

THE RELATIONSHIP BETWEEN COMMUNITY CITIZENSHIP AND THE PROTECTION OF FUNDAMENTAL RIGHTS IN COMMUNITY LAW

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1. Introduction

One of the explicit objectives of the Union Treaty is “to strengthen and protect the rights and interests of the nationals of the Member States through the introduction of a citizenship of the Union” (Article B). However, despite the establishment of Union citizenship in Article 8 EC, the Union Treaty has, on the whole, simply constitutionalized certain rights which previously existed in Community law, introduced few new ones and provided a legal basis, as yet untested, for the enlargement of the content of Union citizenship in future.¹ Article 8 EC appears to do little more than extend the principle of equal treatment to matters with respect to which Community competence was previously either uncertain or contested² and many of the rights which it pretends

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1. For a discussion of the content of Union citizenship see, *inter alia*, Closa, “The concept of citizenship in the Treaty on European Union,” 29 CML Rev., 1137–1170; D'Oliveira, “European citizenship: Its meaning, its potential,” in Monar, Ungerer and Wessels (Eds.), *The Maastricht Treaty on European Union*, (1993) pp. 126–146; O'Keefe, “Citizenship of the Union,” 1994–2 *Actualités du Droit*, 227–248; O'Keefe, “Union citizenship,” in O'Keefe and Twomey (Eds.), *Legal Issues of the Maastricht Treaty*, (1993), pp. 87–107; O'Leary, *The Evolving Concept of Community Citizenship*, forthcoming 1995 Martinus Nijhoff; and Verhoeven, “Les citoyens de l'Europe,” 2 *Annales de droit de Louvain* (1993), 165–191.

2. See e.g. the discussions surrounding the proposal for a directive on voting rights in municipal elections for Member State nationals resident in a Member State other than their own, O.J. 1988, C 246/3.

to constitutionalize such as, for example, a general, but nevertheless limited, right of residence, previously existed in Community law, if only on the basis of secondary legislation.³

One of the core objectives of the creation of a status of citizenship is the protection or enumeration of the rights of individuals *vis-à-vis* the authorities which govern them. Citizenship also provides its beneficiaries with the instruments – rights to political participation and representation – which enable them collectively to protect their rights from untoward state interference and to participate in the legal and political order of which they are members. One of the central objectives of a legal order which protects fundamental rights is similarly to protect individuals from abuse of their fundamental rights by both private and public sectors. Given this common objective, it is curious that Union citizenship omits any explicit reference to the protection of fundamental rights. The rights which constitute Union citizenship need not, of course, be restricted to the express provisions of Article 8 EC. The latter specifically provides that Member State nationals enjoy “the rights conferred by the Treaties” generally. Indeed, the Commission, European Parliament and certain Member States