen, first of all, as a sort of a general power to act also 'in areas which *do not* fall within its exclusive competence (emphasis added),' i.e., areas in which competencies are usually exercised by the Member States. Hence 'in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States ... the Community shall take action.' This reading of the subsidiarity principle first establishes the power for Community action and then the limitation which, however, is very important for the understanding of the federal structure of the Community-insofar as the limitation aspect seen together with the proportionality principle in the third paragraph of Article 3b provides also an institutional safeguard for powers of the Member States. And this, exactly, is the 'primary characteristic' of a federation, namely, a 'guaranteed division of power between central and regional governments', as Arend Lijphart has pointed out.[39]

Thus, the Member States are no longer 'sovereign' in the traditional under-

[38] Cf. J.H.H. Weiler, 'The Transformation of Europe', Vol. 100 *Yale Law Journal* (1991), pp. 2403-2483.

[39] See A. Lijphart, 'Consociation and Federation: Conceptual and Empirical Links', Vol. 12 *Canadian Journal of Political Science* (September 1979), p. 502.

standing of the word, neither empirically nor normatively. Because of global and regional interdependencies[40] created in the process of modernisation towards the post-industrial society, there are more and more complex problems transcending national borders which cannot effectively be resolved by the autark national state. And, it is exactly this need to resolve problems beyond the nation-state which is normatively recognised by the subsidiarity principle defining formally -- as a normative black box, but not in substance -- transnational competencies which have to be exercised by the Community. Thus, the Member States are no longer 'sovereign' in the political sense of *prima potestas*. Nevertheless, because of the institutional safeguard of the subsidiarity principle, the Member States-against Kirchhof's fears mentioned above-remain 'autonomous', i.e., *relatively* independent political units, both in the normative and empirical sense.

Hence, instead of the traditional concept of state sovereignty, only the notion of 'autonomy' provides for an adequate understanding of the process of European integration *and* German statehood as can be seen from the Preamble of the *Grundgesetz* which reads: '... Animated by the resolve to serve world peace as an *equal partner in a united Europe*,... (emphasis added).'[41] How can Germany be an equal partner, if it sticks to the doctrine of national sovereignty? Does the term 'equal partner', referring to the principle of equality, not require the recognition of difference and therefore the 'autonomy' of at least two partners?

Moreover, Neil MacCormick recently outlined the implication of the subsidiarity principle for the understanding of democratic decision-making, which by the way, is also laid down in Article A of the Maastricht Treaty in the wording, 'union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen.' MacCormick states that,

> the state-sovereignty version of popular sovereignty can be itself an enemy of other democratic rights. In general, any form of government or majoritarian democracy inevitably poses the question: 'Who are the people? Of what group must the majority be the majority?' ... The end of the sovereign state creates an opportunity for rethinking of problems about national identity. ... At least one reading of the already-contested concept of 'subsidiarity' points the way here. ... In that context, the best democracy-and the best interpretation of popular sovereignty is one that insists on levels of democracy appropriate to levels of decision-making. And the tendency to over-centralise at the level of Member States is as much to be countered as is any over-centralisation towards Brussels. The demise of sovereignty in its classical sense truly opens opportunities for subsidiarity and democracy as essential mutual components.[42]

[40] See, for instance, J.A. Camilleri and J. Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World*, Aldershot (1992); and D.J. Elkins, *Beyond Sovereignty. Territory and Political Economy in the Twenty-First Century*, Toronto (1995).

[41] Translation by D.P. Currie, *The Constitution of the Federal Republic of Germany*, Chicago (1994), p. 343.

[42] See N. MacCormick, 'Sovereignty, Democracy, Subsidiarity', *Rechtstheorie* (1994), pp. 289-290. The same idea of a territorial 'devolution of power' under the premise of the primacy of international law was already stressed by H. Kelsen in *Das Problem der*

Hence, both the concepts of 'autonomy' and 'subsidiarity' provide an understanding of 'national identity' which no longer needs to be exclusive and allows for the creation of multiple identities. Democracy then, is neither confined to the nation-state nor to majority rule. Foreigners' voting rights are only a danger for the national state concept, but not for a 'republican' understanding of government, which does not refer to the 'sovereign' collectivity or majority.[43] Foreigners' voting rights remain a theoretical prerequisite in order to create not only an 'open society', but also an open 'republic'-to the autonomy of the person as well as political entities.[44] This understanding allows one to de-couple nationality and citizenship, membership and rights. The citizenship of the Union is thus no longer a contradiction to the nationality of the Member States. Not only liberal rights, but also political rights on the basis of residence instead of nationality are compatible as long as political institutions on the level of the European Union are not reconstructed after the nation-state model. That this is-at least as an ideal-possible for the constitution-engineering to create a 'real' community can be seen from the human rights approach of the American Bill of Rights which uses the term 'person' instead of 'nationalised citizen',[45] thus, truly constituting a 'first new nation'as Seymor M. Lipset has put it.

Souvernität und die Theorie des Völkerrechts, reprint of the 2d ed., Aalen (1960), pp. 102-320.

43 A. Lijphart, *Democracies. Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven (1984), pp. 187-196.

44 Based on the functions of autonomy and integration, various legal instruments may provide for the representation and participation of individuals and groups in the institutional setting of a consensus or consociational democracy. See, in particular, Marko, *op. cite.*, note 20, pp. 195-514.

45 The American Supreme Court, however, creates also a 'political function exception' leading to the same result. Thus, as Justice Blackmun outlined in *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), the Court rejected the idea,

> that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office. [Such] power inheres in the State by virtue of its obligations to 'preserve the basic conception of a political community.' And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important non-elective executive, legislative and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.... This is no more than a recognition of a State's historical power to exclude aliens from participation in its democratic political institutions.

In *Plyer* v. *Doe*, 457 U.S. 202 (1982), the Court, however, stressed the 'legislative history' of the Equal Protection Clause that 'the clause was intended to cover any person physically within a state's border' and even 'regardless of the legality of his presence.'

CHAPTER XIX
PROMISES AND RESOURCES - THE DEVELOPING PRACTICE OF 'EUROPEAN' CITIZENSHIP

Antje Wiener

> The importance of the TEU citizenship provisions lies not in their content but rather in the promise they hold out for the future. The concept is a dynamic one, capable of being added to or strengthened, but not diminished.[1]

I. INTRODUCTION

Current citizenship debates are ranging between a focus on social discrimination and formal legalistic definitions of the concept. The link between both extremes remains largely a black box. That is, how social relations are represented in constitutional provisions and how changes of one aspect of the debates impacts on the other remain largely unexplored. So far, socio-historical studies about state-making and citizenship have provided most insightful approaches towards an opening of this black box. Both, studies of Bismarckian style of policy-making from above as well as French style collective struggles for citizenship from below have thus contributed to enlighten us about the link between the social context of citizenship on one hand, and the emergent constitutional framework on the other.

While the scholarly debate on Union citizenship has focused mainly on legal aspects, such as for example, the implications of Article 8 EC Treaty and its provisions, recently a number of non-governmental organisations (NGOs) and interest groups as well as committees of the European Parliament (EP) have shown an interest in the upcoming revisions of the Maastricht Treaty by the 1996 Intergovernmental Conference (IGC).[2] Some of these groups demand a revision of the

1 D. O'Keeffe, 'Union Citizenship', in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty,* London: Wiley Chancery Law (1994), p. 106.

2 As the Euro Citizen Action Service (ECAS) notes, '[o]ver 300 NGOs have participated in the two hearings organised by the Institutional Affairs Committee of the European Parliament' (*ECAS Newsflash*, February 1996, p. 1). The hearings were organised by the institutional committee of the European Parliament (EP) on 18-19 October 1995 'with a view to preparing the Dury and Maij-Weggen Reports on revision of the Maastricht Treaty' (Agence Europe (hereinafter 'AE'), 18.10.95, p. 4). According to Agence Europe, the hearings were attended by 'dozens of NGOs' while 'over 300 NGOs had asked to take part' (AE 18.10.95, p. 4 and AE 19.10.95, p. 4, respectively).
The number of NGO's and interest groups interested in the construction of the Euro-

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 387-414.

provisions which define Union citizenship in Article 8 EC Treaty, toward the extension of the political right to vote for third-country nationals. In demanding such an extension of citizenship rights towards currently excluded residents within EU territory, such voices confirm a dynamic Community discourse on citizenship[3] as it has been expressed in the dynamic provision of Article 8E EC Treaty[4] as well as in current Community discourse, which characterises Union citizenship as a 'developing' concept.[5] What this potential for development means in legal as well as in social terms remains a complex question for students of Union citizenship. While some stress the 'promises' of Union citizenship,[6] others point out that it is 'imperfect'.[7]

polity is often underestimated as is it remains hidden in the overall body of policy-making analyses. For example, with a view to the number of people involved in this process, it is important to note that the participating NGOs often represent a large number of organisations all over Europe. Thus, the participating European Women's Lobby (EWL) represents for example 'more than 2500 non-governmental women's organisations in the European Union' (*EWL correspondence*, 13 March 1996).

3 A Commission document specified that with regard to the dynamic aspect of Article 8 EC Treaty,
it must be stressed that the provisions of Part II of the EC Treaty are not static, but are essentially dynamic in nature. This is plainly spelled out in Article 8E itself, in so far as it envisages that these provisions be strengthened or supplemented in the future.
COM(93) 702 final, 21 December 1993, p. 2.

4 As Article 8E EC Treaty states,
-The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee before 31 December 1993 and then every three years on the application of the provisions of this Part. This report shall take account of the development of the Union.
-On this basis, and without prejudice to the other provisions of this Treaty, the Council, acting unanimously on a proposal from the Commission and after consulting with the European Parliament, may adopt provisions to strengthen or to add to the rights laid down in this Part, which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements.
Article 8E of the Treaty has indeed been termed the *Evolutivklausel*, meaning that it provides space for further development of citizenship. See for example, M. Degen, 'Die Unionsbürgerschaft nach dem Vertrag über die europäische Union unter besonderer Berücksichtigung des Wahlrechts', *Die Öffentliche Verwaltung*, Heft 17, (September 1993), pp. 749-758. This provision thus keeps to a certain extent with the Spanish proposal's demand for 'dynamic' citizenship (Permanent Representation of Spain, 1991).

5 The term 'developing concept' is used by the European Commission, see: European Commission, 'Report on the Operation of the Treaty on European Union', Brussels, 10th May 1995, SEC(95) final, p. 7; as well as by the European Parliament, see: European Parliament, Task-Force on the Intergovernmental Conference, No. 10, 'Briefing on European Citizenship'; PE 165.793, Luxembourg, 15 January 1996, p. 5. See also Manfred Degen who emphasises the importance of Article 8e as an 'evolutive' provision, that is, as one that entails a potential for further development. Degen, *op. cite.*, note 4.

6 O'Keeffe, *op. cite.*, note 1, pp. 87, 108.

7 U.K. Preuss, 'Citizenship and Identity: Aspects of a Political Theory of Citizenship.' in R. Bellamy, V. Bufacchi and D. Castiglione (eds.), *Democracy and Constitutional Culture in the Union of Europe*, London: Lothian FP (1995), pp. 107-120.

This chapter assumes that the perception of Union citizenship as a 'developing concept' poses a principal challenge to those formal or legalistic approaches to citizenship which rely on legal definitions of who has a right to be member of a community and who has not. This assumption is based on the observation that Union citizenship as a citizenship-in-the-making, raises questions about how this process proceeds, who participates and how Union citizenship grows over time. It is argued in this chapter that this challenge substantiates former work on citizenship which claims that a global framework of increasing migratory flows, changing labour market segmentation, and enhanced mobility of people have initiated a process which involves a 'devaluation' of citizenship.[8] It is pointed out that the developing practice of Union citizenship not only produced rights additional to the existing rights of citizenship in the Member States. It is also a crucial part of a larger project of building institutional arrangements of the Euro-polity in which citizenship rights and practices are applied.

If it is true that citizenship developed as part of a historical process that forged the institutions of the national state and secondly, if we agree that the Euro-polity is defined as multi-level not in a constitutional but in a sociological sense,[9] then we must expect Union citizenship to develop in relation to this fragmented polity. Such a perspective on the emergence of Union citizenship as part of a historical process therefore also casts a fresh light on the political character of the Union's institutional setting as context of the process of citizenship making. This polity has a weak core, a fragmented administrative network and a dispersed structure of political participation. Since it does not resemble the familiar context of a centrally administrated, territorially bounded and nationally defined modern state, some have begun to identify the European Union as a post-modern polity.[10] The institutional context of Union citizenship is then clearly different from that of the familiar national frameworks which were the contexts of past citizenship experience.

Despite such significant contextual differences, the majority of analyses have not yet begun to specifically focus on the conceptual and political implications of this phenomenon.[11] I believe that this neglect is particularly curious in the light

8 P.H. Schuck, 'The Treatment of Aliens in the U.S.' Paper prepared for project by the American Academy of Arts and Sciences on German and American Migration Policies, funded primarily by the German American Academic Council Foundation. Draft, May 1996. [The edited version of the paper will appear in P. Shuck, K. Blade and R. Münz (eds.), *Opening the Door: U.S. and German Policies on the Absorption and Integration of Immigrants*, Berghahn Books, forthcoming).]

9 J. Caporaso, 'The European Union and forms of state: Westphalian, regulatory or post-modern?', Vol. 34 *Journal of Common Market Studies* (1996), pp. 29-51.

10 See: Caporaso, *op. cite.*, note 9; J.G. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations'. Vol. 47 *International Organisation* (1993), pp. 139-174.

11 Analysts find that this citizenship lacks aspects of modern citizenship such as for example, the pre-political condition of community. See: C. Closa, 'Citizenship of the Union and Nationality of Member States.' Vol. 32 *Common Market Law Review* (1995), pp. 487-518 and Preuss, *op. cite.*, note 7; Bellamy, Bufacchi and Castiglione, *op. cite.*, note 7.

of the policy background of the developing practices of European citizenship. After all, the idea of modern citizenship was crucial for the beginnings of citizenship policy-making in the EC and has indeed remained a yard-stick for the developing practice of European citizenship for more than two decades. As this chapter proceeds to demonstrate, policy makers have continuously aimed at creating a European identity, a sense of community and shared history while pursuing citizenship policy. Paradoxically, such modern ideas about citizenship have contributed to create a post-modern style of citizenship.

This policy-oriented chapter advances an approach to studying citizenship as a developing practice. It entails an understanding of citizenship practice as a process of mobilisation and strategizing that is developed by Euro-actors as different as interest groups and policy makers.[12] For example, the mobilisations around Union citizenship promises for the future are, among other things, evoked by expectations which stem from past experience. The argument which follows is that the developing practice of European citizenship hinges upon the methodological acknowledgement of the political impact of historical ideas. It is argued that the knowledge of citizenship which has been derived from the way citizenship was applied, developed and practised in the past contributes to an understanding of the hidden link between current expectations, past experience and future promises of citizenship. While we deal with a post-modern style of citizenship in the current EU framework then, this chapter emphasises an understanding of citizenship as constructed over time and entailing layers of past experiences which contribute to construct resources for future expectations of citizenship.

More specifically, this chapter advances two interrelated steps to tackle the impact of past experience on coming revisions of Union citizenship provisions. The first step is about expectations which are derived from a common knowledge about citizenship as a crucial concept in the history of democratic national states. This knowledge includes the idea of citizenship as a nation-state building, rights granting concept which has been crucial in particular for the emergence of western European national states.[13] This aspect is derived from history. It is centred around the idea that citizenship practice as policy or political struggle has decisive state-building qualities as its development over time has contributed to forge the institutional arrangements of modern states. Understood within such a socio-historically contextualized manner, citizenship becomes a powerful political idea.[14] It is argued that similarly to the political power of economic ideas, the

[12] For a detailed development of this approach see: A. Wiener, *Building Institutions: The Developing Practice of European Citizenship,* Carleton University, Department of Political Science, unpubl. Ph.D. Dissertation (1995), Ch. 2.

[13] See: R. Bendix, *Nation Building and Citizenship,* New York: John Wiley (1964); C. Tilly (ed.), *The Formation of National States in Western Europe,* Princeton: Princeton University Press (1975); T.H. Marshall, *Citizenship and Social Class,* Cambridge: Cambridge University Press (1950).

[14] This paper suggests that the importance of this idea is comparable to Peter Hall's finding of the political power of economic ideas for the construction of modern welfare

interrelation between developing practices of citizenship in different historical contexts on the process of state-building contributed to create an idea about citizenship as an organising principle in the history of states. The assumption is that this historical context which sets the patterns of experience/expectation turned into a crucial idea for future policy-making in the case of the European Community (EC). The second step of assessing the promises of Union citizenship draws on this idea and advances a way of pursuing the application of the idea as an informal resource and its step-by-step transformation into formal policy resources (i.e. ultimately Article 8 EC Treaty).

Both these formal and informal policy resources have been created in the more immediate context of citizenship policy-making in the European Community, and now Union (EC/EU). It is this process of resource creating and mobilisation which will be examined more closely in the remainder of this chapter. To provide an overview of which resources are available and might therefore substantiate the expectations of possible 'promises' for the future, this chapter goes back to the first emergence of citizenship as a policy and then proceeds to describe the emergent resources and their change according to EU/EC documented discourse over time. The chapter is organised in two parts. The first part introduces the concept of citizenship practice and sets out the framework for a policy analysis based on the *acquis communautaire* of citizenship. The second part recalls crucial innovations of the citizenship *acquis* as the practice of European citizenship takes shape over a period of more than 20 years.

II. CITIZENSHIP AS A PRACTICE IN THE MULTI-LEVEL EURO-POLITY

While '[n]o standard definition of citizenship has yet gained scholarly consensus'[15], it is possible to state that generally speaking, modern citizenship defines a relation between the individual and the political community. It concerns the entitlement to belong to a political community, the latter having the right and the duty to represent community interests as a sovereign vis-à-vis other communities and vis-à-vis the citizens.[16] This model of a relationship between two entities, namely the individual subject or citizen on one side, and the repre-

states. See: P. Hall, *The Political Power of Economic Ideas*, Princeton: Princeton University Press (1989).

15 See: C. Tilly, 'Citizenship, Identity and Social History', in C. Tilly (ed.), *Citizenship, Identity, and Social History,* Cambridge: Cambridge University Press (1995), p. 5; see also D. Held, 'Between State and Civil Society: Citizenship', in G. Andrews (ed.), *Citizenship,* London: Lawrence & Wishart (1991), pp. 19-25; W. Kymlicka and W. Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory', *Ethics* (January 1994), pp. 352-381; and B.S. Turner (ed.), *Citizenship and Social Theory,* London et al.: Sage (1993) for similar observations.

16 For conceptual work that contributes to such an understanding of citizenship see for example, W.R. Brubaker (ed.), *Immigration and the Politics of Citizenship in Europe and North America,* Lanham: University Press of America (1989).

sentative of a sovereign entity (Queen/estate/nation-state) on the other, has provided modern history with a basic pattern of citizenship.[17] It follows that at least three elements need to be considered in the conceptualisation of citizenship. These are the individual, the nation-state/community, and the relationship between the two which I have elsewhere called 'citizenship practice', understood as the action that contributes to the establishment of citizenship rights, access and belonging in a community.[18] Such practice implies both contentious struggle about interests among social forces and policy-making within the institutions of the polity.[19] Whereas the first two elements, namely the citizen and the nation-state/community, have been stressed by contractarian approaches to citizenship in particular, so far the third--relational--element has not received much attention. Indeed, citizenship theory has been found to lack the tools which would allow to understand citizenship as a practice.[20]

Overall, there is an increasing awareness of the fact that citizenship cannot be dealt with on the basis of formal criteria alone.[21] Yet, as the formal criteria of

17 As Evans and Oliveira point out, citizenship is 'a concept denoting the legal consequences which attach to the existence of a special connection between a defined category of individuals and a state' and thus essentially 'a provision which is made for participation by a defined category of individuals in the life of a state'. See A.C. Evans and H.U. Jessurun d'Oliveira, *Nationality and Citizenship. Rapport réalisé dans le cadre d'une recherche effectuée à la demande de la Communauté européenne*, Strasbourg (20 - 21 November 1989), p. 2. See also Turner who finds that '[t]here are [...] two parallel movements whereby a state is transformed into a nation at the same time that subjects are transformed into citizens'. B.S. Turner, 'Outline of a Theory of Citizenship', Vol. 24 *Sociology* (1990), p. 208.

18 Similar elements have been identified by Charles Tilly as basic criteria for state-making. He writes,

> [I]n its simplest version the problem [of state-making] has only three elements. First, there is the *population* which carries on some collective political life--if only by virtue of being nominally subject to the same central authority. Second, there is a *governmental organisation* which exercises control over the principal concentrated means of coercion within the population. Third, there are *routinised relations* between the governmental organisation and the population.

Tilly, *op.cite,* note 15, p. 32.

19 The notion of contentious politics is based in Tilly's work on state-making (Tilly, *op.cite.,* note 15) and on Tarrow's adoption of this concept to analyse the 'Europeanisation of conflict' in order to assess the process of polity making in the EU. See Sidney Tarrow, 'The Europeanisation of Conflict: Reflections from a Social Movement Perspective', Vol. 18 *West European Politics* (April 1995), pp. 223-251. I argue here that this style of politics has an equally crucial meaning for dynamic approaches to citizenship.

20 Turner, *op. cite.,* note 17, pp. 189-217.

21 See: F. Kratochwil, 'Citizenship: The Border of Order.' Vol. 19 *Alternatives* (1994), pp. 485-506; J. Habermas, 'Staatsbürgerschaft und nationale Identität.' in J. Habermas *(ed.), Faktizität und Geltung*, Frankfurt/M.: Suhrkamp (1991), pp. 632-660. J. Habermas, 'Citizenship and National Identity', in B. von Steenbergen (ed.), *The Condition of Citizenship,* London: Sage (1994); Held, *op. cite.,* note 15, pp. 19-25. E. Meehan, Presentation at the conference '1996 and Beyond. A Constitution for Europe' at South Bank University, London (18-19 April 1996).

state, rules of membership and citizenship rights change, a new relationship between citizens and states emerges. That is, the modern 'routinized relations' between a population and the organisation of a state which were once crucial to the process of modern state-making[22] are changing. The novel institution of Union citizenship is the most significant example of such a transformation to date.[23] The focus on the practice rather than the theory of citizenship has been chosen in order to avoid reifying the traps of a conceptually bound and increasingly obsolete 'language of citizenship' (i.e., modern concepts of citizenship) which refers to a Westphalian system of states.[24] While citizenship practice involves both policy-making and political struggle for citizens' rights this chapter focuses on the policy-making aspect only. In the following I characterise the framework for such an analysis of policy resources.

The policy process is situated in a post-modern polity which is characterised by a weak political core, multi-level networks of interaction and changed capital/labour relations.[25] It is a 'multi-layered polity, where there is no centre of accumulated authority, but where changing combinations of supranational, national and subnational governments engage in collaboration.'[26] This concept is very much focused on the observation that there is a new polity in the making. While it is entirely possible to speak of a system of governance and of a polity in the EU, this polity must not necessarily be linked to or based on the familiar concept of the modern nation-state. Indeed, it remains doubtful whether the EU will once resemble the feature of nation-states.[27]

This has four major implications for policy-making in general. It means that networks of interaction are more constructive than constitutional,[28] the policy

22 Tilly, *op. cite.*, note 13.

23 To assess the development of this citizenship and its embeddedness in the post-modern multi-level Europolity, it is therefore ultimately necessary to study the emergence of new linkages between citizens and the Community, that is, to understand their routinization over time according to the developing practice of citizenship beyond policy studies. This aspect will however not be the focus of this paper.

24 This system was found to be challenged by processes of globalisation and thus does not provide the appropriate means to assess this new type of citizenship (Linklater, 1996; Held, *op. cite.*, note 15; Brock and Albert (1995), in: *Zeitschrift fuer Internationale Beziehungen*). As David Held put it, 'to what political entity does the democratic citizen belong?' as 'the sovereignty of the nation state itself - the entity to which *the language of citizenship* refers, and within which the claims of citizenship, community and participation are made - is being eroded and challenged'. Held, *op. cite.*, note 15, at p. 24, emphasis added.

25 Caporaso, *op. cite.*, note 9, pp. 45-48.

26 L. Hooghe, 'Subnational Movilisation in the European Union', in Vol. 18 *West European Politics* (1995), p. 177.

27 M. Jachtenfuchs, T. Diez and S. Jung, 'Regieren jenseits der Staatlichkeit? Legitimitaetsideen in der Europäischen Union', Mannheim: MZES Working Paper ABIII/15 (1996).

28 As Caporaso points out '[I]t is these networks of interaction - more sociology than constitutional principle– that Marks *et al.* refer to as multi-level polity'. Caporaso, *op. cite.*, note 9, at p. 47.

process is both constructive over time[29] and active compared to the often reactive policy-making of Member States[30] and finally, it indicates that its success depends on how the Treaty is applied.[31] Based on these observations, this chapter focuses on the constructive potential of citizenship policy as it develops over time. To capture the dynamic as an expression of the potential creative aspect of a policy, it examines the resources of citizenship policy. The approach is not conceptual but policy-oriented. It aims at answering the question of *what are the resources of EU citizenship?*

Over time new institutions emerge. These new institutions are often intangible insofar as practices (such as step-by-step policy-making), ideas (such as citizenship) or ways of handling a policy (such as linking special rights to market policies when it seems politically feasible) are not immediately turned into directives or regulations. In fact, sometimes proposals, reports or opinions may spend years in a drawer until they are retrieved and dusted off once the political opportunity is right. In the following, I elaborate a framework to study this phenomenon and subsequently show how citizenship practice often involved dusting off resources which had been created earlier in the process and which were not immediately mobilised towards the creation of Union citizenship. The new institution of Union citizenship bestows rights on Union citizens as Member State nationals - not European nationals. It thus differs from the common perception of citizenship as a regulative institution facilitating access to the bounded territory of a national state.[32] That is, beyond the different organisation of national and Euro-polity (i.e. centralised or dispersed), both types of citizenship are also distinguished by their reference to nationality. Yet, from the background of modern studies of state-making and citizenship, these categories seem indispensable for an understanding of the meaning and political potential of citizenship[33] How are we then to study citizenship without relying on such categories?

29 J.H.H. Weiler, 'Journey to an Unknown Destination: a Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', in Vol. 31 *Journal of Common Market Studies* (1993), pp. 417-446.

30 H. Wallace, 'Negotiation, Conflict, and Compromise: The Elusive Pursuit of Common Policies.' in H. Wallace, W. Wallace and C. Webb (eds.), *Policy-Making in the European Community*, John Wiley & Sons Ltd. (1983), p. 46.

31 Weiler, *op. cite.*, note 29, p. 133.

32 See for instance Brubaker's observation about this type of regulation based on citizenship:
Indeed political territory as we know it today--bounded territory to which access is controlled by the state--presupposes membership. It presupposes some way of distinguishing those who have free access to the territory from those who do not, those who belong to the state from those who do not.
W.R. Brubaker, *Citizenship and Nationhood in France and Germany,* Cambridge, MA: Harvard University Press (1992), p. 22.

33 W.R. Brubaker (ed.), *Immigration and the Politics of Citizenship in Europe and North America,* Lanham: University Press of America (1989); Tilly, *op. cite.,* note 13; Bendix, *op. cite.,* note 13; R. Grawert, *'Staat und Staatsangehörigkeit'*, Berlin: Duncker & Humblot (1973).

Different from most policy analyses of EU policy then, this study does not focus on what causes the changes of a particular policy.[34] Instead, this chapter aims at showing how a particular policy is developed over time, going through a process from defining an idea as crucial, setting policy objectives towards the realisation of this idea and then creating the legal framework which facilitates the application of the idea on an everyday policy-making basis. An understanding of the resources of Union citizenship, their origin and their mobilisation towards the institutionalisation of citizenship will provide crucial information for current political debates about further development of Union citizenship. This policy analysis of the developing practice of European citizenship then focuses on the incremental growth of the *acquis communautaire* in order to sort out the citizenship resources as the 1996 IGC faces a revision of the citizenship provisions.[35]

The fragmented nature of the Euro-polity also sets the pattern of the evolving policy process as different citizenship policy packages were related to the regulations of in different policy areas. They therefore required different procedures of policy application and development. For example the special rights package was mostly a matter of what came to be called the 'Community pillar' and was hence dealt with according to 'Community-method', while the passport package was developed within the institutional framework of common foreign and security policy and justice and home affairs policy, respectively, which after Maastricht became part of the 'second' and 'third pillar' and which were 'almost entirely intergovernmental in nature',[36] yet partly defined by the Community approach of the first pillar, too. In other words, special rights policy was mostly influenced and developed by such Community institutions as the Commission and the European Parliament. In turn, passport policy with its clear relation to borders on the one hand, and education and social policy on the other, has been influenced by both, the Community and the intergovernmental approach. Indeed, it

[34] See for example the work of A. Lenschow, *Institutional and Policy Change in the European Community: Variations in Environmental Policy Integration*, Doctoral Dissertation, New York: Department of Politics, New York University. Unpublished Ms. (1995). P. Pierson, 'The Path to European Integration: A Historical Institutionalist Perspective', Russell Sage Foundation and Harvard University (1995); Ms. and M. Pollack, 'Creeping Competence: The Expanding Agenda of the European Community.' Vol. 14 *Journal of Public Policy* (1994), pp. 95-145.

[35] As the Maastricht Treaty specifies in Article N(2),
A conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided ... considering to what extent the policies and forms of co-operation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.
These revisions are currently debated within the framework of the IGC which began in March 1996 in Turin and ended in 1997.

[36] D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces.' Vol. 30 *Common Market Law Review* (1993), p. 25. See also Demaret (1993), pp. 39-40 and *passim* for an explanation of the various policy methods that are part of the EC/EU's institutionalised compromise.

represented a material intersection between Community and Member State compentences[37] as it was partially influenced by Commission policy and partially by the intergovernmental approach. In a word, the responsibility for handling citizenship policy was divided among various political organs of the Community depending on the policy areas involved. As the case study will further illuminate, these divided responsibilities and split approaches to citizenship policy contributed to the policy being scattered across the Euro-polity, hence the metaphor of a jigsaw-puzzle. The following section provides a summary of the expansion of the citizenship *acquis* as citizenship practice created more resources over time. The fragmented nature of EU citizenship was thus established with the twofold policy basis of special rights policy on the one hand, and passport policy on the other. The remainder of this section elaborates on the *acquis communautaire* as an analytical tool for such a policy analysis.

In the fractured post-modern polity of the EU, policy-making rests on the Maastricht Treaty as quasi-constitution and tangible institutional frameork.[38] Within this framework, the *acquis communautaire* defines the 'additional dimension of the EC'; it is not to be changed and is to be accepted by new Community Members. Thus for example, a commitment is shown by new members towards the community project.[39] The *acquis* therefore amounts to one important political institution in EC/EU policy-making that any analysis of EC/EU

37 Curtin, *op. cite.*, note 36, at p. 24.

38 As Helen Wallace notes, the role of the Treaties is of 'paramount importance' as,
[b]oth their provisions on specific areas of policy and their allocation of institutional responsibilities distinguish the EC from other international organisations by providing the promoters of common policies with constitutional authority and the level of legal enforcement.
See: Wallace, *op. cite.*, note 30, p. 49. For a similar emphasis on the Treaty's role as quasi-constitution and hence a factor that distinguishes the EC politically from international organisations, see Geoffrey Garrett who states that,
the EC's legal system operates as if the 1958 Treaty of Rome and the 1987 SEA comprise something akin to an EC constitution. This contrasts sharply with the interpretation of most international treaties, in which each signatory determines the extent of its own obligations.
See: G. Garrett, 'International Co-operation and Institutional Choices: The European Community's Internal Market.' Vol. 46 *International Organisation* (1992), pp. 535-36.

39 Anna Michalski and Helen Wallace note that,
the *acquis communautaire* is composed of the treaties of the EC and the regulations, directives, decisions, recommendations derived from them, as well as the case law from the European Court of Justice (ECJ). It comprises policies, the legal framework and the institutional structure which a country must accept when it aims at membership in the Community.
A. Michalski and H. Wallace. *The European Community: The Challenge of Enlargement.* London: Royal Institute of International Affairs (1992), p. 36. Yet, while being incremental is part of the acquis communautaire itself, some dispute its perseverance, given that a 'number of protocols to the Union Treaty [...] damage the *acquis communautaire*'.
See: Curtin, *op. cite.*, note 36, p. 18.

politics cannot avoid considering.[40] It stands for the shared institutional properties of the EC/EU at any time. According to the European Commission, the *acquis communautaire* is understood as

> the contents, principles and political objectives of the Treaties, including the Maastricht Treaty; the legislation adopted in implementation of the Treaties, and the jurisprudence of the Court; the declarations and resolutions adopted in the Community framework; the international agreements, and the agreements between Member States connected with the Community's activities.[41]

While Member States might deplore certain aspects of Community policy, 'there is no question that all find themselves locked into a system which narrows down the areas for possible change and obliges them to think of incremental revision of existing arrangements'.[42] These existing arrangements are now familiarly referred to as the *acquis communautaire.*[43] However, the substance of the *acquis* is often difficult to pin down. It is like 'something that everybody has heard about it, but nobody knows what it looks like'.[44] This observation suggests that there is something other than the rules, regulations and constitutionally established procedures of the Euro-polity beyond the visible institutions. In short, while the *acquis* is often known by the participating actors in the Euro-polity, it is not entirely visible. Knowledge does not always imply visibility. There are also processes of meaning construction which add another dimension to the puzzle of policy.

Given this background of visible and hidden components, the *acquis communautaire* is perhaps best defined as containing a set of formalised as well as hidden or informal resources. For analytical purposes, these resources are referred to as formal and informal resources which include procedures and rules, on the one hand, and practices and ideas, on the other (see Figure 1).

40 'There have been attempts to translate it into English, but the result thus far is only the unsatisfactory 'Community patrimony' or 'Community heritage'. The French term has prevailed and become increasingly embedded'. Michalski and Wallace, *op. cite.*, note 39, pp. 36-7. See also P.C. Müller-Graff, 'The Legal Basis of the Third Pillar and its Position in the Framework of the Union Treaty.' *Common Market Law Review*, 1994, p. 496.

41 See: European Commission; Michalski and Wallace, *op. cite.*, note 39, p. 38.

42 Pierson, *op. cite.*, note 34, pp. 16-17

43 See for example Woolcock (1994) p. 199; Wessels (1992); Kovar and Simon 'La Citoyenneté européenne', *Cahiers de droit européen* (1993); Nicoll (1993), p. 22; Lodge (1994) p. 77; Rack (1990), p. 135; La Torre, Chapter XXII of this volume. Given the incremental character of the policy process, it is strange that an institution so central to EC/U politics as the *acquis communautaire* should remain so un-theorized. This lack of theory or systematic approach to the *acquis* does however not prevent the application of the term in the meaning of 'the story so far.' For such a use of the *acquis* see for example A. Clapham, *Human Rights and the European Community: A Critical Overview,* Baden-Baden: Nomos, (1991), p. 29.

44 Michalski and Wallace, *op. cite.*, note 39, p. 35.

Figure 1: The *Acquis communautaire*

INFORMAL RESOURCES → FORMAL RESOURCES
- ideas – rules - practices – procedures

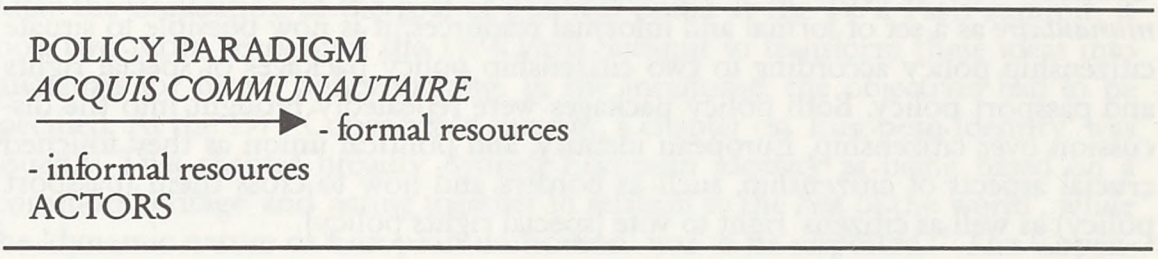
These resources contribute crucial information for Community politics because they may be mobilised (i.e., the formal resources) or changed (i.e., informal resources) once the opportunity is right, they hence invisibly structure Community politics.[45] It follows that a change of the *acquis* potentially involves two processes. One includes the expansion of formal resources (changes of the Treaty, provisions, directives, regulations), the other refers to a materialisation of informal resources (ideas, shared principles, practices as suggested by EP resolutions and Commission proposals or other documents). Overall the change of the *acquis* depends on changes in the political opportunity structure which facilitate the immediate context for the mobilisation of resources towards the establishment of a policy or its components. The analysis of the multi-dimensional jigsaw-puzzle of EU citizenship policy therefore hinges on the systematic assessment of the political opportunity structure and the *acquis communautaire*. The concept of political opportunity structure enables us to structure this policy analysis, it tells us when to expect incremental changes in the *acquis*.[46] A system-

[45] This definition of the *acquis* has been developed on the basis of the international relations literature on regimes. For example Friedrich Kratochwil and John Ruggie stress the need to push analysis beyond international organisations and their formal attributes such as charters, voting procedures, committee structures, and the like. See: F. Kratochwil and J.G. Ruggie, 'International Organisation: A State of the Art on the Art of the State', Vol. 40 *International Organisation* (1986), p. 755. Instead, they stress that there is another category, namely that of understanding, which may shed light on the analysis of international organisation and which therefore deserves more analytical attention. This new focus is based on the observation that 'we *know* regimes by their principled and shared understanding of desirable and acceptable forms of social behaviour. Hence, the ontology of regimes rests upon a strong element of intersubjectivity'. Kratochwil and Ruggie, p. 764 (emphasis in original).
See also Stephen Krasner's definition of regimes as a 'set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations'. S. Krasner (ed.), *International Regimes*, Ithaca: Cornell University Press (1983), p. 2. It is similar even though Krasner's work clearly does not share the ontological innovation suggested by Kratochwil and Ruggie.

[46] The idea of analysing changes in the political opportunity structure is taken from Tarrow's studies on social movement mobilisation. See: S. Tarrow, *Struggle, Politics, and Reform: Collective Action, Social Movements, and Cycles of Protest*, Ithaca: Western Societies Program Occasional Paper No. 21, Center for International Studies, Cornell University (1989), and S. Tarrow, *Power in Movement. Social Movements, Collective Action and Poli-*

atic approach to the policy potential contained by different political opportunity structures over time is now at hand. With reference to historical institutional policy analysis it is possible to do three things: (1) to theorise the larger context by periodizing the policy progress according to policy paradigm shifts;[47] (2) to assess the immediate institutional context based on the set of formal and informal resources which compose the *acquis communautaire*; and (3) based on the definition of policy paradigm and *acquis communautaire*, it is possible to establish the political opportunity structure that provides information about the parameters of action. The analytical framework is schematised in Figure 2.

Figure 2: Expanding the *Acquis communautaire*



It includes the policy paradigm at one point in time, the *acquis communautaire* as a set of resources and the actors who intervene in order to change or mobilise the resources. According to this scheme, crucial expansions of a policy occur when we observe the addition of new ideas and practices on the one hand, and the transformation of ideas and practices into rules and procedures on the other. The story of citizenship practice reveals three major shifts of policy paradigm which enabled consequent incremental changes in the citizenship *acquis*. These turning points are: the Paris Summit Meetings in 1973 and 1974; the Fontainebleau Summit Meeting in 1984; and the Maastricht Summit Meeting in 1991. The following policy analysis focuses on the developing practice of European citizenship

tics, Cambridge: Cambridge University Press (1994). It has been suggested as one way of assessing EU politics by George Ross. See: G. Ross, *Jacques Delors and European Integration*, Cambridge: Polity Press (1995). In this case changes in the political opportunity structure are indicated by the policy paradigm, the actors and the *acquis communautaire* as key factors for citizenship policy.

47 Peter Hall distinguishes between three different types of policy paradigm changes. First and second order changes are seen as changes towards the adjustment of policy, third order changes indicate a 'paradigm shift' that includes 'radical changes in the overarching terms of policy discourse'. See: P. Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policy making in Britain'. Vol. 25 *Comparative Politics* (1993), p. 279. In the case of the EC/U, these are shifts between union and market politics as the overarching terms of policy generation. For example, in the 1970s policies have been established under a politics-oriented paradigm with the creation of political union as the overarching goal of EEC policy making at the time. In the 1980s in turn, policies have been formulated within the context of a market-oriented paradigm with the overarching goal of constructing the single market without internal frontiers until 1992. Finally, in the 1990s, a swing in the policy paradigm has been predicted by many.

from its early appearance as passport and special rights policies in the 1970s. It is structured according to the incremental growth of the *acquis communautaire*, or the shared properties of citizenship policy.[48]
Citizenship practice in the EC/EU remained largely invisible until Citizenship of the Union was spelled out and legally grounded in the 1993 Maastricht Treaty. However, as this case study suggests, the roots of citizenship policy and actual citizenship practice can be traced over a period of about two decades. During this time various policy packages belonging to different policy areas (for example, internal market policy, electoral policy, education policy, visa policy and policing) contributed to the eventual embedding of citizenship in the Treaty. Community institutions, including Commission portfolios, parliamentary committees and Councils were involved in the process. With the category of the *acquis communautaire* as a set of formal and informal resources, it is now possible to situate citizenship policy according to two citizenship policy packages of special rights and passport policy. Both policy packages were repeatedly brought into the discussion over citizenship, European identity, and political union as they touched crucial aspects of citizenship, such as borders and how to cross them (passport policy) as well as citizens' right to vote (special rights policy).

III. CASE STUDY: THE DEVELOPING PRACTICE OF EUROPEAN CITIZENSHIP

During the economic crisis of the 1970s, EC policy makers aimed at improving the EC's image on the global stage. Then Commissioner Vicomte Davignon characterised the situation thus: 'I have at times compared Europe with Tarzan. It has a relatively advanced morphology but its speech is still fairly scanty'.[49] Yet, Henry Kissinger asked in the middle of the crisis '[W]ho speaks for Europe?'[50] His query suggested, that the EC lacked representation on the global stage. The documented policy discourse of the time reveals that politicians saw this void as being in part due to the lack of a European identity. Despite EC politics being legally legitimised by the Treaty of Rome as a quasi-constitution,[51] the Commu-

48 The *acquis* indicates 'what the Community has achieved' until a certain point in time. European Documents, No. 1000, 25 April 1978, p. 4 (Commission communication to the Council on 'The Problems of Enlargement').
Article C TEU specifies: The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.

49 AE, No. 713, 5 January 1973, p. 7: interview in *La Libre Belgique*, 28 December 1972.

50 Kissinger asked this question when a Danish representative of the EC spoke in the name of the Community in Washington in September 1973. See: Desmond Dinan, *Ever Closer Union? An Introduction to the European Community*, Boulder, CO.: Lynne Rienner (1994), p. 85.

51 J.H.H. Weiler, 'Supranationalism Revisited - a Retrospective: the European Communities after 30 Years', in Werner Maihofer (ed.), *Noi si mura*. Selected Working Papers of

nity was not able to create an image of itself as an actor who could represent European interests in global politics with one voice. The problem was specified as how to create a feeling of belonging among Community citizens that could contribute to the identity of this union? The documented Community discourse of the time suggests that one way of confronting the problem was to establish a European identity.

As the final Communiqué of the 1972 Paris summit stated,

> [T]he Member States of the Community, the driving force of European construction, affirm their intention before the end of the present decade to transform the whole complex of their relations into a European Union.[52]

After the declaration of the goal of political union at the 1972 Paris summit, it took two more years until the 1974 Paris Summit to transform these ideas into guidelines for future policy-making. In the meantime, the objectives had to be specified. At the 1973 Copenhagen summit, a chapter on 'European Identity' was issued.[53] This chapter broadly defined European identity as being based on a 'common heritage' and 'acting together in relation to the rest of the world', while the 'dynamic nature of European unification' was to be respected.[54] The Copenhagen Summit confirmed the intentions of the then nine EC Member States to alter their internal relations; with respect to further political integration, by moving towards a European union.[55] The project of a European identity touched three different contexts: international relations, intra-Community relations, and Community-citizen relations.

At the meeting between the Heads of Government and Commission President Ortoli in Paris 1974, a time frame for policies towards the creation of European Union was laid out.[56] With a view to the developing practice of European citizenship, points 10 and 11 of the final Communiqué of this summit meeting were crucial because they proclaimed the creation of a Passport Union and the establishment of special rights for citizens of the nine Member States respectively.[57] Special working groups were assigned the task of producing draft reports for the development of the passport union, special rights, universal suffrage and a concept of European Union. At this same time, people began to speak of a 'Citizens' Europe'. In this Council document, citizens were, for the first time, consid-

the European University Institute. Florence: EUI (1986), pp. 342-396.

52 Commission, 1972, General Report, point 5(16) (c.f. Dinan, 1994:81).

53 Europe Documents, No. 779.

54 *Ibid.*, p. 1.

55 *Ibid.*, pp. 1, 2.

56 Other observers stress the direct link between the document on European identity and setting the policy objectives towards the creation of Community citizenship. Thus Andrew Clapham finds for example that '[t]he 1973 Copenhagen Declaration on European Identity led to a decision at the Paris summit (1974) to set up a working party' to study the application of special rights. See Clapham (1991), p. 66, *op. cite.*, note 43.

57 Bull. EC 12, 1974, pp. 8, 9.

ered as participants in the process of European integration, not as consumers but as *subjects*.[58] This notion of citizens as 'subjects' became a new aspect of the *acquis communautaire*. Out of the debates over identity which ensued were generated the policy objectives of 'special rights' for European citizens and a 'passport union.' Both aimed at the creation of a feeling of belonging. Special rights and passport policy thus turned into crucial informal resources of the citizenship *acquis*.

The debates over policy objectives during the 1970s revealed how policy makers were organising the existing resources such as constitutional assets and how they began to develop new ideas. Among them were the decisions to develop policies toward the creation of 'special rights' and a 'passport union' with a common passport for Community citizens. When they were defined as policy objectives in 1974, the first steps towards their creation were made and the *acquis* began to gradually broaden. The adoption of the 1976 Council decision to implement direct universal suffrage[59] and the first European elections in 1979, on the one hand, and the adoption of a Council resolution on the creation of a single European passport in 1981[60] on the other, were crucial first steps that expanded the institutionalised *acquis*. Besides these institutional changes, the *acquis* was expanded on a discursive level as the idea of 'Europeanness' that had been introduced with the document on European identity in 1973 and gradually included both special rights and passport policy. At the end of the 1970s, the territory was a space where voters shared the practice of voting. In this early stage then, citizenship practice introduced perspectives that contributed to a new way of transgressing inter-Community borders.[61]

What then changed within the *acquis* and what does this imply for resources of Union citizenship? A closer look at the resources not only brings changes to the fore, but it also highlights a growing tension in European politics. A grad-

58 For the observation on this new discourse on 'citizens', see also Guido van den Berghe who writes, '[p]oint 11 of the final Communiqué is noteworthy, not only because it speaks of 'special rights', but also because the word 'citizen' of the nine Member States is used'. See: G. Van den Berghe, *Political Rights for European Citizens.* Aldershot: Gower (1982), p. 31; see also: European Parliament (1992), p. 14.

59 On 8 October 1976 the Council adopted an 'Act concerning the election of the representatives of the Assembly by direct universal suffrage'. *Official Journal* No. L 278, 8.10.76, pp. 1-11).

60 *Official Journal*, No. C 241, 19/9/81, Council Resolution.

61 As Guido Van den Berghe points out, a 'qualitative change' was introduced by voting directly for the European parliament. What was formerly 'abroad' was now to be thought of as European, as if the Community was beginning to assume its own 'territory.' In his study of the development of political rights in the EC, Van den Berghe points out that, [A]lthough the European Community does not have its own territory, whereas the different Member States do, the term 'abroad' has throughout the entire study been put into inverted commas in order to underline the qualitative change from national elections which direct elections are taken to represent for the citizens of the Member States resident in another Member State. Indeed, in contrast to national elections, these electors are not persons resident outside the geographical area in which elections are held. Van den Berghe, *op. cite.*, note 59, p. 2.

ually widening gap between functional (market-oriented) aspects of integration, on the one hand, and the intended and unintended consequences of this process, on the other emerged.[62] This type of tension had not been central for Community policy-making in the previous decades which were mostly focused on the establishment of a common market policy. As the policy analysis reveals, the new overarching goal of political union, a new necessity to speak with one voice in global politics and the introduction of a debate over the definition of citizens brought new concerns to the fore. The question of how to define the rights of European citizens thus triggered a series of debates which contributed to a new perspective on Europe. It was considered as an entity that could be compared to processes of modern state-building; this perspective included a redefinition of the relation between citizen and political entity.

The next stage of Community development was initiated with the Fontainebleau Summit meeting in 1984 which put market-making on top of the Community agenda. Citizenship practice now concentrated on the effort to facilitate an increasing movement of worker-citizens as one basic condition for economic flexibility. Based on the movement of these worker-citizens, the demand for greater social and political equality among 'foreigners' and 'nationals' arose.[63] Within this context of functionalist needs towards economic integration a political tension over equal access to political participation emerged; the Commission began to write proposals towards the establishment of equal political participation for EC citizens; a 'passport of uniform design'[64] was created; and a 'Community Charter of Fundamental Rights for Workers' was adopted.[65]

Post-Fontainebleau Community policy represented one major achievement: the planning, negotiating, and signing of the Single European Act. Therefore, the impact on the less economically involved and hence, less politically exposed individual citizen within the area of the internal market remained barely visible.[66] This part first briefly recalls the overall story of citizenship practice during the Fontainebleau period and then summarises the changed *acquis* of citizenship

62 Some differentiate between rights as 'useful tools for integration' and rights as 'weapons in the hands of Community citizens'. Clapham, *op. cite.*, note 43, p. 10. As this paper goes on to show, the first aspect has been central to EU citizenship policy making in the 1970s, while the latter aspect did not come to the fore until citizenship became an established right after Maastricht.

63 At the time nationals of one of the Member States who worked and resided in another Member State than that of their citizenship were considered *foreigners* as opposed to the *nationals* who were citizens of that Member State.

64 *Official Journal*, No. C 241, 19.9.81, Council Resolution.

65 See COM(89) 568 final which was adopted at the European Council meeting at Strasbourg, 8-9 December.

66 This lack of attention to the individual citizen or 'the people' of the Community was, however, not shared by the Commission and much less by the Parliament. Both institutions frequently mentioned the need to include 'the ordinary citizen.' Despite these efforts, in the late 1980s, Delors' view of an ideal type 'ordinary citizen' who stood 'for change which strengthens the feeling of belonging to one and the same community' had yet to be articulated in terms of practical policy. (Bull. EC, Supplement 1, 1987, p. 33)

practice in particular. The SEA decisively changed the Community's institutional network as well as the interest of Community organs in expanding it.[67] Part of these changes was clearly the institutionalised procedure of qualified majority voting which meant the introduction of 'minisupranationality' according to some.[68] Thus, the context was created wherein the notions of democratic procedure as well as democratic values would be addressed in the future. For example, changes in the Community's institutional framework reflected an increasing focus on democratic decision-making procedures. Democratic values were brought in as a factor of a Community without internal frontiers. The Commission's White Paper and the convening of an IGC in the 1980s contributed to the creation of new resources that expanded the *acquis*, the former by turning ideas into directives and the latter by providing the legal framework to mobilise them as part of the common market policy.[69] Within this political opportunity structure, the Commission's responsibilities with regard to passport policy-making seemed limited to worker-related issues. Citizens at that time had to be considered as worker-citizens in order to ensure continuous progress with regard to citizenship practice. Indeed some of the debated special rights were best termed 'wage-earners' rights'[70] such as for example the rights that had been named in the Social Charter. The citizens' right to move freely within the Community was advantageous from the point of view of the economic goals of Community policy. Signing the Schengen Accord in 1985 showed that some Member States had a particular interest in cross-border traffic.[71] Nevertheless, citizenship practice sug-

67 The SEA thus 'ultimately proved to be instrumental in reviving the dynamic of EC political as well as economic integration. S. Bulmer and A. Scott, *Economic and Political Integration in Europe: Internal Dynamics and Global Context*, Oxford: Blackwell Publishers (1994), p. 4. Some indeed compare the Fontainebleau period with the previous period by referring to a changed attitude towards the constitutional development of the Community, viewing the SEA as leading towards the 'high road of treaty revision'. See: W. Nicoll, 'Maastricht Revisited: A Critical Analysis of the Treaty on European Union', in A.W. Cafruny and G. Rosenthal (eds.), *Vol. 2 The State of the European Community. The Maastricht Debates and Beyond*, Boulder: Lynne Rienner (1993), p. 19.

68 Nicoll, *op. cite.*, note 69, p. 24.

69 More specifically, the clear definition of the 279 directives prescribed by the Commission's White Paper 1992 provided the point of departure for this type of policy making which led to a new era in Community politics which soon became known under the slogan of 'Europe '92'. While the White Paper went beyond market policy making it was nonetheless conceptualised to operate within a market paradigm. Behind a quite technical appearance, the White Paper had a whole series of legal commitments for the Member States in store that were part of the implementation of the directives. It therefore required basic agreement on the legal basis for resolving intra-Community disputes. With the White Paper then the Commission had established a time table for economic policy making by setting the 1992 time limit for the process of creating an internal market without frontiers. Beyond that, by means of an IGC it had elaborated a plausible reason for a Treaty reform.

70 George Ross, *Jacques Delors and European Integration*, Cambridge: Polity Press (1995), p. 103.

71 J.D.M. Steenburgen, *Schengen, Internationalisation of Central Chapters of the Law on Ali-*

gests that Community policy in this period went beyond the level of economics alone.

At the end of the 1980s the definition of new frontiers of citizenship concentrated on territorial and socio-economic limits of citizenship. In socio-economic terms, these frontiers excluded some citizens based on newly established special rights for worker-citizens, as well as non-income producing citizens or those who were not considered as being related to economically active worker-citizens. In fact, the line between inclusion and exclusion was set by restricting free movement to the worker-citizen, his spouse and their family. Those who did not qualify for the right to freedom of movement according to this definition were excluded. Apart from materialised geographical borders, socio-economically set boundaries thus had an impact on the practice of movement and vice versa. The management of these boundaries was central to the project of market-making. One of these mechanisms was for example based on movement. It reflected an interest in labour-market flexibility; this in turn enhanced the competitive capability of the Community as one actor in the global economy.[72]

While the process of market-making proceeded throughout the mid- and late 1980s, a discourse about the impact this market would have on the political and legal status of Community citizens vis-à-vis the Community also emerged. That discourse identified progressing economic integration as bringing about a loss of status. That is, once citizens moved they lost access to participation. This was considered as a lack of democracy and was hence one aspect of the 'democratic deficit.'[73] This argument which was introduced to the universe of political discourse by the Commission is notably embedded in modern citizenship discourse.[74] The introduction of such democratic discourse to the universe of politi-

ens, Refugees, Privacy, Security and the Police, Leiden: Stichting NJCM (1992), p. 57.

72 The mechanism of closure and disclosure rested on such aspects of citizenship practice as the rights to movement, residence and establishment. According to Article 8A EEC Treaty, the territorial limits were set by the borders of the internal market. As Article 48 EEC stated, '[f]reedom of movement for workers shall be secured within the Community ... it shall entail the right .... to move freely within the territory of Member States for [the purpose of employment].' According to Article 48(3) EC, the freedom of movement for workers entailed the right to (a) accept offers of employment and (b) move freely within the territory of Member States for this purpose, as well as (c) to stay in a Member State for the purpose of employment 'subject to limitations justified on grounds of public policy, public security or public health.' Public servants were excluded from this freedom according to Article 48(4).

73 The other aspect of the 'democratic deficit' was a question of democratic procedure. Both aspects are rooted in different contexts. Bulmer and Scott note that the SEA had not successfully challenged the deficit. They identify a twofold procedural deficit, one as the 'Community's decision-making procedures' and the other as the lack of 'democratic legitimacy' as regards the legislative process. Bulmer and Scott, *op. cite.*, note 67, p. 7.
In turn, the Commission's demand for the political right to vote is based on historical experience of citizenship practice in nation-states. The often interchangeable use of the term prevents a clear understanding of the political consequences involved.

74 After all, the concept of modern citizenship rests on three constitutive elements (nation-state/community, citizen, citizenship practice) and three historical elements. Access to

cal discourse which was, at the time, dominated by the market paradigm, contributed a crucial ideational aspect to the *acquis communautaire* of the time. As market integration assumed momentum and the establishment of the free movement of capital, goods, services, and persons took shape accordingly, the absence of political rights would lead to individual political exclusion. To provide individual integration into the Community, it was argued, political rights needed to be appended to the Treaty via Article 235 EEC Treaty.[75]

In sum, the reconstruction of citizenship practice in the 1980s led to the mobilisation of two types of resources. One was the mobilisation of market-making resources. It led to the expansion of the formal institutions of the *acquis*, that was clearly expressed by the institutional reform of the Treaty based on the Single Act. The other was a mobilisation of ideas that generated a new discourse about democracy. Both flowed from this period's stress on the free movement of worker-citizens as one crucial aspect of market-making. The former was represented as the splitting of passport policy into boundary politics and border politics which involved a competence separation among Community institutions. Subsequently the area of justice and home affairs was defined as being part of the Member States' domain whereas the implementation of measures towards the completion of the common market remained (according to Article 8A EEC Treaty), the Commission's domain. The latter aspect emerged in the universe of political discourse when the Commission argued that the special right to free movement in the Community would lead to deprivation of democratic participation, unless those who moved to work in another Member State were granted the political right to vote.

This interrelation between the free movement of worker-citizens and the political right to vote and stand for election represented a decisive change in the informal *acquis* because it linked informal resources, such as normative values, to market policy-making. The discourse highlighted the different expressions of belonging, namely, belonging with reference to a community within a bounded territory which is defined by political citizenship rights and access to political participation. This was the type of belonging-discourse invoked by the Commission's report on the right to vote. The other type of belonging is more subtle as it rests on feelings of inclusion and exclusion that are often based on actual inclusion by means of social rights that have been established as a consequence the expansion of social policy. This type of expansion of social policy towards immi-

participation is one of the latter. With the demand for access then, the question of state-building was - however carefully - introduced to the discourse. Similar to the loss of power by nation-states–something which had been observed as one phenomenon of the 1980s and some of which had been restored within the Community–we then observe a loss of access on the part of the citizen.

75 These concerns for democratising the process came much more clearly to the fore when 'legitimacy' and more precisely 'democratic legitimacy' turned out to be the central principle of the 1990s. However it is worthwhile to note that they had been added as a new informal resource (i.e., ideas) to the *acquis* before the Maastricht negotiations were to begin.

grants who are not (yet) nationals and do not have access to political citizenship rights has been characterised as a policy of 'disclosure' in other cases.[76] Such a situation of disclosure had precisely been created by the Community's top-down citizenship practice that contributed to the adoption of the Social Charter.

The conflictual aspect of market-making called for a narrowing of the gap between the politically excluded and socio-economically included Community citizens. That gap between legal and identity-based belonging would begin to diminish as more political citizenship rights would be stipulated. The Commission contributed to the creation of new informal resources towards that new step of disclosure in citizenship practice. This newly invoked discourse on democracy as one resource towards the development of citizenship was enforced by referring to common European historical experience when it emphasised, that this tension contradicted the European democratic heritage.[77] The measure to close the gap was at hand and had been prepared for a long time: enhanced special rights policy while numerous statements acknowledge this period as one of successful relaunch including institutional reform[78] and subsequent market-making,[79] this citizenship policy analysis shows that this period also contributed to the process of union-building as some steps towards a refined relationship between Community citizens and the Community had been accomplished and further steps had been prepared. If the latter aspect remained largely invisible during the 1980s, the changes of the less tangible aspects of the *acquis* substantiate this view.

The 1990s resulted in the adoption of political citizenship rights as well as the stipulation of the rights of free movement and residence not only for the employed and their families, but also for other persons, under the condition of economic security and nationality. One major change in the citizenship *acquis* sub-

76 W.R. Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, MA: Harvard University Press (1992); Y. Soysal, *Limits of Citizenship, Migrants and Postnational Membership in France*, Chicago: University of Chicago Press (1994).

77 Brigid Laffan identifies a tension between 'integration and democracy' whereas the 'West European state, notwithstanding different traditions and historical experiences, is the primary focus of allegiance and loyalty [and] provides the framework for democratic politics'. See: B. Laffan, 'Comment', in Bulmer and Scott, *op. cite.*, note 67, p. 100. As she adds, it is because of 'our attention to the state as a normative order' that we are aware of this tension. Historical experience then is a crucial factor once the political meaning of European integration is at stake.

78 W. Wessels, 'The Institutional Debate- Revisited. Towards a progress in the *acquis academique'*, in C. Engel and W. Wessels (eds.), *From Luxembourg to Maastricht. Institutional Change in the European Community after the Single European Act*, Bonn: Union Europa Verlag (1992), pp. 17-32; J-V. Louis, 'Les Nouvelles Procedures: Conclusions et perspectives', in Engel et al. (1992), pp. 161-170; J. Lodge, 'The European Parliament and the Authority-Democracy Crises', Vol. 53 *The Annals of the American Academy of Political and Social Science*, Special Issue on the European Community (1994), pp. 69-83.

79 W. Sandholtz and J. Zysman, '1992: Recasting the European Bargain'. Vol. 1 *World Politics*, pp. 95-128; W. Streeck, 'European Social Policy: Between Market-Making and State-Building', in S. Leibfried and P. Pierson (eds.) *European Social Policy: Between Fragmentation and Integration*, Washington, D.C.: Brookings Institution (1995), pp. 389-431.

sequent to the constitutionalization of political citizenship rights in the EC Treaty was that it made possible talk about citizens' rights and accordingly, citizenship practice as citizenship policy. In other words, the resources that had remained more or less hidden for 20 years were now, if only in part, bundled and had a name: Union citizenship. However, this name comes with many meanings as citizenship evokes expectations which are often grounded on national experiences and which therefore usually differ from a formal interpretation of Union citizenship.[80]

Citizenship practice during this period was strongly influenced by a series of Spanish letters and proposals. They contributed to a debate over Community citizenship which could draw on the resources that had become part of the *acquis communautaire* since the early 1970s. Two types of resources were mobilised during the citizenship negotiations which preceded Maastricht. First, citizenship was to grant rights that were special to the different levels of the Community as a polity and as a social space (free movement, residence, establishment, voting and standing for municipal and European elections at one's place of residence). Second, the visible sign while travelling outside the Community was the uniform passport (reduced border checking, diplomatic protection while abroad). Some of these resources were formalised with the establishment of Article 8 EC Treaty.

The debate unfolded over four stages. It was triggered by a letter from Spanish Prime Minister Felipe Gonzalez written on 4 May 1990 for an interinstitutional conference which was to prepare the IGC on political union.[81] Then a 'Foreign Ministers' Note for Reflection' included the idea of citizenship in its recommendations for the Dublin II Council on 25-26 June 1990. This note stated that the upcoming IGC had to deal with the

> transformation of the Community from an entity mainly based on economic integration and political co-operation into a union of a political nature, including a common foreign and security policy.

Three main aspects were considered as important towards this goal: (1) the transfer of competences; (2) Community citizenship; and (3) the free circulation of persons.[82] The second stage included the time between the Dublin II Council and the first meeting of the IGC on 14-15 December 1990. In this period, the concept of 'European citizenship' became part of the Community discourse as policy makers reacted to the Spanish proposal. The third stage lasted until the Maastricht European Council in December 1991, and was mostly dedicated to a legal definition of citizenship so as to include it in the Treaties. The fourth stage began after Maastricht and ended with the first Citizenship Report of the Com-

80 E. Meehan, *Citizenship and the European Community*, London et al.: Sage (1993), p. 1.

81 For the letter, see SEC(90) 1084 and AE, No. 5252, 11 may 1990, p. 3. It is important to note that this 'interinstitutional' conference included the main Community institutions. It was thus different from the IGC format which restricted the negotiation process to the Member States.

82 *Europe Documents*, No. 1628, p. 2.

mission in 1993. During this stage, the practical aspects of citizenship policy such as voting rights were refined. The four stages represent the negotiation of a number of documents towards the final wording of the Maastricht Treaty.

In time for the IGC on political union on 28 February 1991, the Spanish Delegation came forward with a second proposal on citizenship. It proposed to embed citizenship in the Treaty by way of a new Title to provide a framework for a dynamic concept of citizenship. The rights mentioned in the Title included first, the social right of a citizen to 'enjoy equal opportunities and to develop his abilities to the full in his customary environment;' second, the civil rights to movement and residence 'without limitation of duration in the territory of the Union;' third, the political rights to 'take part in the political life of the place where he lives, and in particular the right to belong to political associations or groupings and the rights to vote in and stand for local elections and elections to the European Parliament;' and finally the right to 'enjoy the protection of the Union and that of each member State' while in third countries.[83]

The discourse on citizenship practice in the early 1990s showed that although the historical element of *belonging* was continuously addressed, the focus was shifted from creating a *feeling* of belonging to establishing the *legal ties* of belonging. The Maastricht Treaty conferred the rights of residence, movement and vote in municipal and European elections as well as the right to diplomatic protection when abroad to citizens of the Union.[84] While the identity-based link between citizens and the Union had been pursued over the previous decades, and continued to be part of the border politics of the 1990s as well, citizenship practice in the Maastricht period succeeded in legally establishing a bundle of citizenship rights, among them first and foremost, political rights. It thus established the legal ties of belonging which are one necessary condition for access to participation as a new formal resource of the *acquis*. The legal ties were not only important for defining the relation between citizens and the Community anew, they also raised questions about the political content of nationality. Along the lines of the Spanish proposal, Parliament demanded that Union citizenship be included in the Treaty as a separate title comprising the following central aspects: social rights including a substantial widening of the proposals contained in the Social Charter; equal rights between men and women; the political right to vote and stand for election in local and EP elections at one's place of residence, as well as the political right to full political participation at one's place of residence; and the civil right to free movement and residence in all Member States. Importantly, the report repeatedly emphasised the necessity to rethink citizenship as it could no longer be reduced to the 'traditional dichotomy between citizen and foreigner

[83] 'Permanent Representation of Spain to the European Communities. 'Intergovernmental Conference on Political Union and European Citizenship: 21 February 1991', in Finn Laursen and Sophie Vanhoonacker (eds.) *The Intergovernmental Conference on Political Union. Institutional Reforms, New Policies and International Identity of the European Economy*, Maastricht: European Institute of Public Administration (1992), pp. 326-27.

[84] O'Keeffe, *op. cite.*, note 1.

or to the exclusive relationship between the state and the citizens as individuals."[85] Once individuals enjoyed different types of rights in this new world that reflected flexibility and mobility, it became increasingly difficult to define citizenship practice as based on nationality.[86]

Post-Maastricht, another debate about the inclusion of Union citizens, that is citizens who had legal ties with the Union, and the exclusion of 'third country citizens,' (in other words, individuals who did not possess legal ties with the union but might have developed a feeling of belonging) was pushed by interest groups and the European Parliament in particular.[87] One proposition to solve this potential political problem was the establishment of place-oriented citizenship.[88] This demand was brought into the debate by the European Parliament (Outrive Report, Imbeni Report). It was enforced by the demand to change the citizenship legislation of the Treaty. For example, instead of granting citizenship of the Union to '[e]very person holding the nationality of a Member State' (Article 8 (1)), the ARNE group requested citizenship for '[e]very person holding the nationality of a Member State *and every person residing within the territory of the European Union*'.[89] The discourse on place-oriented citizenship suggests to respect the new geography of citizenship. That is, citizenship is not built on the legal ties of belonging to the community alone but also on identity-based ties of belonging to spaces within the Community. Indeed, European citizenship practice did not aim at destroying *one* (national) identity--albeit this was a frequently mentioned British worry throughout the process. It rather attempted to continuously mobilise *various* identities. The Maastricht step towards naming citizenship was a change in the citizenship *acquis* which put citizenship up for de-

85 PE 150.034/fin., pp. 6-10, at p. 9.

86 Meehan captured this fragmenting aspect of European citizenship noting that it is,
> neither national nor cosmopolitan but that is multiple in the sense that the identities, rights and obligations associated [...] with citizenship, are expressed through an increasingly complex configuration of common Community institutions, states, national and transnational voluntary associations, regions and alliances of regions.

See: E. Meehan, *op. cite.,* note 80, p. 1.

87 For a new dynamic in the debate over 'third-country nationals' it is important to recall that with regard to the Berlin Wall, the Community had to face a new challenge in the area of border politics; namely the question of visa and asylum policy, now involving the question of east-west migration, and how it was to be dealt with by the upcoming Schengen re-negotiations.

88 It is interesting to observe the notion of 'place-oriented' citizenship as *discourse* discerned from the study of citizenship practice in the EC/U context, on the one hand, with the application of 'place-sensitive' citizenship as a *concept* suggested by Jenson's work on citizenship in the Canadian context. Jane Jenson, 'Citizenship and Equity. Variations Across Time and Space', in Janet Hiebert (ed.), *Political Ethics: A Canadian Perspective*, vol. 12 of the Research Studies of the Royal Commission on Electoral Reform and Party Financing, Toronto: Dundurn Press (1992). This observation may be crucial for subsequent comparative studies on citizenship practice in contexts that differ from those of the familiar nation-state model.

89 See: Antiracist Network for Equality in Europe (ARNE), (1995), p. 4; emphasis in original.

bate.

In this final section on the Maastricht period, I highlight two aspects which are important for an understanding of the new citizenship article with a view to further citizenship practice. One is an understanding of how the formal attributes of the *acquis* have been expanded and what this implies for citizenship practice. This aspect relies largely on legal information. It is based on the letter of the Treaty and most extensively elaborated by formal legal approaches.[90] The other is about the informal attributes of the *acquis* that provide information about the meaning of this newly established supranational citizenship. It is about public expectations of citizenship and the means to realise them. This aspect was most clearly explored by groups and committees of the European Parliament as well as by a rising number of interest groups as well as social movements.[91]

With the ratification of the Maastricht Treaty, a legal focus on a politically rather than a socio-culturally derived definition of citizenship questions the legal restriction of third country nationals' political participation according to the concept of nationality. Participation in elections for both the European Parliament and on the municipal level were now to be carried out according to geographical, not national, terms of belonging. While it is often and correctly emphasised that nationality remains the pre-condition for obtaining the political right to vote,[92] the notion of 'place' was thus introduced as a new component to identify where to practice this right. According to Socialist MEP Lode van Outrive, a prospective step towards solving the problem of third country nationals' rights to participate politically could lie in a move towards a 'place-oriented definition of citizenship'.[93] And, as the EP argued, these standards are no longer appropriate at a time when people often do not live and work within the national contexts of their place of birth, but have established themselves as residents in new contexts. In making these observations, the European Parliament brings the tension between socio-economic inclusion and political exclusion to the fore: a legal stipulation of citizenship leads to the political exclusion of large

90 See for example: O'Keeffe, *op. cite.*, note 1; Closa, *op. cite.*, note 11; C. Closa, 'The Concept of Citizenship in the Treaty on European Union', Vol 29 *Common Market Law Review* (1992); S. O'Leary, 'The Relationship between Community Citizenship and the Protectin of Fundamental Rights in Community Law', Vol 32 *Common Market Law Review* (1995), p. 519.

91 See for example, the Parliament's Bindi Reports of 1991-1993 (PE 207.047/fin.), as well as the Imbeni Report of 1993 (PE 206.762), the Banotti Report of 1993 (PE 206.769/fin.); contributions by church and immigration committees (Niedersachsenbüro, 1993); and for the social movements see the Antiracist Network for Equality in Europe (ARNE) and Eurotopia (ARNE (1995); Eurotopia (1995)).

92 Closa, *op. cite.*, note 90, pp. 487-518; O'Leary, *op. cite.*, note 90; O'Keeffe, David. *op. cite.*, note 1; M. Martiniello, 'Citizenship of the European Union. A Critical View,' in R. Bauböck (ed.), *From Aliens to Citizens, Redefining the Status of Immigrants in Europe*, Aldershot: Avebury (1994), pp. 29-47.

93 *Verbindungsbüro des Landes Niedersachsen bei den Europäischen Gemeinschaften. Disskussionsveranstaltung Ausweitung der Unionsbürgerschaft als Mittel einer EG-Einwanderungspolitik?* Brussels, 28 September 1993, in Official Meeting Report (on file with author).

groups of otherwise socially, culturally and economically included members of a the European Union as a new community.[94]

Three major characteristics of citizenship practice were reflected in the first Commission report on citizenship since the Maastricht Treaty entered into force on 1 November 1993. First, the report revealed a discursive link to the original idea of creating a European identity as it had been forged in the early 1970s and then been integrated step-by-step into the treaty until it culminated in the stipulation of citizenship in the Maastricht Treaty. Second, it expressed the interdependence of special rights as political rights of citizens and the passport union, which includes the establishment of the freedom of movement. And, third, by bringing attention to the dynamic nature of the Treaty provisions, the document underlined the constructive aspect of this formal expansion of the *acquis*. With regard to the potential of post-Maastricht citizenship promises, it is crucial to note that previous citizenship practice has created new resources for the *acquis*. Beyond the formal aspect of new political rights, the practice shows that citizenship practice may have ceased to be a top-down practice that relies on Community institutions only. Instead an emerging interest of social forces such as social movements and interest groups imply that citizenship practice now also increasingly includes more actors. As the Imbeni Report of the Parliament put it, 'now that the Treaty has been ratified, consideration must be given to the new legal framework for improving it.'[95]

The date of the Maastricht entering into force on November 1, 1993, thus marks one stage in the story of constructing European citizenship; namely, citizenship has been included in the Treaty, it is clearly defined and visible. Now, Article 8 EC Treaty may be invoked. However, the embedding of citizenship in the Treaty represents but one dimension of this story. Beyond this legal dimension, the institutional as well as the socio-cultural dimensions have proved to be crucial, as both contributed not only to the project of market-making but also to that of Union-building. Secondly, this chapter began with the assumption of citizenship being a dynamic concept. In other words, if the union-building contribution of citizenship is examined, it is important to understand where such constructive aspects of citizenship are situated and which institutions have been involved in constructing them.

The ensuing debates over voting rights for third-country nationals after Maastricht add a new insight into the case study. They suggest a change in the developing practice of Union citizenship. Now, not only the institutions of the Europolity but also NGOs and interest groups began to voice their demands based on the new formal resources of an expanded *acquis*. Union citizenship was defined and the political right to vote of Union citizens was beginning to be generalised across the Union. New opportunities for citizenship practice were created, including new access to political participation (European and municipal elections),

[94] The excluded groups comprise according to different estimates between 8 and 13 million people (O'Keeffe, *op. cite.*, note 1.)

[95] PE 206.762 and PE 206.250, 20 October 1993, p. 10.

the right to move and reside freely within the territory of Member States, the right to petition; and the right to consular protection while abroad.

Compared to the early beginnings of citizenship practice, this struggle takes place in a political opportunity structure that includes a revised and expanded *acquis communautaire*. The set of formal institutional arrangements now entails the Single European Act (1987), the Social Charter (1989), the Schengen Convention (1990), and (with the Maastricht Treaty) most importantly, the Committee of the Regions, co-decision and Article 8 EC Treaty on Union Citizenship (1993). These innovations include formal institutional aspects of the *acquis communautaire* such as conventions, acts, articles, protocols and procedures which decisively contributed to a changing political opportunity structure by facilitating new formal resources. Whether or not they are accessible and if so how, will become evident as the negotiations over, for example, place-oriented citizenship rights for third-country nationals within the framework of the current IGC. The resources to be mobilised towards this end have in part already been created by citizenship practice and are hence part of the *acquis*. They consist, for example of a set of formal resources (in particular, Article 8 EC Treaty) on the one hand, but also of a set of practices and meanings that had been accumulated over time (such as for example, the Commission's normative argument in favour of voting rights for those citizens who do not reside in the Member State of their origin), on the other. The emergent demands for expanded citizenship rights based on residence and not on nationality suggest that the time to work with the newly established institution of Union citizenship has come. The question is now one of political opportunity.

IV. CONCLUSION

As European citizenship practice proceeds, national citizenship practice does not remain unchallenged. That is, if citizenship is established via civil, political and social rights, and there is a role for citizenship in forging the principles of identity, legitimacy and solidarity as basic principles that lie at the centre of the modern nation-state, then this creates a dilemma for the participating Member States in the EC. After all, the Member States' identity, legitimacy and solidarity stems from precisely these aspects of citizenship. A construction of a European citizenship therefore means a challenge to their political domain.[96] Yet this very process has been encouraged by the introduction of special rights to the *acquis*.

This chapter argued that once we agree that Union citizenship holds promises for the future and, if we furthermore share the observation that the familiar categories of nationality and the nation-state do not apply in the case of Union

[96] Van den Berghe points at this dilemma early in the process when he notes that to grant 'foreigners'–that is nationals living outside their Member State of origin within the Community–the political right to vote is considered by the majority of the Member States as breaking with the 'idea that the political domain is reserved for its own nationals'. Van den Berghe, *op. cite.*, note 58.

citizenship, then the question of what citizenship entails apart from formal criteria needs to be addressed anew. In taking on this task, the chapter proposed a way of understanding Union citizenship based on a study of citizenship as a practice. To that end, it carried out a policy analysis based on the developing discourse on citizenship. It assumed that an analysis of the emergence of citizenship as a policy facilitates an insight into the developing meaning and practice of Union citizenship over time. This perspective facilitated a special focus on the creation and transformation of the resources of Union citizenship such as rules, procedures, practices and ideas as they appear as part of the citizenship discourse. The assumption was that a careful reading of the making of this discourse would provide key information as to the roots of this new type of citizenship and, subsequently, shed light on the potential it holds for future citizenship politics. Among other things, these promises depend on the resources which have been accumulated within the citizenship *acquis communautaire* over time.

The chapter drew attention to the fact that citizenship policy-making in the EU/EC began from the modern idea of creating a 'European Identity'. In pursuing this strategy as one which would enable the European community to speak with one voice in the international realm, over twenty years the developing practice of European citizenship created a fragmented type of citizenship. This fragmented Union citizenship is probably here to stay. It will not turn into anything akin to a nationally defined citizenship. While it entails elements of modern citizenship such as rights, access, and belonging, it is not based on the modern criteria of territoriality, statehood and nationality. Instead, the dimensions of rights, access and belonging mirror the fragmented Euro-polity. The analysis of the developing practice of European citizenship based on expanding resources within the citizenship *acquis* thus finds that Union citizenship means much more than a simple compilation of rights, a conclusion which has been suggested by some formal legal approaches. The analysis also sheds light on the creation of belongingness to the EU and suggests that it emerged according to what individuals did or might aspire to do with reference to economic and political participation. Crossing national borders as economically active citizens, waving closed passports at internal Community borders as travellers, exchanging knowledge as scholars and students, voting commonly for the European Parliament and sharing municipal governance as Union citizens are aspects of this process.

CHAPTER XX
SUPRANATIONAL CITIZENSHIP AND DEMOCRACY: NORMATIVE AND EMPIRICAL DIMENSIONS*

Carlos Closa

I. INTRODUCTION

The aim of this chapter is to explore the perspectives for a supranational democracy in the EU in connection with the legal status of EU citizenship. The discussion starts by identifying the normative justification for EU level democracy: the incapability of Member States to secure an equilibrium between legitimacy and efficient provision of citizens necessities (Part I). The need of increasing legitimacy provided by efficient decision-making (one that might deliver a set of outcomes satisfactory to all participants) clashes with the control capability by individual Member States and the legitimising subjects. Majority principle is the procedural mechanism used in democracy in order to bridge efficient decision-making and legitimacy. Majority voting has featured prominently in discussions on constitutional reform. However, a preliminary question is to elucidate the criteria that made majority a legitimate procedure. Thus, the second step is to clarify the relationship between procedural comprehension of democracy and its subjective referent (Part II). For this, the characterisation of the political subject of democracy, (the *demos*) is briefly discussed in both normative and empirical dimensions. The aim is to determine, in normative terms, the possibilities for consistency between supranational democracy and national citizenships, and between these and supranational citizenship. Although there is some ground to state the normative compatibility between those, the argument must take into account the functional requirements of democracy (Part III). The diagnosis is the lack of a European public sphere. Whether this will emerge in the future is an open question, but, in any case, strategies that attempt to reconstruct models drawn from nation-states do not seem normatively acceptable. Alternatively, some normative requirements for a European public sphere are discussed. Finally, it is suggested that some institutional developments of EU citizenship consistent with nationally-bounded normative discourses on democracy and citizenship might assists the emergence of a European public space (Part IV).

* I am deeply indebted to Will Kymlicka for his comments on an earlier version of this paper.

M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 415-433.

II. EXPLORING THE NORMATIVE CASE FOR SUPRANATIONAL DEMOCRACY

The reasons for a normative case for EU democracy are provided by the empirical evaluation of the real conditions for the operation of national democracies within the EU (and, more precisely, the limits to their autonomous capability for self-determination). The EU is the paradigmatic case of an enlarged area for the exercise of an individual's autonomy in private spaces (i.e., the market) whose corresponding institutionalised public spheres are still very much delimited by the boundaries of each Member State. The nation-state is declining progressively as an arena for the reconciliation of private autonomy and public self-determination. Given that EC law is constructing a supranational sphere for economic activity, the EU is increasingly becoming the arena for an individual's autonomy whilst, on the other hand, public power regulation of this private sphere is carried away from the traditional framework for an individual's self-realisation: the state. In this context, national self-determination is more a chimera than a reality whilst supranational processes have a logic on their own which relegate not only democracy but also politics itself, or in other words, private law is displacing public law as the constitutional basis of society.

The implications of this assessment could be dismissed from a perspective which still retains nation-states as the most valuable and viable framework for politics. From this perspective, it might be argued that there is nothing un-democratic in freely-elected governments entering into international commitments (preferably after a vigorous debate) so long as they can be held accountable by their national electorates. This criticism is based upon two implicit understandings of respectively, the commitments of EU membership and the scope for political accountability within the EU.

Regarding the first issue, Member States freely agree on a legally binding international treaty in the exercise of their sovereignty. It follows that, logically, they can also freely exercise their sovereignty by withdrawing from the EU, even though ECJ case-law has established the unlimited duration of the Treaties. The ruling by the German Constitutional Court on the Maastricht Treaty[1] has made this point clear: Germany can withdraw from the EU. In practice, the EU sanctions a system of economic, social and political interdependence and one might legitimately express doubts on the real possibilities for exercising this option. It is hard not to agree with Habermas that there exists a gap between the nation state's increasingly limited manoeuvrability and the imperatives of modes of production interwoven world-wide which create the illusion of real sovereignty.[2] Nevertheless, the assumption on which the EU political order has been built is the separate sovereignty of Member States and their final right to withdraw.

1 Cases 2 BvR 2134/92 & 2159/92 *Manfred Brunner and Others* v. *The European Union Treaty* (1994) Vol. 1 *Common Market Law Reports* 57.

2 J. Habermas, 'Remarks on Dieter Grimm's "Does Europe need a Constitution?"', Vol. 1 *European Law Journal* (1995), pp. 303-307.

What follows from this is that Member States and their national governments must remain the masters of the contract. This implies two items: predictability and control, both contained, for instance, in the ruling of the German Constitutional Court on the Maastricht Treaty. And it is at this point where the former assumption is not matched by reality. EU legal doctrine has vigorously argued that the Treaties are a kind of constitution for the EU: from the original precepts, a body of legislation and principles has been developed, a body certainly unpredicted to the extent reached. Member States cannot exit this process: the rule of law being a common constitutional principle, they are obliged to comply because they freely agree to do so. This process of constitution-building is not limited to law, but it also appears in form of innovative political decisions. A topical example might illustrate this point.

Member States have agreed to create an EMU through a three-stage process which sets several criteria for each country converting to the single currency. The problem now is not that the criteria were not spelled out clearly enough and are currently under a process of reinterpretation. The problem is that the Member States did not anticipate the regulation of their fiscal behaviour in the post-EMU stage. Thus, the so-called Stability Pact (unpredicted as part of the commitments of the Maastricht Treaty) is appearing as an internal reform of the Treaties. Predictability therefore, is not implicit in the nature of the EU and, as the ECJ ruled long ago and another Constitutional Court has confirmed, the Member States are committed to an undefined process.

At this point, the central issue is control (which is the second item implicit in the assumption of Member States' sovereignty). This is also the prerequisite for political accountability: according to the assumption above, governments might be held accountable and responsive for their dealings at the EU level. Two different levels of control can be distinguished: control on treaty or constitutional agreements, and control on 'ordinary' decision-making. Regarding the first, the capability of controlling treaty changes remains very much in the hands of national parliaments which have to grant consent to any EU reform. However, experience seems to show that parliamentary control is not enough to secure public acceptance in the case of treaty reforms; national public debates on the contract are also required. In conclusion, the unanimity requirement for constitutional reform combined with the implicit right to withdraw create a powerful tool for the control by Member States of the constitutional reform (not to be confused with predictability).

What is the situation regarding control of 'ordinary' decision-making? Two different procedures are used for EU decision-making. The first is unanimity. As a procedure, there is nothing undemocratic in unanimous decisions. Theoretically, unanimous decisions satisfy the two requisites of democratic control: accountability and responsiveness. Each representative in the Council can be held accountable by their domestic constituencies and this is the line endorsed by the German Constitutional Court in its Maastricht Ruling: it is first and foremost for the national peoples of the Member States who, through their national parliaments, have to provide democratic legitimation (§39 b.1.). Democratic legiti-

mation necessarily comes about through the feed-back of actions of the European institutions into the parliaments of the Member States_(§43).

Needless to say, unanimous decision-making operates under the form of an imperative mandate for representatives. Problems appear when this understanding has to be fitted into the real working conditions of the EU, whose decisions involve complex packages, trade-offs and side payments. Greater democratic accountability to parliamentary bodies would imply a decrease in the discretionary margin for negotiation and thus, a likely decrease in the efficiency of the political outcomes. This is exacerbated in conditions of imperative mandate by the component units. Since EU legitimacy relies, apart from the rule of law, in its efficiency to deliver (i.e. capability to solve problems), a kind of social legitimacy,[3] the paradoxical conclusion is that the lack of domestic control is highly functional for EU legitimacy.[4] To summarise, unanimity threatens efficiency and therefore, the capability of the EU to deliver goods; this capacity is its original purpose and main source of legitimacy.

Qualified majority voting has been introduced to improve efficiency of decision-making and thus, social legitimacy. This procedure does not, of course, guarantee control by all parts. Minorities, in the case of qualified majority voting, can claim illegitimacy, in the sense that responsiveness and accountability do not work for particular groups of individuals. In this situation, nation-states (and least not, EU Member States) are facing a truly democratic dilemma: the ability of citizens to exercise democratic control over the decisions of the polity versus the capacity of the system to respond satisfactorily to the collective preferences of its citizens.[5] At this juncture, majority and legitimacy are not coterminous. The conclusion that may be drawn is the practice of citizenship grounded in that the plurality of EU nationalities has not been enough to secure an efficient democratic decision-making process and, therefore, it seems that (at least in formal terms) the reconciliation of private autonomy and public self-determination which is at the very basis of the idea of democratic citizenship has been substantially weakened by the European integration process.

It seems that there are three possible strategies to curb this situation. The first is the attempt to restore public accountability grounded in national citizenries by increasing predictability and control through the unanimity rule. Some arguments already discussed demonstrate the unfeasibility of this strategy. The second strategy is the acceptance of the *status quo*; i.e. accepting the autonomization of EU from the requisites of accountability and its consolidation as an arena for private action. This is a fully legitimate ideological comprehension of the EU.

3 J.H.H. Weiler, 'Problems of legitimacy in post-1992 Europe', Vol. 46 *Aussenwirstschaft* (1991), pp. 411-437.

4 W. Merkel, 'Integration and Democracy in the European Community. The Contours of a Dilemma'. Center for Advanced Studies in Social Sciences, Institute Juan March Working Paper 1993/42 (1993), 41 pages.

5 R.A. Dahl, 'A Democratic Dilemma: System Effectiveness versus Citizen Participation', Vol. 109 *Political Science Quarterly* (1994), p.28.

The concern is that it implies a neutralisation of political power at the national level. The third strategy is to explore the possibility of bridging an efficient procedure for decision-making with a pretension of democratic legitimacy, i.e., to try to establish a link between efficiency, procedure and people. Most of the discussion on democratic legitimacy focuses on the procedures and efficiency of decision-making. The proposal of this chapter is to tackle the issue from the consideration of the subject of political power: citizens.

III. THE DEMOCRATIC *DEMOS:* NORMATIVE AND SOCIOLOGICAL EMPIRICAL DIMENSIONS

There is a clear connection between the procedural understanding of democracy and its subject. The essential consensus for a democracy is a procedural one: consensus on the rules for the solution of conflicts. Thus, Habermas argues that the consensus achieved in the course of arguing as an association of free and equal citizens stems in the final instance from an identically applied procedure recognised by all.[6] This consensual procedure is the majority principle which is generally identified as the democratic principle for processing within conflicts.[7] Majority has a technical validity; according to Bobbio, it allows a group to better reach a collective decision among people with different opinions, whilst unanimity rule prevents obstacles and impedes the formation of a collective will. The concept of 'majority' means the political subject of power in opposition to other subjects, although, in Bobbio's opinion, it does not mean that government is exercised through a determined procedural rule.[8] The important aspect is that the majority principle requires changeable majorities, with the various parts of the body politic being able to alternate wielding power.[9] Importantly, the referent of 'majority' is a set of very ephemeral aggregations: within national political systems, majorities are electoral majorities, the product of an electoral occasion. Elections are, therefore, the mechanism to mediate between people and legitimate political power.

However, one should not be mislead by the technical procedure of this argument, i.e., elections: they are a way for the governing people, the *demos*, to manifest itself, as well as one of the forms of providing representation. The crux of the issue is to identify the subject as to who governs and who is represented.

The idea of democracy as a procedural mechanism linking individuals is only possible if a hipostasisation of real individuals into the idea of citizen is made.

6 J. Habermas, 'Citizenship and National Identity', in B. van Steenbergen (ed.), *The Condition of Citizenship*, London: Sage (1994), p. 24.

7 G. Sartori, *The Theory of Democracy Revisited*, New Jersey: Chatham House (1987), p. 91.

8 N. Bobbio, 'La regola di maggioranza: limiti e aporie', in N. Bobbio, C. Offe, and S. Lombardini (eds.), *Democrazia, maggioranza e minoranze,* Bologna: Il Mulino (1981), p. 34.

9 Sartori, *op. cite.*, note 7, p. 33.

The governing people is a transformed political subject, a people of citizens: a citizen is an individual enlightened by reason, who is free from class prejudices and the inherent cares to economic condition and who is also able to opine on public affairs, making an abstraction of his personal preferences.[10] The rationalist notion of citizen has, in the opinion of Burdeau, an empirical counterpart: the 'situated' man, the man in his daily life relation as characterised by his profession, lifestyle, tastes, necessities and available opportunities. He is a person conditioned by his environment, who perceives himself by watching his conditions not through a metaphysical reflection on his essence.[11] Therefore, empirical forms of democracy act on certain sociological preconditions (for instance, identity).

The contention of this chapter is that the naturalisation, i.e., uncritical acceptance, of current configurations of 'peoples' as the normative model of *demoi* (as it happens in historicist and organicist models) should not be taken for granted. This caution is particularly relevant if democracy is conceived as much an analytical concept with descriptive purposes as a normative ideal.[12]

The democratic theory of Schumpeter is the example of a contingent, i.e., historicist and particularistic, understanding of *demos*. Schumpeter argues from an incontestable historical fact: what has been thought and legally held to constitute a 'people' has varied enormously, even among democratic countries. Consequently, there are no grounds for arguing that any exclusion whatsoever from the *demos* is improper.[13] This argument has been criticised for two reasons. First, in Schumpeter's solution, there are simply no principles for judging whether anyone is unjustly excluded from citizenship. Second, Schumpeter conflates two different kinds of prepositions: a) system x is democratic in relation to its own *demos;* and b) system x is democratic in relation to everyone subject to its rules.[14] Similarly, organic conceptions of *demos* suffer from the central defect of either not being conducive to democracy at all or, in any event, allowing for the justification of any political regime whatsoever.[15] Even if this organic concept is reduced to the softer version of sharing the same value beliefs and value goals (basic consensus or consensus at the community level), this is a facilitating condition but not a prerequisite for democracy because democratic forms are in fact superimposed on either heterogeneous and homogeneous communities.[16]

These conceptual problems derive from the identification of empirical forms with normative models, something which usually occurs when the democratic nation-state is the referent. Democratic theory is intimately associated with the form it has assumed under the prevalent form of political power: the state and, in

10 G. Burdeau, *La democracia,* Barcelona: Ariel (1959), p. 30.
11 *Ibid.*, pp. 34-35.
12 Sartori, *op. cite.*, note 7; R.A. Dahl, 'Procedural democracy', in *Democracy, Liberty and Equality,* Oslo: Norwegian University Press (1986).
13 J. Schumpeter, *Capitalism, Socialism and Democracy*, New York: Harper Bros. (1942).
14 Dahl, *op. cite.*, note 12, p. 206.
15 Sartori, *op. cite.*, note 7, p. 23.
16 Sartori, *op. cite.*, note 7, p. 90.

particular, the dogma of national representation. As is known, traditional theory of the state does not presupposes a *demos* but population, the substrate on which the *demos* is constructed, a pre-democratic aggregation of individuals. The mechanism for unifying politically is representation, a conceptual construction which is not exclusively associated with democratic procedures. Procedures such as divine right, dynastic right or limited suffrage[17] have also been used as entitlements to represent collectivities. Any linking of representation and democracy must be explicitly mediated by the procedure to generate representation, i.e., universal free elections.

The objection is that conflating national representation with democracy raises to a normative category what is a circumstantial adaptation of the democratic form. There has been a historical coincidence between national representation and democracy, but the former is merely a contingent historical manifestation of the latter's transformation.[18] The first transformation was into the assembly from that of the Greek city-state; the second transformation was the establishment of representative democracy within the nation-state. A third transformation is now taking place: the grander scale of transnational, supranational forms of governance which affect citizens' daily lives at the same time that they restrict the citizens' ability to influence decisions.[19] Duverger, in turn, emphasises that these three models of democratic political society result from the democratisation of their respective autocratic equivalents (fiefdom, monarchy and imperium). In Duverger's opinion, the European Community is therefore, the model of democratisation of an imperial political society which merely masks a national expansion.[20]

Descriptively, representation may be defined as

> a mutually supportive mechanism of (not necessarily extremely strong) pre-existing feelings of commonness and institutions (...) which reflect and simultaneously actively shape the community which follows from this dynamic interaction'.[21]

From this, it might be queried what kind of pre-existing feelings of commonness and institutions exist empirically and their normative foundation.

It is with this background that the question of the validity of the defining criteria of the political subject of a democracy needs to be reconsidered. Obviously a democratic polity requires some kind of criteria to delimit its boundaries and the participating individuals. The legal referent presupposed by a *demos* are the constitutional rules defining personal qualifications for exercising voting rights

17 I am referring here to voting rights which are granted on the basis of criteria such as wealth or ownership of land.

18 Dahl, *op. cite.*, note 12; M. Duverger, *Una metamorfosis inacabada. La Europa de los hombres,* Madrid: Alianza Ed. (Translated from the French original), (1994).

19 Dahl, *op. cite.*, note 12.

20 Duverger, *op. cite.*, note 18.

21 U.K. Preuss, 'Problems of a Concept of European Citizenship', Vol. 1 *European Law Journal* (1995), p. 277.

(first and foremost, in most constitutional orders, nationality). In most cases, nationality laws crystallise (although not necessarily in an exclusive form) ethnic-cultural criteria. Therefore, the intrinsic problem of this defining criteria is that it inscribes, at the very core of democratic forms, an organic definition in which the legitimacy of majority rule does not mainly derive from the procedure but from the pre-democratic elements that brought a people together. Mechanicist identifications between nationality and citizenship have hidden this problem.

Theoretically, a detachment of the subject of democracy (the *demos*) from nationality is possible. Dahl and Habermas propose two paradigms for a normative definition of the democratic subject. Dahl identifies five criteria: voting equality, effective participation, enlightened understanding, control of the agenda and inclusiveness. The latter's criterion is as follows: the *demos* must include all adult members of an association except transients.[22] Whilst the association might be any human grouping, the essential (defining) characteristic of membership is that one is subject to the rules. This bears a strong parallelism with Habermas' arguments: within a bounded nation, sovereignty (national sovereignty) can be based on human rights (that is, in subjective legal personality) rather than on alternative, exclusinary notions. In the opinion of Habermas,

> the united will of citizens is bounded, through the mediation of universal and abstract laws, to a democratic legislative procedure which (...) only admits regulations that guarantee equal liberties for all and everybody: the procedurally correct exercise of popular sovereignty simultaneously secures the liberal principle of legal equality (which grants everybody equal liberties according to general laws).[23]

The empirical counterpart to this normative statement reflects a poorer reality, where nevertheless, processes of generalisation of citizenship rights to all individuals within the boundaries of nation-states point toward that direction.

My conclusion from this section is that some criteria for exclusion from national citizenships reflect pre-democratic elements and they are open to normative challenge. Thus, there is some ground for transcending the current configuration of national citizenships. Although this might clear the path towards the formulation of a supranational democracy, it is necessary to take the issue back to empirical aspects.

IV. THE MISSING LINK: THE EU PUBLIC SPHERE

Political sociology has emphasised that democracy presupposes a mediation between the scope for the realisation of the individual's autonomy (the market) and public power, this being called political culture, civil society or public sphere. The public sphere, in Habermas' model, presupposes a triadic model which ex-

[22] Dahl, *op. cite.*, note 12, p. 221.

[23] J. Habermas, 'Human Rights and Popular Sovereignty: the Liberal and Republican Versions', Vol. 7 *Ratio Juris* (1994), p. 11.

plicitly recognises the normative zone between public power and the market.[24] If we agree that a sphere of mediation between private and public power is a functional requirement of democracy, statements on the prospects for EU democracy depend on the methodological significance granted to a factual reality (diagnosis): the presence of a European public sphere.

The diagnosis on the EU public sphere, in which disagreement is hardly possible, concludes that the prerequisites for EU democracy are largely lacking: there is no Europeanised party system, nor European associations or citizens' movements, nor European media. The biggest obstacle, though, seems to be the absence of a common language, from which the problem arises that political discourse remains bounded by national frontiers.[25] In the words of the German Court in the Maastricht ruling, democracy entails that the decision-making processes of the organs exercising sovereign powers and the various political objectives pursued can be generally perceived and understood, and therefore, that the citizen entitled to vote can communicate in his own language with the sovereign authority to which he is subject (§41).

Without denying the sociological validity of this diagnosis, it is necessary to underline the reliance of the methodological instruments to evaluate the prospective EU public sphere on the nation-state. This was also a temptation in early studies on integration concerned with the creation of a 'political community'. In synthesis, drawing on the Tönnies distinction between community and society, it was argued that some kind of communal entity would have to precede the creation of a European political union. The influence of the nation-state model continues to be attractive to certain authors, who argue for instance that,

> it is an empirical question in the first place whether the populations of the European Union Member States share common ideas, values, interests and feelings of unity and social solidarity which have become characteristic of the political and cultural coherence of *nation-states* and which are amenable to be represented in common institutions and to be reflected in a common public sphere.[26]

In this view, the capability to reproduce romanticised ideal-type elements of the nation-state is the criterion defining the *demos*.

The paramount exponent of this line is the *Maastricht Urteil* of the German

[24] M.R. Somers, 'What's Political or Cultural about Political Culture and the Public Sphere? Toward a Historical Sociology of Concept Formation', Vol. 13 *Sociological Theory* (1995) p. 124. I adhere to the re-formulation of the Habermas notion by Somers: 'a contested participatory site in which actors with overlapping identities as legal subjects, citizens, economic actors, and family and community members (i.e. civil societies) form a public body and engage in negotiations and contestation over political and social life.' See M.R. Somers, 'Citizenship and the Place of the Public Sphere: Law, Community, and Political Culture in the Transition to Democracy', Vol. 58 *American Sociological Review* (1993), pages 587-620, at p. 589.

[25] D. Grimm, 'Does Europe Need a Constitution?' Vol. 1 *European Law Journal* (1995), pp. 294-296.

[26] Preuss, *op. cite.*, note 21, p. 278.

Constitutional Court. The definition of *demos* contained therein is basically organic, although Weiler specifies that there are two substrands deriving from it and which refer to the European *demos:* the soft 'Not Yet *demos*' (a European organic *demos* may come into existence sometime) and the more radical 'No *Demos*' (the former possibility is impossible and undesirable).[27] The central question is the negation of the existence of the sociological conditions for democracy or, in other terms, the features of the public sphere. The Maastricht ruling explicitly grounds democracy in its 'pre-legal' elements: democracy, if it is not to remain a merely formal principle of accountability, is dependent on the presence of certain pre-legal conditions. Political processes of will-formation take place giving expression to what binds the people together (to a greater or lesser degree of homogeneity) spiritually, socially and politically.

Bonds (spiritual, social, political) and homogeneity, in this line of thought, precede democracy. Characteristically, identity is not an explicit outcome of democracy but a constitutive element of the nation on which democracy is superimposed. This is an opinion also shared by students of nationalism. Thus, A. Smith (who considers national identity the essential element for the kind of political communities on which democracies operate) argues that the idea of cultural identity embodies a sense of shared continuities on the part of successive generations of a given unit of population, shared memories and the collective belief in a common destiny of that unit and its culture.[28] More cautious authors dilute this implicit and heavy axiological burden: what it is required is

> a collective identity which, by no means, needs to be rooted in ethnic origin, but may also have another basis: an awareness of belonging together that can support majority decisions and solidarity efforts, and can permit it to have the capacity to communicate about its goals and problems discursively.[29]

For this line of thought, identity (national or cultural) emerges as a founding element of democracy and the lack of this pre-democratic element, a European identity, appears as the obstacle for EU democracy. For Smith, Europe is deficient both as idea and as process: it lacks a pre-modern past; a prehistory which provides it with emotional substance and historical depth. At best, European countries have partially shared traditions and heritages which constitute a 'family of cultures'. The new Europe's true dilemma is a choice 'between unacceptable historical myths and memories on the one hand, and on the other a patchwork, memory-less, scientific 'culture' held together solely by the political will and economic interest that are so often subject to change'.[30] The obstacles to EU democracy are the weakly developed collective identity and the low capacity for

[27] Weiler, *op. cite.*, note 3.
[28] A. Smith, 'National Identity and the Idea of European Unity', Vol. 68 *International Affairs*, (1992), pp. 55-76.
[29] Grimm, *op. cite.*, note 25, p. 297.
[30] Smith, *op. cite.*, note 28, p. 74.

transnational discourse.[31]

This methodology is axiologically biased: the concept of democracy is reconstructed according to the concrete sociological features operating in a given national context. These features are reconstructed as the model of public sphere and then, are elevated to the category of normative concept, thus neutralising alternative proposals which are not explicitly grounded on the empirical model of the national democratic state.[32] Conceiving democracy above the nation-state level becomes, in this perspective, not only empirically difficult but also normatively questionable. It is empirically difficult because there is an obvious problem of identification of a model of national public sphere in a supranational setting. It is normatively questionable because in this view, a supranational public sphere would be incompatible with national ones.

A. The Dubious Rejection of the Essentialist Argument Through Empirical Facts

The empirical side of the argument has been counter-argued, even though without great success. The persuasiveness of considering identity as a fundamental pre-requisite of democracy has stimulated optimistic interpretations seeking to identify 'European' identity. This empiricist approach links in logical succession, two different strategies of European construction: traditionalism (the foundation of European unity in an spiritual fact, e.g., religion)[33] and modernism and constructivism (creation of a homogeneous cultural space through communication technologies).[34] Some argue that Europe (and not the EU) constitutes the widest possible frame for citizens in terms of their social identity. The problem of European identity derives from its lack of distinctiveness due to its universalisation (the extension of European values and life forms world-wide).[35] There is also a divergence between the political and institutional framework of the EU and the geographical space of a European identity. For some, the common experience and tradition of thought that may be the substrate of a European political community transcends the mere affirmation of political will by some states. On the contrary, those reside equally in all the peoples of Europe.[36] Despite this, there is a strong convergence among EU countries in the sense of the development of

31 Grimm, *op. cite.*, note 25 p. 297.

32 Weiler, *op. cite.*, note 3; Habermas, *op. cite.*, note 2.

33 This search for a 'foundational' element can be found in contemporary writing. Thus, Marquand refers to Christian religion as the aglutinanting element. D. Marquand, 'Reinventing Federalism: Europe and the Left', in D. Miliband (ed.), *Reinventing the Left*, London: Polity Press (1995).

34 J-M. Ferry, 'Identité et citoyenneté européenne', in J. Lenoble and N. Dewandre (eds.), *L'Europe au soir du siècle. Identité et démocratie*, Paris: Éditions Sprit (1992), pp. 42-43.

35 S. Giner, 'The rise of a European society', Vol. 31 *Revue Européenne des Sciences Sociales* (1993), pp. 151-65.

36 E. Tassin, 'Europe: a Political Community?', in Ch. Mouffe (ed.), *Dimensions of Radical Democracy*, London: Verso (1992), p. 171.

parallel or similar structures which allows one to conclude that the incipient advent of a European society is clearly in sight.[37]

The discussion on the role of language for democratic forms is similarly informed by the national model. It is plausible that language has a very different normative value if it is conceived as a cultural expression of uniqueness (national or otherwise) or, merely, as a means of communication. Some argue that democracy within national/linguistic units is more genuinely participatory, precisely because of the pre-democratic elements: political communication has a large ritualistic component, and these ritualistic forms of communication are typically language specific.[38] Probably, it would be very difficult to disentangle both aspects. And, in fact, they seem to be conflated when it is argued, for instance, that language-based political units are in fact the most consistent with freedom and equality, since language helps to construct a society of free and equal citizens.[39] However, national languages have had a rather different function in totalitarian regimes. Probably, an emphasis on the communicative side posits the problem of a shared European language as a more practical one rather than as a purely normative one.[40] Whilst the process of creating national languages was intrinsically linked to the process of nation-building, the tendency in the EU is the maintenance of national languages and the consolidation of a diglossia[41] with English as the dominant language. Although the dis-apparition of national languages is unlikely, some argue that their robustness, in the long term, is dependent on continuing state support and protection.[42]

However, the empiricist line does not seem the most solid methodological avenue because the survival of an exclusively nation-state drawn model of public sphere as an epistemologically valid category can be questioned. The (explicit or implicit) reaffirmation of territorially-bounded public spheres and nationally integrated political communities for the realisation of civic or communitarian solidarity has been theoretically challenged. The traditional account of public spheres becomes spurious if post-war reconfiguration of sovereignty, citizenship and national communities are taken into account. In particular, Soysal contends that public spheres are realised intra- or trans- nationally; and the referent is no

37 Giner, *op. cite.*, note 35.

38 W. Kymlicka, 'Identity, Language and Democracy. Commentary on Veit Bader,' Presentation at the Conference on 'Social and Political Citizenship in an Age of Migration,' Florence: European University Institute (February 1996).

39 *Ibid.*

40 Importantly enough, the epistemological role of language to explain nation-building process is very unequal among theorists such as Anderson, Gellner, Smith or Hobsbawn. See E. Bakke, 'Towards a European Identity?' Oslo: ARENA Working Paper 10/95 (1995), p. 10.

41 By the term, 'diglossia', I refer to a situation of bilingualism in which one language is dominant over the other.

42 A. de Swaan, 'The Evolving European Language System: a Theory of Communication Potential and Language Competition', Vol. 14 *International Political Science Review* (1993), p. 252.

longer the national citizenship but an abstract individual entitled to claim the collective and bring it back to the public sphere as his 'natural' right.[43]

B. An Alternative Normative Ground For The European Public Sphere

If the foregoing is a possible assessment of empirical traditions, a normative design for EU democracy grounded on the traditional empirical perception would be wrong. An alternative is to evade 'substantial' definitions of identity and to pursue, instead, a procedural one: 'une identité dont la définition n'est jamais considérée comme simplement donnée, ni liée à un contenu fixe sémantiquement, mais constamment reformulée dans le cadre d'une discussion démocratique'.[44] In this line of thought, one finds Habermas' criticism of Grimm's thesis. Habermas argues that the burden of majority and solidarity formation must not be shifted from the levels of political will formation to pre-political, presupposed substrates because the constitutional state guarantees that it will foster necessary social integration in the legally abstract form of political participation and that it will substantially secure the status of citizenship in democratic ways.[45] There is no automatic or self-evident relation between national identity and democracy.

Thus, the kind of possible scenario for an eventual EU democracy is one in which the cultural or identity context of a more or less homogeneous nation would have to be substituted by something different. In this line, Etienne Tassin argues that,

> a common space of European peoples should be protected both from the chimera of an original common identity to be reconstituted for the planned union, and from the phantasm of a unitary will to be forced out of nothing so that a common politics should become possible.[46]

If anything, there is a basic agreement on the critical character of European identity, either as a 'moral identity'[47] or as a reflexive identity where the socialisation processes, as well as economic, political and juridical processes are the object of a permanent critical evaluation. The result is 'une instabilité potentielle de l'ensemble des institutions, mais également une possibilité ininterrompue de ration-

[43] Y. Soysal, 'Changing Boundaries of Civic Participation: Organized Islam in European Public Spheres', Florence: European Forum Working Paper (1997).

[44] 'An identity whose definition is never simply taken for granted, nor linked to a fixed content, but constantly re-formulated in the framework of a democratic discussion.' A. Berten, *'Identité européenne, une ou multiple? Réflexions sur les processus de formation de l'identité'*, in Lenoble, and Dewandre, *op. cite.*, note 34, p. 82.

[45] Habermas, *op. cite.*, note 2.

[46] Tassin, *op. cite.*, note 36, p. 188.

[47] V. Camps, 'L'identité européenne, une identité morale', in Lenoble and Dewandre, *op. cite.*, note 34, pages 99-105.

alisation, de correction et de réorientation en fonction d'objectifs qui surgissent du sein même de la réflexion'.[48] Critical reflexivity allows one to refer to universal elements embedded into national political constitutions as well as international judicial space. National identities which are culturally different can enter into a political community through their compatibility with the axiological referent framework (without implying a culturally homogeneous society).[49]

The possible substitute of national identity for democracy is a liberal political culture grown out from the practice allowed by the status of EU citizen. This, of course, has to be a very rich status:

> a liberal political culture can hold together a multicultural society only if democratic citizenship (...) can be recognised and appreciated as the very mechanisms by which the legal and infrastructure of actually preferred forms of life is secured. Forms of life comprises not only liberal and political rights, but of social and cultural rights as well.[50]

European Union citizenship defines a status for individuals with a fundamentally liberal profile.[51] It is liberal in the double but inter-linked sense that, a) the market is the model of public space on which EU citizenship is grounded; and b) almost all socio-psychological traits normally associated to nationality bounded and communitarian understandings of citizenship are absent. This model of citizenship resembles a libertarian ideal of democracy whose essential characteristic is the assumption of private law as the constitution and the lack of provision for political self-determination. In its current configuration, the status of EU citizenship is insufficient to become the institutional foundation of an EU democracy.

The emergence and lately, survival, of this political culture depends on EU citizenship becoming recognised and appreciated as the very mechanism which secures preferred forms of life. But rather than a comprehensive ensemble of rights, which is more coherent within national contexts, the requirement for EU citizenship is a development of rights in careful balance with these available under national citizenship. For instance, cultural specificity is often perceived to be under threat by EU regulatory activity which leads one to think that any present development must be fundamentally guarantist. Development of EU citizenship will require that attention is paid to the interplay between market, social and political rights. Under EC law, individuals have seen those rights greatly enhanced in relation to the realisation of their private autonomy in the marketplace. The

48 'A potential instability of the whole of institutions, but also equally an uninterrupted possibility of rationalisation, of correction and reorientation in function of objective arising from the core of the reflexion.' Berten, *op. cite.*, note 44, p. 93.

49 Ferry, *op. cite.*, note 34, at pp. 50-51.

50 J. Habermas, 'The European Nation-State. Its Achievements and its Limits. On the Past and Future of Sovereignty and Citizenship', Vol. 2 *Rivista europea di diritto, filosofia e informatica* (1995), pp. 33-34.

51 C. Closa, 'EU Citizenship as the Institutional Foundation of a New Social Contract: some Skeptical Remarks', Florence: EUI - RSC Working Paper no. 96/48 (1996).

counterpart has been a selective, market-logic led creation of EU social rights; further development of social rights with a redistributive profile seems to require a previous process of will-formation.[52] At this stage, the decisive aspect will be to recognise the inducing effect of the political institutions resulting from the process of constitutionalisation.[53] In the same line, Tassin states, 'A common citizenship of European peoples can emerge from the political institutions of a public space of fellow-citizenship which is alone capable of giving meaning to a non-national political community'.[54]

V. EU CITIZENSHIP AS THE INSTITUTIONAL FOUNDATION OF A EUROPEAN PUBLIC SPHERE: POSSIBLE DEVELOPMENTS

Certainly, citizenship is not only a question of conferring a political and social status, but it also implies creating the sphere for citizens action. Although the causal relationship between citizenship status and the creation of a public sphere does not seem to be empirically proved,[55] the absence of a coherent legal status of citizenship is not irrelevant in normative terms. Therefore, an interpretation of EU citizenship along this line would direct one toward the identification of practical requirements which may assist in gearing a legally defined status of individuals toward praxis, i.e., the creation of arenas for public deliberation. The autonomy of EU citizenship from essentialist elements implicit in national citizenships[56] provides a more rationalistic ground for its development. But, on the other hand, the absence of these essentialist elements imposes high reflexive demands on individuals: it will require permanent rationalisation and objectivization processes that might substitute myths and routinized narratives. This citizenry would need to develop a sense of critical awareness towards 'performative contradictions' in EU policies and it would be required to devote explicit attention to the reconsideration of recent and historical narratives as well as the construction of a community of feelings.[57]

Although democratisation may seem an unavoidable future necessity of the Euro-polity,[58] this endeavour is however, not normatively neutral or unchallenged. It is probably true that the people of Europe would acquiesce to the factual existence of the kind of political structures associated with a political com-

52 *Ibid.*
53 Habermas, *op. cite.*, note 2.
54 Tassin, *op. cite.*, note 36, at p. 189.
55 Soysal, *op. cite.*, note 43.
56 C. Closa, 'Citizenship of the Union and Nationality of Member States', Vol. 32 *Common Market Law Review* (1995), pp. 487-518; Weiler, *op. cite.*, note 3.
57 V. Pérez D'az, 'The Challenge of the European Public Sphere', Madrid: ASP Research Paper 4/1994 (1994), 18 pages.
58 P. Schmitter, 'Is it Really Possible to Democratize the Euro-polity? And if so, what Role might Euro-citizens play in it?' Florence: European University Institute Manuscript (1996), pp. 243-245.

munity,[59] such as citizenship. But given the lack of normative consensus or furthermore, the normative rejection of forms of institutionalisation which resemble (even remotely) state structures, practical endeavours to constitute a European Union political sphere from EU citizenship can only be legitimately accepted if they satisfy the paradoxical condition of being compatible with processes of public deliberation on the normative self-understanding of national democracies.[60] Although this may seem to imply a process of 'de-nationalisation' of states (where the idea of a European fatherland may be replaced by that of a public space of disparate communities),[61] it is more congruent to place this normative strategy within the context of 'post-national' citizenship. Thus, the development of EU citizenship is part of a more general tendency. The revalorization of legal personality as a meaningful and alternative status to the national citizenship developed by legal theorists[62] finds its empirically grounded counterpart in 'actorhood' rather than membership as the essential element to define participation.[63] In other words, this normative strategy grounds EU citizenship (understood as a status) and the concomitant public sphere on the universalistic elements embedded into particularistic settings. For some, this is congruent with the 'essence' of the modern liberal community: the abundance of altruistic norms that effectively manifest a belief in the intrinsic value of all members of the community.[64]

This normative understanding questions specific methodologies which attempt to reconstruct a EU conception of citizenship based on ideal types. These methodologies are drawn out of a context of meanings; no doubt, state, nation and nationality are part of the conceptual 'site' of citizenship. If, as has been argued, the transformation of the Euro-polity into a democracy requires new experiments or concrete manifestations of traditional concepts such as citizenship, representation and decision-making, these novel institutions cannot be predefined.

A more profitable approach is to identify specific problems for the emergence of a European public sphere and then, the possible developments of EU citizenship which can be grounded in particularistic settings of principles but which nevertheless, can assist in resolving these obstacles. I will not discuss here the problems as Pérez D'az has already pointed out three of them: first, the absolute priority of domestic matters combined with the expectation that they should be resolved by national governments; second, the 'performative contradiction' of

59 P. Howe, 'A Community of Europeans: the Requisite Underpinnings', Vol. 33 *Journal of Common Market Studies* (1995), p. 34.

60 This normative argument is coupled by Schmitter's assumption of a more pragmatic origin. Contraposing status to identity, he argues that the citizens potentially involved are much more confident of their rights and entitlements at the national level and much less conscious of their identities at the supra-national level. (Schmitter, *op. cite.*, note 58.)

61 Tassin, *op. cite.*, note 36, p. 190.

62 L. Ferrajoli, 'Cittadinanza e diritti fondamentali', Vol. 9 *Teoría Política* (1993), pp. 63-76.

63 Soysal, *op. cite.*, note 43.

64 Howe, *op. cite.*, note 59, at p. 39.

EU politics where everyday behaviour tends to follow the logic of self-interested nationalism and contradicts thus the rhetoric ideal of a common interest; and, lastly, the difficulty of persuading a commonality of feelings posed by historical narratives.[65]

The following discussion aims to point out some developments of the current status of EU citizenship which expand the scope for the practice of EU citizenship. Importantly, institutionalisation requires re-formulating national citizenship and, in this sense, it may stimulate discursive flows among individuals and the kind of reflexive and rational 'identity' on which EU citizenship may be based. Of course, no automatism is assumed following the practical proposals.

First, inclusion of the principle of equality within EU citizenship (with procedural guarantees in order to avoid discriminatory effects on non-EU nationals in Member States).[66] Derogations actually allowed from this principle of non-discrimination offer a shelter to certain communitarian understandings of the relations between individuals and the state premised on nationality. Anxieties about national identities are well protected by current EU provisions.

Second, the full constitutionalisation of a political status for individuals on which this public sphere might be grounded, which implies completing the procedural conditions for the intercourse of rational flows. Whilst it is disputed whether a high degree of participation implies a parallel high degree of legitimacy, it is undeniable that the absence of formal mechanisms for participation is a source of illegitimacy for any regime. A fuller definition of the political rights of EU citizenship are a likely result of spill-over from the rights already regulated. It has been convincingly argued that the rights to vote and stand as candidate already included under EU citizenship cannot be effectively exercised without full guarantees of political freedom: expression, assembly and association.[67] Whilst freedom of expression falls into the category of human rights (and it consequently widely accepted in all Member States), rights of assembly and association have a more discretionary interpretation in the national legislations of the Member States. Germany's Aliens Act expressly provides for the possibility of restricting or forbidding the political activity of non-nationals, and the Portuguese Constitution establishes a explicit or tacit governmental permission to engage in political activities. This is not as much of a problem in practical terms. As Lundberg argues, it is likely that if difficulties (deriving from these restrictive interpretations) appear in the exercise of the political rights established by article 8 of the TEU, the ECJ will probably remove them by recourse to the doctrine of *effet utile* and the principle of equality.[68]

Third, propositions one and two lead to an interesting point: political equality among EU citizens should be logically premised on the assumption that all

[65] Pérez D'az, *op. cite.*, note 57, at p. 17.

[66] I am grateful to Diedre Curtin for her observations in this respect.

[67] E. Lundberg, 'Political Freedoms in the European Union', in A. Rosas and E. Antola (eds.), *A Citizens' Europe?* London: Sage (1995).

[68] *Ibid.* at p.129.

EU Member States are equally democratic. Logically, it seems that discretionary judgments by any Member State on the democratic character of another EU Member State are redundant. And therefore, there is no ground for the unilateral modification of the political status of any EU citizen vis-à-vis her/his democratic domestic regime. As a conclusion, EU citizens cannot be considered political refugees in any of EU member states.

Fourth, some spill-over effects are to be expected from EU citizenship provisions, specifically on nationality laws. Although determining nationality is still an exclusive competence of the Member States, the ECJ has established in the *Micheletti* ruling an obligation to observe EU objectives and principles. First, nationals from third countries may expect different conditions of access to the exercise of EU citizenship rights, depending upon the country where they attempt to naturalise. Therefore, a coherent interpretation of the equality principle may gear towards harmonisation of naturalisation rules. A second, less compelling reason, is that EU citizens are in unequal situations for the exercise of political rights to which they are entitled by the naturalisation rules in each Member State.

Moreover, there are cases in which there is no reciprocal treatment of citizens between two Member States regarding political rights. In a coherent construction, harmonisation should precede a form of plural nationality. The advantage of this kind of development is that these measures still keep competence within the Member States' hands and outside EC law. But, on the other hand, they force national processes of deliberation on the acceptability of EU citizens as participants of the national political life.

Fifth, it seems fully consistent with the development of the discursive capability of a European *demos,* the increment of the forms of direct participation. Even divergent or opposing arguments about public good have the functional effect of identifying and/or ratifying focal points of interest, although the mistake of thinking that European unity is the theme around which one could create a European public sphere should be avoided. In this sense, proposals for holding an EU wide referendum on carefully chosen topics[69] seem to be coherent because the possibilities to transcend national aggregation seem to be greater around a dualistic issue. This contributes toward a further enlargement of the criteria of residence to grant voting rights to EU citizens. The obstacles to this development are obvious: referenda are awkward to certain conceptions of representative democracy. On the other hand, referenda are one of the institutions most closely identified with the actualisation of national sovereignty.

Direct participation cannot be considered only uni-dimensionally. In a static dimension, participation refers to decision-making within the current institutional and legal framework. In a dynamic dimension, participation refers to the process of transformation to which the Union is committed, either as reform or enlargement. Citizens rights have to be considered regarding both the structure and the process.

[69] Schmitter, *op. cite.*, note 58.

Lastly, the democratisation of the Euro-polity starts at the constitutive dimension. After the Maastricht debates, referenda have become a pressing demand from national citizenries. There is a normative commitment to do so. In the words of Dahl,

> the people of a democratic nation are not only fully entitled to explore the trade-offs between system effectiveness and citizen effectiveness, but I believe that commitment to democratic values obliges them to do so'.[70]

The requisite of unanimous reform however, shields national processes of will-formation from the burden of generating a common interest. Institutional devices allow strategic behaviour by national citizenries which leads towards complex package-deals rather than agreement on principles. Thus, constitutive unanimity prevents the emergence of a form of social contract among individuals. Granted, in a contractarian context such as the EU, any minority is free to self-determination. But democratisation would require that constitutive decisions were not subordinated to the wishes of a minority.

VI. CONCLUSIONS

Rejection of the possibility of supranational democracy is exclusively based on a mechanicist identification between national identity, national representation and the nation-state, on the one hand, and democracy on the other. If this conceptual site is not by-passed, supranational democracy is not only empirically unlikely, but also normatively undesirable. The normative setting for an EU democracy is grounded in the erosion of national democracies and, specifically, the increasing divergence between the levels for an individual's autonomy and political self-determination. The subjective referent of a supranational democracy can only emerge from the development of the universalistic elements embedded into particularistic settings. The model of political culture of this *demos* is a highly rationalised and reflexive one, where identity cannot have a founding role but might only result from citizenship practice.

[70] Dahl, *op. cite.*, note 5, at p. 34.

CHAPTER XXI
CITIZENSHIP, CONSTITUTION, AND THE EUROPEAN UNION*

Massimo La Torre

My chapter is divided in six sections. In the first, I shall give a summary of the provisions of the Maastricht Treaty concerning the new condition of European citizenship and I will argue for the *constitutional* character of them. Afterwards I will present a short assessment of Union citizenship rules which leads to the view of citizenship as a *residual* right. I shall then try to show the 'lexical' priority of being a person in legal terms over holding the status of citizenship; to this purpose I shall make recourse to Professor Rawls' concept of 'political person'. However in the fourth section, I argue the other way around; that is, I shall try to assess citizenship as a *fundamental* right of human beings. The fifth section will address the relationship between citizenship and democracy, especially within the context of the European Union. In the sixth and last section I shall conclude with a criticism of an organic and communitarian concept of democracy, which has been partly adopted by the German Federal Constitutional Court in its *Maastricht Urteil*.

My chapter will not be merely an exegetical exercise on the contents of Articles 8-8e of the Treaty of Maastricht. Insofar as Article 8e makes European citizenship a concept in progress, I shall rather focus on the strong normative (moral and political) side of the question. If you like, I shall adopt more a *de lege ferenda* than a *de lege lata* perspective. Nor would I limit myself to a consideration only of the new institution of European citizenship. This is first of all a form of *citizenship*. We should thus analyse what the latter means in order to understand the contents and the purport of the former.

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M. La Torre (ed.), *European Citizenship: An Institutional Challenge* 435-457.

I. EUROPEAN CITIZENSHIP AS A CONSTITUTIONAL RIGHT

We can start by briefly recalling the provisions on European Citizenship introduced by the Maastricht Treaty.[1] First of all it should be stressed that declarations and provisions dealing with citizenship are placed in a quite strategic place within the architecture of the Treaty. In fact in the Preamble of the Treaty, the contracting parties solemnly declare that they are 'resolved to establish a citizenship common to nationals of their countries'. We find then a general declaration inserting European Citizenship into the list of the main objectives of the Union (Title One, Article B). The articles specifically devoted to the new institution are added to the Part One 'On principles' of the amended version of the EEC Treaty, i.e., they are inserted before the titles devoted to the so-called four freedoms (free movement of goods, persons, services and capital).[2]

This particular place occupied by the provision on European Citizenship in the new Treaty gives them a foundational role and furthermore facilitates their enforceability by the European Court of Justice.[3] One can also argue that the foundational place given to the provisions dealing with citizenship suggests that Articles 8-8d are to be considered as rules which cannot be derogated by other provisions of Community law. Their 'constitutional' character within the architecture of the Treaty does not allow for an interpretation of them as *lex generalis* subject to change and modifications brought about by some *lex specialis*. European Citizenship, being addressed in the part of the Treaty which lays down its constitutive principles, can hardly be seen but as an essential content of the constitution of the Union. This – I would like to stress – also is the opinion of the European Commission expressed in its *Report on the Citizenship of the Union*, published in 1993, according to which those citizenship rights have 'constitutional status'.[4]

A general definition opens the series of articles devoted to the new concept: the European citizen is said to be whoever is already a national of a Member State (Article 8, section I). Section II of Article 8 deals with the legal effects of this status: it means first of all that the European citizen is the holder of all the

1 For a general view, see C. Closa, 'The Concept of Citizenship in the Treaty of the European Union', in *Common Market Law Review* (1992), pp. 1137 ff.; R. Kovar, D. Simon, 'La citoyenneté européenne', in *Cahiers de droit européen* (1993), pp. 285 ff.; J. Liñan Nogueras, 'De la ciudadanía europea a la ciudadanía de la Unión', in *'Gaceta jurídica'* (1992), pp. 63 ff.; D. O' Keeffe, 'Union Citizenship', in D. O' Keeffe and P. M. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, Chancery, London (1994), pp. 87 ff.; and V. Lippolis, *La cittadinanza europea*, Bologna: Il Mulino (1994).

2 Cf. E.A. Marias, 'From Market Citizen to Union Citizen', in E.A. Marias (ed.), *European Citizenship*, Maastricht: European Institute for Public Administration (1994), p. 10.

3 Kovar, Simon, *op. cite.*, note 1, p. 286.

4 See also J. Mönar, R. Bieber, *La citoyenneté de l'Union. Possibilités, recommandations et suggestions visant à protéger et à développer la citoyenneté de l'Union dans la perspective de la Conférence intergouvernementale de 1996 sur la révision du traité de Maastricht*, Parlement européen, Direction générale des Études, Série Affaires juridiques, Luxembourg (1995), p. 14.

rights and all the duties deriving from the terms of the Treaty. However, we know that the terms of the Treaty are also applicable to subjects who are not European citizens, to aliens residing in one Member State and even to aliens residing elsewhere, in their home countries for instance. It is therefore possible to be a holder of rights and duties deriving from the terms of the Treaty without being a national of one Member State. The difference between a European citizen and an alien would then be that the former can be a holder of *all* the rights and duties derivable from the terms of the Treaty, while the latter can be a holder only of *some* rights and duties based on them. But, for that we need criteria of ascription of rights and duties respectively to European citizens and to aliens, that is, rules for knowing which rights and duties are granted to the ones and which are ascribed to the others.

Articles 8a-8d give a list of specific rights connected with the status of European citizen. No specific duty is mentioned alongside the rights, although Article 8 has previously stated that the new citizenship implies a subjection to the duties imposed by the Treaty. Article 8a ascribes a general right to freely circulate and reside in any Member State. Article 8b provides for a right to vote and be elected in municipal elections in any Member State for aliens who are nationals of another Member State. Article 8b furthermore establishes a general right to vote and to be elected to the European parliament even in a Member State other than one's own.

Article 8c assures diplomatic protection by a Member State to citizens of other Member States in countries where the citizen's Member State has no diplomatic representation. Article 8d sets down the right to raise petitions to the European Parliament and to make recourse to the Ombudsman for citizens of all Member States.

Last but not least, Article 8e foresees the possibility for the Council to fulfil these provisions by other rules whose enactment the Council is entitled to recommend to the Member States according to their respective constitutional order. This last article is quite important for us, inasmuch as it makes the concept, and the corresponding status, of European citizenship susceptible to be expanded in its scope and enriched in its quality and effects. This article – I would like to stress – also directly justifies an explicit normative approach to European citizenship. Since this is – so to say – not yet permanent and allows for evolution, an evolutive interpretation of it and even a *de lege ferenda* approach are legitimate. This point has been confirmed by the European Commission in its 1993 *Report on Citizenship*, where citizenship rights are said to be 'essentially dynamic in nature'.[5] Thus a philosophical (strong normative) approach to European citizenship, such as the one along which I shall try to proceed here, is justified by the

[5] O' Keeffe, *op. cite.*, note 1, p. 102. See also the Commission's Report on the Functioning of the Treaty (10 May 1995), where we read the following:
La citoyenneté européenne ainsi constituée est évolutive, le Traité prévoyant la possibilité de l'extension des droits du citoyen, au terme d'une procédure impliquant l'unanimité du Conseil et la ratification par chaque État membre.

positive law itself. That we should discuss the citizenship of the Union and try to develop it, is prescribed by the wording of the Treaty.

Citizenship in political and legal terms is the status granted to persons linked to a polity through a special bond of allegiance. 'A citizen, we might say, is a man whose largest or most inclusive group is the state'.[6] Citizenship moreover is that bond of allegiance toward a political community by which the individual is granted on the one side fundamental rights and on the other a power of determining together with his fellow citizens the political decisions of the community. Citizenship thus is two-sided: on the one side it is a status by which an individual is the recipient of benefits from the state (mainly legal protection); on the other side it involves the right to participate in legislation and hold public offices.[7] It is also two-sided insofar as it implies and makes complementary: (i) the obligation to abide by the Community laws; and (ii) the right to discuss and deliberate about them. In short, citizenship above all is a political and legal notion, although it has been recently reinterpreted and enlarged as a sociological concept denoting factual or active membership or the concrete enjoyment of social benefits within a group.[8] Thus, European citizenship is a citizenship in the 'classical' (political and legal) sense. This also is emphasised by the fact that among European citizens' rights, no social right is mentioned, perhaps also because in liberal legal systems, social rights can be and are ascribed to people independently from their status as citizens.[9] European citizenship should rather be seen as a *constitutional* right of the Union.

II. CITIZENSHIP AS A RESIDUAL RIGHT

A. THE *ACQUIS COMMUNAUTAIRE* OF ARTICLES 8A-8D

Now, without diminishing the relevance of the new institution of European citizenship and without being sceptical or suspicious about its impact as unfortunately many are,[10] I would like to show that many of the rights provided for in Articles 8a-8d were already an *acquis communautaire*, that is, valid and funda-

6 M. Walzer, 'The Problem of Citizenship', in M. Walzer, *Obligations. Essays on Disobedience, War, and Citizenship*, Cambridge, Mass: Harvard University Press (1970), p. 218.

7 See Aristotle, 1275b.

8 The recent affluent literature reformulating the notion of citizenship as inherently connected with the Welfare State and the redistribution of social and economic wealth stems, as is well known, from an ever-quoted booklet by the British sociologist T. H. Marshall, *Citizenship and Social Class* (now in T. H. Marshall, *Class, Citizenship, and Social Development*, Chicago: University of Chicago Press (1964)).

9 L. Ferrajoli, 'Dai diritti del cittadino ai diritti della persona', in D. Zolo (ed.), *La cittadinanza. Appartenenza, identità, diritti*, Bari: Laterza (1994), pp. 263 ff.

10 For a skeptical approach, see H.U. Jessurun d'Oliveira, 'Union Citizenship: Pie in the Sky?', in A. Rosas and E. Antola (eds.), *A Citizens' Europe. In Search of a New Order*, London: Sage (1995), pp. 58 ff. More suspicious than skeptical, or perhaps skeptical because suspicious, is R. de Lange, 'Paradoxes of European Citizenship', in P. Fitzpatrick (ed.), *Nationalism, Racism and the Rule of Law*, Aldershot: Darmouth (1995), pp. 97 ff.

mental law of the European Community, and that they have been sometimes ascribed to non-nationals of Member States as well. This is immediately patent as for the rights provided for in Article 8d. Article 138d makes it clear that the right of petition to the European Parliament and the right of access to the European Ombudsman are granted also to residents irrespectively of their being a national of a Member State. Nor is this right a novelty within Community law. We might remember that Article 128 of the internal rules of procedure of European Parliament established that 'any citizen of the Community' has the right to direct questions and raise claims to the Parliament.

The freedom of movement and establishment was already a principle of the previous Community law from its beginning (see Articles 48, 52, and 59 of the Treaty of Rome). It is a right which was later conceded (through an evolutive interpretation) even to non-nationals residing in a Member State. In fact, as far as the freedom of movement and residence is concerned, we cannot forget the important role played by the jurisprudence of the European Court of Justice. This freedom, which in the Treaty of Rome was seen as fully subordinate to the end of economic integration and was therefore strictly connected with the fulfilment of some economic function, has been increasingly interpreted by the Court as a fundamental right and granted as such to all EC nationals and even to non-EC nationals. This freedom has been progressively extended to the addressees of services, such as patients of medical treatment or tourists, and even to the simple customer. The Court moreover, has even included in the class of beneficiaries of this right, the non-nationals of EC Member States in the case of addressees of services.[11] But the evolution of the right of free movement and residence in the Community is not exclusively due to jurisprudential interpretation and judicial activism. We should not forget Directives 90/364-366, which enlarge the scope of the right of residence to persons who have ceased their work and to students.

The principle of non-discrimination has as well been extended. This has happened in two directions: first to agents other than strictly economic, then later, to subjects other than EC nationals. In the decision taken by the ECJ in the *Gravier* case (15 February 1985), students have been included in the category of persons concerned by the principle of non-discrimination enshrined in Article 7, now Article 6, of the EC Treaty. We can also remember the decision of the *Cowan* case (2 February 1989), which granted the protection of fundamental human rights to anyone, national or not of a Member State, who finds himself in a situation covered by Community law. Yet, the ECJ has stated a clear limit to the application of the principle of non-discrimination: it is only operative for matters of European Community law.

However, as far as the freedom of movement and residence is concerned, the Treaty of Maastricht introduces a remarkable difference with regard to the *acquis communautaire*: it makes clear and therefore no longer a matter of judicial activ-

[11] See *Graziana Luisi et Giuseppe Carbone* v. *Ministero del Tesoro*, in Cases 286/82 et 26/83, *Recueil*, p. 377 ff., and *BG-INNO-BM* v. *Conféderation Luxembourgeoise*, Case C-362/88, *Arrêt du 7 Mars 1990, Recueil*, p. 666 ff.

ism, that this right is no longer dependent upon economic considerations and functional needs of the internal market. In the Maastricht Treaty, the freedom of movement and residence is considered as a fundamental political right of the citizens of the Union.

As for the rights to vote and to be elected in municipal elections this is a promising novelty, although some European countries (the Netherlands, for instance) had introduced it before the Maastricht Treaty, even for nationals of non-Member States. Moreover, we should not forget that on 5 February 1992 a Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level has been adopted, whereby each party undertakes the obligation to guarantee to all foreigners who have been resident in the country for a minimum period of five years freedom of expression, of assembly and of association, and the right to vote and to be elected in local elections. Now, the right to vote and stand as a candidate in the elections for local authorities, if granted at a large European scale can have – as is shown by the French example (where municipalities send their representatives to the body electing the Senate) – a remarkable impact on the dogma of the so-called national sovereignty, insofar as local authorities and councils contribute to the election of political representatives at a national level.[12] Once an alien is entitled to vote and to be elected in a town council for instance, and then is called on to participate in the election of a national legislative body, then that legislative assembly can no longer be considered as only being the representation of nationals' will and interests, and as deriving its legitimation exclusively from the 'people' seen as the sum of nationals.

The rights to vote and to be elected to the European Parliament in a Member State other than one's own are indeed very comfortable, but insofar as the European Parliament remains a kind of ornamental institution, this right will not give too much strength to European citizenship. Nonetheless, it is important to recall that this right (while it gives the alien the possibility of electing representatives to the European Parliament in the Member State where he is residing) collides on the one side with a narrow concept of national sovereignty and on the other with the idea that the European Union is an association of 'peoples' and not of individuals. But, if the Union is rather an association of individuals than a collection of peoples and the European Parliament is representative more of citizens than of nations, then the political legitimation of the new European polity is not so much bound to collective identities such as those built through national membership. If the national district electing a European Member of Parliament comprises also non-nationals, that is, nationals of a Member State, we can no longer say that the member of the European Parliament is the representative of a body of nationals (whatever they could be, Spaniards, Italians, Germans, etc.); as a matter of fact, he has been elected by non-nationals as well (for instance in an Italian district by resident Germans). Given that the European Parliament is the main source of democratic legitimation of the European Union, and that this

[12] See the decisions of the French *Conseil constitutionnel* of April 9, 1992 (n° 92-3O8 DC) and of September 2, 1992 (n°92-312 DC).

body is in fact, not the representative of compact *peoples* (homogeneous groups of nationals), but of plural and dishomogeneous groups of *citizens* of the various Member States, the European Union cannot be considered as just an organisation of peoples and not of individuals. We might then envisage a further development for the election of the European Parliament, that it could be organised according to territorial districts which are not strictly national.

Diplomatic protection is also useful and it may be of utmost importance for a Spaniard to be protected by an English consul in a town of Belize, but perhaps the Spanish tourist would have enjoyed such protection in any case because of a bilateral agreement between Spain and the United Kingdom. In any case, the possibility for a Member State to be represented abroad through another Member State was explicitly affirmed by the Vienna Convention of 18 April 1961. Thus, Article 8c does not introduce any special new element in the *status quo* of the regulation concerning diplomatic representation, in particular if we take into account that Article 8c does not foresee the possibility of a *common* diplomatic representation of all Member States.

B. The Bundle of Rights Comprising European Citizenship

European citizenship is a bundle of rights of a different legal, political and existential significance. Some are or can be relevant, others look like a kind of a legal gadget deprived of any real impact for the life of Europeans and mainly employed *pour apaiser le bourgeois*. But even if we should assume a sceptical or pessimist view about European Citizenship, we still have the *concept* of it, which I do not think is too little,[13] though on the other side such a concept may be used as an ideological device to cover and embellish a reality in which there are no *European* citizens (but only *nationals*) nor European *citizens* (no holder of citizenship rights at the European Union but only clients and subjects).

Nonetheless (and this is what the thousand forms of 'ideology critique' have never understood), social life is moved through words and concepts. The internal point of view is irreducible to the external cynical observation of the sociologist. People kill each other for words and concepts, though I am not suggesting that this should happen for the concept which we are discussing here. Words and concepts have a symbolic meaning, and symbols can be constitutive of facts. What we thus need is to fill up the wording and the concept of European Citizenship with a strong content. This quite obviously does not mean that words can replace actions nor that, even giving European citizenship the highest possible profile, this will ever be the only legal status enjoyed by European citizens. Citizenship (and European citizenship is no exception), is not only an additional, but also in a sense a *residual* right.

[13] See D. O' Keeffe, 'General Course in European Community law – The Individual and European Law', in Vol. 5, *Collected Courses of the Academy of European Law*, Book 1, Dordrecht: Kluwer (1996), p. 150: 'In the end, the most important feature is possibly that the first step has been taken, and that the concept now finally exists'.

In order to develop my argument, I would like to hint at what I believe is a fundamental principle directing our modern liberal legal systems. Rights were, until the Eighteenth century, classified mainly as natural and civil. Natural rights were the patrimony of all mankind; civil rights were granted only to the members of a given community.[14] At some point, especially after a sharp distinction between society and government was introduced, a third category was envisaged: political rights, the enjoyment of which required a further particular qualification, beyond that of being a community member. As any reader of Jane Austen's *Pride and Prejudice* will recall, even in nineteenth century England, unmarried women were not entitled to inherit their parents' estate. Thanks to the French Revolution, many previous civil rights (the right to conclude a valid contract, the right to ownership, but also the right to freely move within the country) were equated to natural rights, that is, to human rights. And this has mostly remained so, even if the Code Napoléon (in Articles 7 and 8) introduced a strong difference between civil rights (the access to which is granted to any national) and citizenship (that is the sum of political rights, which become the privilege of male landowners), thus sharply distinguishing between 'nationality' and 'citizenship' and re-establishing a strong separations between nationals and aliens.

In the constitutions of most democratic states, many 'civil' rights, like the right of access to justice (to courts), the right to ownership, the right of free movement, are granted to anyone irrespective of his nationality. But this often is the case even of the so-called 'social rights', a new category unknown to our ancestors. For instance, the right to health care is granted by the Italian Republic's Constitution of 1948 to all persons who are living in the country. The same is the case for the right to education in the Spanish Democratic Constitution of 1978. I do not think I need to discuss this in more detail.[15]

If the foregoing is the case, if in democratic states citizens' rights are mainly those which are called political rights (the right to vote and to be elected to the national parliament, and the right to have access to public functions and offices),[16] we would be able to de-dramatise the contrast between the condition of alien and that of citizen. Liberal legal systems consider any human being a person in legal terms, that is, they give him a legal subjectivity. This status alone guarantees to the person a relevant series of rights, such as the right to ownership, the right to enter into a valid contract, the right to physical integrity, freedom of expression, and even the right to work and to health care and education. Being a legal subject seems then much more fundamental (more important) than being a citizen.

[14] T. Paine, in H. Collins (ed.), *Rights of Man*, Hammondsworth: Penguin (1976), p. 90: 'Natural rights are those which appertain to man in right of his existence [...] Civil rights are those which appertain to man in right of his being a member of society'.

[15] For a sociological assessment of this evolution, see Y. Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe*, Chicago: University of Chicago Press (1994).

[16] See, *inter alia*, G. Biscottini, 'Cittadinanza (diritto vigente)', in F. Calasso (ed.), *Enciclopedia del diritto*, Vol 7, Milano: Giuffrè (1960), p.140.

To be a citizen may be seen as a possibility which is first opened by the condition of legal subject. To assure fundamental rights to human beings, we do not need to ascribe to them the status of citizen. To be a human being, it is sufficient to be a person in legal terms. And this alone makes it possible, at least in the legal domain, to live a life in dignity. Citizenship assumes then the features of a kind of *residual* normative position, comprising much less rights than legal personality. This is the case of national states, but it is *a fortiori* valid within the precinct of the European Union.

III. A NORMATIVE CONCEPT OF CITIZENSHIP

To justify my contention of the lexical priority of legal subjectivity over citizenship, let me now take a brief stroll along John Rawls' theory of a political person.

Rawls moves from an idea of human being which requires him to be rooted in social relationships. There is no place for an isolated and abstract individual in Rawls' latest political philosophy. 'We', he assumes, 'have no prior identity before being in society'.[17] But it is not clear what we should here understand by society. Does society mean an organic entity against which any reflective attitude is condemned to fail and any will to bow? Or is it the fact of many individuals associated and carrying on their life on some concept of mutual solidarity? The most plausible interpretation is that society in this context means some scheme of social cooperation, something which is brought about or put on the stage through a more or less critical behaviour. Without some amount of reflexivity and criticism, we could not first pursue the common aims which give cooperation its sense and direction, its 'point' – in Ronald Dworkin's terminology, or its 'Witz' – as Wittgenstein would say, and we would not then be able to behave correctly according to the rules which make cooperation possible. Criticism is fundamental in order to assess whether our behaviour is the one required by the cooperative rules or not; to this purpose we need critical comments and reaction by our partners.

In this view therefore, the concept of a person is strongly connected with the notion of a citizen. If the individual or the person as such is possible only within a society, person can be defined as whoever is capable of being a member of society, that is a *citizen*. 'A person', says Rawls, 'is someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life'.[18] Rawls then explains what he means by society: 'a fair system of cooperation over time, from one generation to the next'.[19]

Now, in order to have a fair system of social cooperation, three conditions at least should be satisfied. First, the cooperative rules should be publicly discussed,

[17] J. Rawls, *Political Liberalism*, New York: Columbia University Press (1983), p. 41.
[18] *Ibid.*, p. 18.
[19] *Ibid.*, p. 15.

approved and implemented by the whole of society. 'Cooperation', Rawls writes, 'is distinct from merely socially co-ordinated activity, for example, from activity co-ordinated by orders issued by some central authority'.[20] Second, the cooperative rules should be fair, that is, such that each member could reasonably accept them. 'Cooperation invokes the idea of fair terms of cooperation: these are terms that each participant may reasonably accept, provided that everyone else likewise accepts them'.[21] Third, each participant in the cooperative scheme should have some end or good which he intends to reach by adhering to the cooperative scheme. 'The idea of social cooperation requires an idea of each participant's rational advantage, or good'.[22]

All these conditions of a fair system of social cooperation can be restated in terms of features required of persons in order to be a full member of a cooperative scheme, that is, in order to be a citizen. The previous argument that a person is anyone who could become a citizen, is in a sense turned upside-down. If, at first a person was seen as someone who can be a citizen, now a citizen is a person who satisfies some special requirements. He should possess the powers of moral personality and the powers of reason. The former include: (a) the capacity for a sense of justice ('willingness [...] to act in relation to others on terms that they also can publicly endorse'[23]); and (b) the capacity for a conception of the good ('capacity to form, to revise, and to rationally pursue a conception of one's rational advantage or good'[24]). The powers of reason are those of judgment, thought, and inference.

Not every person is a citizen, although a person is someone who can be a citizen. And not all social cooperation is a fair scheme of social cooperation. In order to assess a cooperative model of social behaviour as fair, we need to refer to criteria and requirements logically (lexically) and normatively prior to the model itself. But where are those criteria sited? Well, the answer is quite simple. They are posited in a normative concept, that which is called by Rawls a *political* conception of the person. This conception is political in the sense that it makes it possible to have a fair scheme of social cooperation and therefore citizens.

It is not enough to be a citizen in order to be a member of some cooperative model. Citizens are only those who are members of *fair* systems of cooperation. Slavery could perhaps be considered as a kind of *cooperative* model, but certainly not of a *fair* cooperative model. And being a slave is the opposite of being a citizen. Thus citizens are those individuals who, before being citizens, can be recognised as political persons, that is, as persons capable of building a polity through free and public discourse. That is why we need to provide for an institutional situation corresponding to the notion of political person, which is – I believe – the institution of a legal person. We need a visible and guaranteed status of a po-

[20] *Ibid.*, p. 17.
[21] *Ibid.*, p. 16.
[22] *Ibid.*
[23] *Ibid.*, p. 19.
[24] *Ibid.*

litical person independent from the condition of citizen, in order to mark the fact that the polity (the association of citizens) is a reflective and autonomous construction of subjects who enjoy an identity and a proper dignity – if even only symbolically or ideally–outside the polity itself. Legal personality then, is the institutional status corresponding to the concept of political person.

This pair of concepts and institutions also makes it possible that the concept of the 'good', that is, the particular and 'thick' good which is different for any individual life, remains private and does not collapse into the concept of the 'right', that is, in the general and 'thin' concept of good shared by all citizens which gives a sense to their cooperation. 'As free persons', writes Rawls, 'citizens claim the right to view their persons as independent from and not identified with any particular such conception with its schemes of final ends'.[25] It seems to me that in the concept of 'political person', even the thick particular good of the person does not define the person itself. In so far as a person is a subject endowed with the powers of moral personality and the powers of reason, his concept of the 'good', his life plans, still do not fully overlap with the political person himself, since it is this latter who produces that concept and those life plans. Legal subjectivity thus formally enshrines the capability of persons of having conceptions of the good, of claiming to advance them, and of taking responsibility for their ends. Now, since the assumption of the legal quality of a person is only a necessary but not yet sufficient condition for being a citizen, that is, a member of a *particular* society, then there is no conceptual need to deny that quality to any human being. Such denial could be only justified normatively, if one wishes to assert that humanity as such, the mere fact of being human, is not of any value. In any case to become a citizen, a special existential claim should be raised and a conventional decision is further required.

IV. A HUMAN RIGHT TO CITIZENSHIP

Until now I have tried to show that being a person in legal terms is a much more fundamental position than enjoying the condition of a citizen. Although I believe in the normative priority of legal subjectivity over citizenship and I am pleading for not taking citizenship too seriously, my argument is not meant as a farewell to citizenship. Citizenship is not renunciatory, insofar as a political community is a space of common concern and a body of shared principles. If political community is based on some common interests and conceptions, to be full member of such community one should be linked to it by a special bond of interests and ideas. Citizenship is just the outcome and the expression of this social bond.[26]

A further explanation is then necessary in order to avoid a misunderstanding

[25] *Ibid.*, p. 30.

[26] See M. Walzer, *Spheres of Justice. A Defense of Pluralism and Equality*, Oxford: Blackwell (1989), Chap. 2.

about my contention. I have attempted to show that in order to be a citizen, one should first be considered as a person, and that being considered as a person in legal terms brings already with it many practical advantages and social benefits (the capacity to conclude a valid contract, for instance, or health care by public agencies, etc.), so that the position of a citizen becomes somehow 'residual' and less significant than we are used to admitting. However, one could, and should perhaps, go the other way around. We might accept Elias Canetti's views on the necessity of a fatherland for any human being. He says,

> *Jeder Mensch braucht eine Heimat, nicht eine, wie primitive Faustpatrioten sie verstehn [...] nein, eine Heimat, die Boden, Arbeit, Freunde, Erholung und geistigen Fassungsraum zu einem natürlichen, wohlgeordnten Ganzen, zu einem Kosmos zusammenschließt.*[27]

Human beings need belonging, and belonging implies or requires somebody or somewhere to which one belongs. Belonging is a condition of human identity. As a boy, I used to spend my summer vacation in a village in Calabria; there, when someone wanted to know who I was, instead of asking 'what's your name?', she asked 'who do you belong to?'. For human beings, to be only a human being seems to be on the one side intolerable and on the other, a mere animal condition which can allow a humiliating treatment. Being only human is as if one were naked, without the defense offered by a social status and the group which lurks behind it, and therefore extremely vulnerable. Mere humanity is sometimes perceived as shameless, a kind of sin, which deserves to be punished. This is why citizenship is a fundamental right of all human beings, to protect them against social nakedness,[28] to give them a sense of belonging and a visible sign of it.

We may think that, in order to be a person (not only a person in moral or legal terms, but also a living person in blood and flesh) one needs a 'house', a place where one can proudly and comfortably affirm to feel and be 'at home'.[29] And to be at home, when translated in political and constitutional language, means to be a citizen. Thus we might say that the individual, in order to be a full person (even in existential terms), needs to be a citizen. On the other hand, a moral person, endowed with reason and autonomy, should be rooted in an existential reality, so that he could take flesh and blood in a concrete type of human being. The problem with the reasonable and autonomous self of the political concept of person is that it is an ideal and abstract construct distant as such from the real life of concrete individuals.

[27] 'Everybody,' he says 'needs a homeland, not one as understood by primative 'Faust' patriots [...] no, a homeland which connects territory, work, friends, recreation and spiritual space to a natural, well ordered whole, to a cosmos' E. Canetti, *Die Blendung*, Frankfurt am Main: Fischer (1993), p. 57.

[28] See H. Arendt, 'Es gibt ein einziges Menschenrecht', in O. Höffe et al. (eds.), *Praktische Philosophie/Ethik*, Vol. 2, Frankfurt am Main: Fischer (1981), pp. 152 ff.

[29] H. R. van Gunsteren, 'Admission to Citizenship', in *Ethics* (1988), p. 731.

We could furthermore argue that living as a moral person requires or involves being a full person in existential terms. This argument lead us to a fundamental point, stressed about fifty years ago by Hannah Arendt: that there is a fundamental right to be a citizen, that is, to have some type of citizenship. Without this right, which has been formalised in Article 15 of the Universal Declaration of Human Rights of 10 December 1948, not only the moral or legal dignity of a person, but also his existential quality, would come up tremendously diminished, as it is shown by the tragedy of the innumerable stateless persons in the 1920s and 1930s of this century.

> For it is only as members somewhere that men and women can hope to share in all the other social goods – security, wealth, honour, and power – that communal life makes possible.[30]

Thus 'the right to have rights', of which legal subjectivity consists,[31] includes also citizenship as the right to have *political* rights. Conversely a human being cannot be deprived of his citizenship, so that he could be banned into the limbo of homelessness or statelessness. Citizenship – as has also been affirmed by the U. S. Supreme Court[32] and enshrined in the German *Grundgesetz* (Article 16, section I) – is an inalienable human right. That means that a person can raise at least two justified claims as far as citizenship is concerned: (i) a very strong claim not to be deprived of his citizenship; and (ii) a strong claim to be received as a citizen in the country where he can legitimately say to be at home, insofar as he has a strong concern for the public welfare of the country and he shares its fundamental ideas. A reasonably long period of residence in the country should be considered a sufficient proof of a special bond of the person with the country in question.

Neither a genealogical nor a cultural criterion was the one selected by the founding fathers of the United States as a basis for citizenship. Residence, as the sign of a common concern in a community territorially defined, was enough. 'All elections ought to be free' – reads Article 9 of the Declaration of Rights of the People of Massachusetts, immediately adding that, 'All the *inhabitants* of this commonwealth having such qualifications as they shall establish by their frame of government have an equal right to elect officers, and to be elected, for public employments' (emphasis mine). And Article 6 of the Declaration of the Good

30 M. Walzer, *op cit.*, note 26, p. 63.

31 Bruce Ackermann defines *citizenship* as 'the right to have one's rights' in B.A. Ackermann, *Social Justice in the Liberal State*, New Haven: Yale University Press (1980), p. 93. But by conceiving of citizenship as the recognition of the human dignity of a person, I think he is collapsing here the concept of citizen into that of person. His ideal liberal State is more a *society* (the context of human interaction in general) than a *political community* (the context of *institutonalised* human interaction concerning its laws and policies).

32 See, for instance, *Trop* v. *Dulles*, 356 US 86, 630-58 (March 31, 1958), at p. 643, where we find citizenship described – as Ackermann does – as 'a right to have rights'.

People of Virginia (of 12 June 1776) solemnly repeats that the elections of the representatives of the people should be free, and that all human beings who give sufficient evidence of a permanent interest for the community and of a special bond with it should hold the right to vote.[33] The French Constitutions of 1791, 1793 and 1795 all, although with more or less generosity, gave resident aliens the right to be French citizens. Tom Paine could thus write that 'France and America bid all comers welcome, and initiate them into all the rights of citizenship',[34] and that their institutions are grounded on a 'universal right of citizenship". Furthermore, this right is rooted in the very normative core of democracy. The latter, once conceived as an extension of the principle of autonomy, according to which one should obey only those rules which one has produced or has the right to produce, in order to be effective, cannot allow for people who obey without ruling. Those situations in which this happens, as in the case of a foreigner, can only be justified if the person concerned spends most of his life outside the precinct of that polity. But if a person should be permanently denied the right to issue or to contribute to the issuance of the rules he is obliged to follow, we will face a clear infringement upon the democratic principle of self-determination.

Article 15 of the Universal Declaration of Human Rights – as we know – establishes a general right to citizenship. Unfortunately its formulation is a trifle too vague, in that it does not even hint at the kind of relationship between political community and individual which would justify the individual's claim to be accepted as a full member of the political community. But the Declaration of Chicago is only one chain of a longer story and thus can and should be read in the context of this story. The story in question is that of the Declarations of Human Rights which lie at the base of modern constitutional states. This story begins in America in the eighteenth century.

In the American Declarations of Rights, we find that the fundamental justification of citizenship is a common concern in the commonwealth as instantiated by *permanent residence*. And, according to the first French Constitutions, residence beyond a certain period of time was always considered a sufficient condition for having access to citizenship. Here, we find a clear principle from which we are now in a better position to understand Article 15 of the Chicago Declaration. To this purpose, Article 20 of the American Convention of Human Rights of 22 November 1969 can also be helpful . By restating a general right to citizenship, it explicitly mentions a criterion required for the acquisition of the citizen-

[33] See what George Jellinek, the founding father of modern German public law, wrote more than a century after the drafting of the American Declarations, seeing their liberality as a kind of anomaly:
Staatsangehörigkeit ist fast überall Erfordernis für die Eigenschaft als Wähler, nur einige amerikanische Staaten lassen auch den Ausländer wählen, unter der Voraussetzung, daß er eine Erklärung abgibt, Bürger der Vereinigten Staaten werden zu wollen.
G. Jellinek, 'Besondere Staatslehre', in G. Jellinek, *Ausgewählte Schriften und Reden*, W. Jellinek (ed.), Vol. 2 Berlin: Häring (1911), p. 197.

[34] T. Paine, *op. cite.*, note 14, p. 110.

ship: this is seen in the mere fact of having been born in the territory of the State *(ius soli).*

The human right to citizenship, the right to have political rights, as a rule of an international covenant, could be considered cogent, and made operative, for all those persons who, having permanently resided in a country, and having given sufficient evidence of a special bond with that country, wish to become citizens of that state. If one were unconcerned by the evidence of a special bond, then of course, the rights to citizenship would remain founded on the condition of a refugee. But the right to citizenship is not the same as the right to asylum: the latter is held by all human beings, and to be claimed the person should not have to prove any special connection with the country to which he intends to have access; the former, on the contrary, requires a particular link with the country in order to be claimed. This difference has found a legal translation in the Universal Declaration of Human Rights, in which the two rights are provided for in two different articles and are treated in different ways.

In order to claim a right to citizenship, I do not need to be a refugee. What I need is a link with the State as instantiated by *ius soli* or by having developed a sense of belonging based on permanent residence. If this is true, any legislation which denies *ius soli* or residence as a sufficient condition for citizenship might be considered a violation of a rule of public international law (namely, of Article 15 of the Universal Declaration of Human Rights). A violation of international legal rules would furthermore be involved by provisions which establish a status of citizenship in a political community (say, the European Union), but do not consider *ius soli* and residence as criteria (among others) of access to that citizenship (say, the European citizenship).

V. EUROPEAN CITIZENSHIP AND DEMOCRACY

I would like to argue for a strong concept of European citizenship. This is fully justified from an internal legal point of view, since Article B of the Treaty of Maastricht holds as one of the main purposes of the Union 'to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union'. We may also recall a decision taken by the European Court of Justice in *Commission* v. *Council* (30 May 1989), confirming the full legality of the Erasmus Programme, which is then justified with reference to the 'objectifs générants de la Communauté, tels que la réalisation d'une Europe des citoyens' (objectives which are the *raison d'être* of the Community, such as the realisation of a citizens' Europe).

A strong concept of European citizenship, characterised by a wide and rich range of rights ascribed through it and with independence from national citizenships, could powerfully contribute to solve at least partly, but yet effectively, the democratic deficiencies of the European Union. A democracy is not only a representative or parliamentary political régime, but also and above all, an association of equal citizens who are defined as such directly, that is without refer-

ring to intermediate social and political groups. Democracy is not only (or even mainly) given by the majority rule applied to political decisions, but eminently by the existence of a public domain of free discussion. But in order to have this, some requirements have to be satisfied: a feeling and a sphere of common concern first of all.

One could and should decide on matters which can more or less directly affect one's own life. Autonomy, which is an ideal principle presupposed by democracy, and expanded by this into a collective practice, makes sense only if it is exercised within the individual's scope of interests and action. Beyond this scope there is no right of autonomy; even worse autonomy, as an individual decision and action, can be transformed into its opposite: heteronomy, disruption of others' private sphere and life plans. This holds *a fortiori* for an extension of the principle to collective entities, that is, for democracy. A democratic decision cannot go beyond the area of interests which are at stake within a specific scope of (collective) action, that is, beyond the area constituted by those individuals who are the holders of the right of democratic decision. Now, citizenship as membership to a body politic, even if conceived only in formal legal terms, can contribute to create the idea of a common concern, the concern which is common to persons who bear a same legal and political status.

To have a public sphere of discussion, another requisite should be fulfilled: that of having procedures which allow a fair discussion. But in order to have a fair public discussion, we need to assume that people when entering into that discussion share at least a few 'thin' principles: *contra negantem principia non est disputandum*.[35] We need to assume that people recognise reciprocally the autonomy (the possibility of a rational and independent action, in this case discussion itself) and therefore the sincerity and the dignity of their opponents or fellow discussants. We should thus assume that in a public discussion, discussants have equal rights.[36] Citizenship (and European citizenship is no exception) is just the sum of rights which allow subjects to take part in a political deliberation and to discuss issues in order to arrive at a reasonable and well pondered decision.

This can mean that in order to promote democratic progress in a society, we can first create statuses granting common and equal rights among its members, and then proceed to identify a viable institutional device to render visible and effective the public discourse which has started with the ascription of those statuses. In terms of the present political and institutional situation in the European Union, we can therefore plausibly believe that we can have European democratic citizens even before having at the supranational level, institutions endowed with effective powers of political direction governed by democratic procedures. If we have a European citizenship as an independent status, granting rights such as political rights (rights to vote and to be elected) both at the supranational

[35] See A. Schopenhauer, *Die Kunst, Recht zu behalten. In achtunddreißig Kunstgriffen dargestellt*, F. Volpi (ed.), Frankfurt am Main: Insel (1995), p. 38.

[36] See R. Alexy, *Theorie der juristischen Argumentation*, 2nd ed., Frankfurt am Main: Suhrkamp (1991), pp. 238 ff.

and infranational level (see Articles 8b and 8c of the Treaty of the Union); or rights such as the right not to be discriminated against as an alien as compared with a national (see Article 6 of Maastricht Treaty); or rights such as the freedom of movement to and through any Member State and freedom of residence in them (see Article 8a), then, even if the European Parliament is not a fully developed democratic institution (because of the limited range of its current powers), we shall have a society of democratic citizens which will represent a better condition for developing democratic decision-making at the supranational level. Of course to this purpose, the rights which we have mentioned should be fully deployed in all their potentiality, and break the limitations which Articles 8a-8c still impose upon them.

When democratic institutions are deficient, democracy can also be developed through *democratic citizens*. In particular, in the European Union whose Member States actually are all democratic régimes, what is fundamental is not to maintain a nationalist or ethnic view of democracy. We need a free sphere of public concern and the sense of participating in a fair, cooperative scheme. A stronger and richer concept of European citizenship can be extremely helpful in this direction.

VI. CITIZENSHIP AND DEMOS

'Es gibt keine Demokratie ohne Demos' – says Josef Isensee, a well-known German constitutional lawyer[37] –, whereby he means that democracy is built upon a collective subject pre-existing to it, endowed with a proper intense life, that is, a people seen as a homogeneous cultural and ethnic body. Moving from this premise, the German lawyer then draws the conclusion that there is no possible legitimation basis for a *European* democracy (that is, for the European Union), since there is no European *demos*, that is, a European *folk*.

It may also be remembered that the same author has successfully fought against the introduction, in the *Freie und Hansestadt Hamburg*, of an aliens' right to vote for the election of district councils, endowed of indeed poor competences, with the argument that State officials and representative bodies (at whatever level and of whatever size) enjoy democratic legitimation if and only if they receive their mandate from the 'People' in its entirety, that is, from the 'German People'.

37 'There can be no democracy without demos.' J. Isensee, 'Europa–die politische Erfindung eines Erdteils', in J. Isensee (ed.), *Europa als politische Idee und als rechtliche Form*, Berlin: Duncker & Humblot (1993), p. 133. For a more sophisticated, but in its core quite similar view, see D. Grimm, 'Does Europe Need a Constitution?', *European Law Journal* (1995), p. 295: 'Here, then, is the biggest obstacle to Europeanization of the political substructure, on which the functioning of a democratic system and the performance of a parliament depends: language'. According to Grimm, the European Parliament, even reformed and fully empowered as a legislative assembly, could not be considered as a European popular representative body, 'since there is as yet no European people' (*ibid.*, p. 293).

The German Federal Constitutional Court unfortunately accepted Isensee's argument,[38] thus reformulating the concept of 'people' mentioned in Article 20 of *Grundgesetz* ('Alle Staatsgewalt geht vom Volke aus') into that of German people[39] and twisting this into an ethnically defined community of fate[40] which has constitutional relevance even before the drafting of the constitution itself. Democracy –said the German Court – should not be seen as *freie Selbstbestimmung aller*, free self-determination of all (as was formerly held by the Court itself[41]), but as a power which derives from a unique and unitary entity whose individual members as such have no constitutional right of participation to collective political decisions; they can exercise democratic self-determination only jointly, only if considered as an indivisible group.[42] The idea that democracy means the right for the people (in the plural) concerned by the laws to contribute to their deliberation and enactment is dismissed.[43] Now, this is indeed a peculiar concept of democracy. It is based on a romantic idea of 'people' or 'nation',[44] which has represented a reaction against the originary liberal concept of democracy based on two basic pillars: individuality and public reason.[45]

In the romantic protest against liberal democracy, the very concept of political representation is deeply modified: representation is no longer expression of the concrete will of concrete individuals, but is rather expression of the *existence* of a community. In this second acceptation of representation (connected with a people idealised as a compact, tight and uniform ethnic entity, which has been cherished by 'democrats' such as Carl Schmitt[46]), even a dictator can 'represent' a

38 'Das Volk, welches das Grundgesetz als Legitimations- und Kreationssubjekt der verfaßten Staatlichkeit bestimme, sei das deutsche Volk', BVerfGE 83, 60, 65.

39 See also BVerfGE 83, 37:
Das Staatsvolk, von dem die Staatsgewalt in der Bundesrepublik Deutschland ausgeht, wird nach dem Grundgesetz von den Deutschen, also den deutschen Staatsangehörigen und den ihnen nach Art. 116 ABS. 1 GG gleichgestellten Personen, gebildet.

40 Cf. BVerfGE 83, 37, 40:
Das Bild des Staatsvolkes, das dem Staatsangehörigkeitsrecht zugrunde liege, sei die politische Schickalsgemeinschaft, in welche die einzelnen Bürger eingebunden seien. Ihre Solidarhaftung und ihre Verstrickung in das Schicksal ihres Heimatstaates, der sie nicht entrinnen könnten, seien auch Rechtfertigung dafür, das Wahlrecht den Staatsangehörigen vorzubehalten (emphasis mine).

41 See, for instance, BVerfGE 44, 125, 142.

42 Das demokratische Prinzip läßt es nicht beliebig zu, anstelle des Gesamtstaatsvolkes jeweils einer durch örtlichen Bezug verbundenen, gesetzlich gebildeten kleineren Gesamtheit von Staatsbürgern Legitimationskraft zuzuerkennen,
BVerfGE 83, 60.

43 See BVerfGE 83, 60, 72. See also BVerfGE 83, 37, 42.

44 Cf. R. Koselleck, 'Volk, Nation', in *Geschichtliche Grundbegriffe*, O. Brunner, J. Conze and R. Koselleck (eds.), Vol. 7.

45 Cf. J. Rawls, *op. cite.*, note 17, pp. 212 ff., and D. Gauthier, 'Public Reason', in 'Social Philosophy and Policy' (1995), pp.19 ff.

46 See C. Schmitt, *Verfassungslehre*, 3rd ed., Berlin: Duncker & Humblot (1957), p. 209:
Repräsentation ist kein normativer Vorgang, kein Verfahren und keine Prozedur, sondern etwas Existentielles. Repräsentation heißt, ein unsichtbares Sein durch ein öffentlich anwe-

community, and in the end even a dictatorship may be legitimately be considered a... democracy. If, to have democracy what is required is on the one side a *Volk* and on the other a special existential (ethnic) link between the *Volk* and its leaders (this being the proper *Repräsentation* of the *Volk*), then it is not at all contradictory to have an authoritarian and even a totalitarian leader and nevertheless 'democracy'.[47]

Indeed, in a democracy the people is not given by a 'authentic' *demos*, but by its citizens, that is, by those individuals who publicly share a common concern and adhere to the fundamental principles by which the democracy defines and builds itself. In a democratic perspective 'people is rather only a summary formula for human beings'.[48] As a matter of fact, there is no *demos* without democracy, that is, without individuals who recognise each other's rights and duties. A people in political and legal terms (a *demos)* is a normative product: *'populus dicitur a polis'* – wrote Baldus de Ubaldis in the fourteenth century;[49] it is not there to be found before one starts the difficult enterprise of building up a polity. A people in political and legal terms is the outcome of political and legal institutions: it crystallizes around them *('civitas sibi faciat civem'* – said Baldus' master, the great Bartolus de Sassoferrato). A people in democratic terms, a *demos*, the people of a democratic polity, thus makes itself insofar as it aggregates along the *rules* of democracy. We can recall a famous phrase of Kant in which he defines a constitution as 'den Akt des allgemeinen Willens, wodurch die Menge ein Volk wird' (the act of general will whereby a multitude becomes a people).[50]

The story going on between people and democracy is more or less the same as the one of the egg and the chicken. Which came first: the chicken or the egg, *demos* or democracy? Now, as far as the latter pair is concerned, we can confidently solve the enigma: they were just born together! In short, *es gibt kein Demos ohne Demokratie* (there can be no *demos* without democracy).

This is another reason, and a fundamental one, why European citizenship is so important: because it is a stone, and a founding one, in the building of a European democracy. Democracy needs at least two poles: decision-making authorities and citizens toward whom those authorities are called to account for

sendes Sein sichtbar machen und vergegenwärtigen (emphasis in original).

47 'According to this view, democracy and dictatorship are not essentially antagonistic; rather, dictatorship is a kind of democracy if the dictator successfully claims to incarnate the identity of people.' U. K. Preuss, 'Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution', in *Constitutionalism, Identity, Difference, and Legitimacy. Theoretical Perspectives*, M. Rosenfeld (ed.), Durham and London: Duke University Press (1994), p. 155.

48 B.-O. Bryde, 'Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie', in *Staatswissenschaften und Staatspraxis* (1994), p. 322.

49 Baldus, *Liber Sextus Decretalium Bonifacii P. VIII*, I.6. See J. Canning, *The Political Thought of Baldus de Ubaldis*, Cambridge: Cambridge University Press (1987), p. 161.

50 I. Kant, 'Zum Ewigen Frieden. Ein philosophischer Entwurf', in I. Kant, *Kleinere Schriften zur Geschichtsphilosophie, Ethik und Politik*, K. Vorländer (ed.), Hamburg: Meiner (1959), p. 128.

their decisions and the corresponding behaviour. If we have democratic citizens, persons endowed with a rich patrimony of rights, we should then have democratic political authorities. If we have democratic citizens, we already have a *demos*. And to have citizens in legal and political terms is only a question of common rights and duties.

In the organic view of democracy, we are confronted with a dangerous confusion of the notion of *public opinion* with that of ethnic and cultural homogeneity. This confusion unfortunately seem to be perpetuated in the *Maastricht Urteil* by the German Federal Constitutional Court.

> *Demokratie, soll sie nicht lediglich formales Zurechnungsprinzip bleiben, ist vom Vorhandensein bestimmter vorrechtlicher Voraussetzungen abhängig, wie einer ständigen freien Auseinandersetzung zwischen sich begegnenden sozialen Kräften, Interessen und Ideen, in der sich auch politische Ziele klären und wandeln und aus der heraus eine öffentliche Meinung den politischen Willen verformt. Dazu gehört auch, daß die Entscheidungsverfahren der Hoheitsgewalt ausübenden Organe und die jeweils verfolgten politischen Zielvorstellungen allgemein sichtbar und verstehbar sind, und ebenso daß der wahlberechtigste Bürger mit der Hoheitsgewalt, der er unterworfen ist, in seiner Sprache kommunizieren kann'.*[51]

I find it correct to affirm that democracy, in the sense of majority rule, presupposes some fundamental pre-legal conditions as much as some fundamental normative (moral and political) principles, a vigorous and open public discussion and an influential public opinion. Democracy as a political institution needs, in other words, a civil society. But, first, a civil society does not necessarily need to coincide with some Schicksalgemeinschaft, a homogeneous ethnic and linguistic community. (Suggestively enough when the German Court tried to establish a clear-cut separation between national citizenship and European citizenship, it did not find anything better than making recourse to their different level of existential tightness:

> *Mit der durch den Vertrag von Maastricht begründeten Unionsbürgerschaft wird zwischen den Staatsangehörigen der Mitgliedstaaten ein auf Dauer angelegtes rechtliches*

[51] Democracy, if it is not to remain merely a formal principle of accountability, is dependant on the presence of certain pre-legal conditions, such as a continuous free debate between opposing social forces, interests and ideas, in which political goals also become clarified and change course and out of which comes a public opinion which forms the beginnings of political intentions. That also entails that the decision making processes of the organs exercising sovereign powers and the various political objectives pursued can be generally perceived and understood, and therefore that the citizen entitled to vote can communicate in his own language with the sovereign authority to which he is subject.
1 CMLR 57 (1994), p. 87. BVerfGE 89, 155, 185, emphasis mine. For a powerful criticism of the constitutional *Weltanschauung* of the German court as expressed in this decision, see J.H.H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos, and the German Maastricht Decision', *European Law Journal* (1995), pp. 219 ff.

Band geknüpft, das zwar nicht eine der gemeinsamen Zugehörigkeit zu einem Staat vergleichbare Dichte besitzt'.[52]

Second, a civil society becomes a 'people', in the sense of the sum of a polity citizens, only by interacting with constitutional rules and institutions. This point is clearly expressed in the following statement by Ulrich Preuss:

> Neither pre-political feelings of commonness – like descent, ethnicity, language, race – nor representative institutions as such are able to a create a polity, be it a nation-state, a multinational state or a supranational entity. Rather, what is required is a dynamic process in which the will to form a polity is shaped and supported through institutions which in their turn symbolise and foster the idea of such a polity.[53]

To be sure, a common language among citizens and between civil society and political institutions is needed in order to have public discussion and thus public reason. However, a common language can be a conventional or an artificial one. To be citizens, individuals should be able to communicate with political authorities: they should be able to understand each other. But this does not imply at all that to this purpose individuals should use their own mother tongue. Any other language will do, provided it is common to the parties.

It may be the case that in the European Union we do not still have such a common language. Nonetheless, such a language *can* be found. We can think of a *lingua franca* emerging in the ongoing process of European integration or of a net of various national or regional languages employed each at a different level and for a certain occasion but allowing a continuous flux of information.[54] Moreover the common language does not need to be on any occasion the same. We could perhaps apply a kind of subsidiarity principle to the use of the different languages, choosing the one or the other according to the context and the dimensions of the issue at stake and the people (and the languages) concerned. *'Zweitens'* – as was pointed out by Edmund Bernatzik, a leading public lawyer of Austria, *'Felix – kann man ja eine fremde Sprache lernen'.*[55] In any case successful

[52] 'With the establishment of union citizenship by the Maastricht Treaty, a legal bond is formed between the nationals of the individual member-States which is intended to be lasting and which, *although it does not have a tightness comparable to the common nationality of a single state, provides a legally binding expression of the degree of de facto community already in existence.'* 1 CMLR 57 (1994), p. 86; BVerfGE 89, 155, 184. Emphasis mine.

[53] U. K. Preuss, 'Problems of a Concept of European Citizenship', *European Law Journal* (1995), pp. 277-278. Italics in original.

[54] See what Jürgen Habermas opposes to Dieter Grimm's defense of cultural homogeneity as legitamation for democracy: J. Habermas, 'Comment on the paper by Dieter Grimm: "Does Europe Need a Constitution?"', *European Law Journal* (1995), pp. 303 ff.

[55] 'Second,... one can perfectly well learn a foreign language'. E. Bernatzik, 'Die Ausgestaltung des Nationalgefühls im 19. Jahhundert', in E. Bernatzik, *Die Ausgestaltung des Nationalgefühls im 19. Jahhundert – Rechtsstaat und Kulturstaat. Zwei Vorträge gehalten in der Vereinigung für staatswissenschaftliche Fortbildung in Cöln im April 1912*, Hannover:

European experiences such as for instance, the Erasmus Programme or the European University Institute in Florence (a university is an institution for which communication is of utmost relevance) show that it is possible at least to have a European university even without a European *Volk*.

Europe is admittedly not a nation, European citizens as such either. It is high time perhaps that the one (Europe) and the others (European citizens) combine their plans, leaving the nation to its old-fashioned nightmares of blood and soil.

I am not so much concerned about the sociological evidence supporting the romantic thesis according to which peoples and nations are homogeneous ethnic and cultural entities. My stance towards this thesis is quite radical. Should it be true, should nations be *Volksgemeinschaften* (ethnic community), that would not still be a legitimation ground for a genuine democratic polity. Since democracy is based on intersubjective discourses and representation, any process which would work without an explicit reference to individual and interindividual will formation, would not be appropriate to offer any democratic legitimation to a polity. The *demos* of democracy certainly is not *ethnos*.

Yet, in order to defeat the 'folkish' resistance, we might recall a historical fact: that in most cases the so-called *Schicksalgemeinschaft* (community of fate) is the outcome, an artificial product, of the State or of other reflective political processes.[56] This was recognised in 1933 by Hermann Heller, he himself a strong defendant of nations as *Schicksalgemeinschaften* (and therefore quoted in the *Maastricht Urteil*[57]), when he was confronted with the rise of the Nazi régime.

> *Weder das Volk noch die Nation dürfen als die gleichsam natürliche Einheit angesehen werden, die der staatlichen Einheit vorgegeben wäre und sie selbsttätig konstituierte. Oft genug war es [...] umgekehrt die staatliche Einheit, welche die 'natürliche' Einheit des Volkes und der Nation erst gezüchtet hat. Der Staat ist mit seinen Machtmitteln durchaus im Stande selbst aus sprachlich und anthropologisch verschiedenen Völkern ein einziges zu machen'.*[58]

Helwingsche Verlagsbuchhandlung (1912), p. 27.

56 Compare what is said by Oswald Spengler, an author certainly not to be suspected of any 'abstract', 'formal', or 'thin' universalist liberal political views:
Die 'Muttersprache' ist bereits ein Produkt dynastischer Geschichte. Ohne die Capetinger würde es keine französische Sprache geben[...]; die italienische Schriftsprache ist ein Verdienst der deutschen Kaiser, vor allem Friedrichs II. Die modernen Nationen sind zunächst die Bevölkerungen alter dynastischer Gebiete.
The 'mother-tongue' is already a product of dynastic history. Without the Capentinger there would be no French language. (...).; The Italian written language is attributable to the German emperors, in particular Frederick II. Modern nations are first of all the populations of old dynastic territories.
O. Spengler, *Der Untergang des Abendlandes. Umrisse einer Morphologie der Weltgeschichte*, München: DTV (1986), p. 779.

57 See BVerfGE 89, 155, 186. Cf. the sharp critical comments by Brun-Otto Bryde (B.-O. BRYDE, *op. cite.*, note 48, p. 326, note 37).

58 Neither the people nor the nation may be considered to be the quasi natural unit which is prior to, and by itself, constitutes statal unity. Often enough, it was (...) conversely, statal unity which has bred the 'natural' unity of the people and the nation. With its

Peoples in the cultural sense, in some cases at least, are not prior but posterior to the State's (sometimes brutal) intervention. The 'ethnic' homogeneity of Pale in Bosnia could never be claimed as the outcome of an organic process of communitarian growth.

On the other side, as far as a European *demos* is concerned, we might affirm that, in spite of the lack of one (and only one) common language, there is something like a common European cultural identity. A common history, common tragedies and sufferance, common values, common 'myths'– if you like–,[59] have made of the French, the Italian, the German etc., a common 'people'. Though a Sicilian can manifest some perplexity in front of a guy dressed in leather pants and a feathery hat drinking litres of beer, he will still identify this individual as a European like him, with more things uniting than dividing them.

In a democracy, to be a citizen, to develop a sense of belonging to a democratic polity, one should overcome one's own rooting in unreflective communities, and be *for a moment* naked, a mere human being. Moving from this nakedness, one can then freely decide whether and how one wishes to cooperate. Only from this *nowhere* will persons be able to build up *fair* terms of cooperation, since in that hypothetical condition, there will be no room for discriminatory grounds. Democracy as a polity of *equals*, should presuppose a kind of 'transcendental' nakedness: 'Democracy is a system of government according to which every member of society is considered as a man, and nothing more'.[60]

Let me conclude in a rhetorical way, with an appeal, the same as we find in a page written by Elias Canetti in his masterpiece, *Die Blendung*: 'Let us behave as the animals that we are, with a capability and a need to move around, and not as plants rooted for ever in a lump of earth. 'Seien wir Tiere! Wer wurzeln hat, reiße sie aus!'.[61]

power resources the state is certainly capable of creating one people out of linguistically and anthropologically different people.'
H. Heller in G. Niemeyer (ed.), *Staatslehre*, 6th, rev. ed., Tübingen: Mohr (1983), p. 186.

59 F. Chabod, *Storia dell'idea d'Europa*, Bari: Laterza (1995).

60 W. Godwin in I. Kramnick (ed.), *Enquiry Concerning Political Justice and Its Influence on Moral and Happiness*, Hammondsworth: Penguin (1976), p. 486.

61 'Let us be animals! Whoever has roots, rip them out!' E. Canetti, *op. cite.*, note 27, p. 457.

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European Citizenship
An Institutional Challenge

Massimo La Torre

One of the most promising institutional innovations introduced by the Treaty on the European Union signed in Maastricht and by the reform of the European Community which accompanied it, has been a new legal status granted equally to all Member States nationals: European Citizenship. The recent Treaty of Amsterdam has since improved and broadened this new status.

Political community may be seen to consist of two main elements - citizenship on the one hand and sovereignty on the other, so that if we have citizens, there must be a sovereign. This is the reason why, once a European citizenship is established, one may say that through a kind of "constitutive act" a European supranational society has been founded. In a democratic society, citizens are both the holders and the recipients of sovereignty, so that the scope of citizenship defines the area where sovereignty is operative and from which it may draw its legitimacy. Citizens should necessarily refer to a society endowed with powers of self-determination (that is, sovereignty). European citizenship is therefore extremely relevant, since it has a "foundational" character and signals the emergence of a new polity.

This book deals with each of these questions, and covers all aspects of European citizenship. It is entirely devoted to analysing this new and promising status, studied from a multiplicity of perspectives by a number of outstanding scholars and researchers drawn from most of the Member States of the European Union. It will be of prime interest both to lawyers and laymen who want a better knowledge of the new opportunity for political participation and the new rights created by the European Union for its citizens.

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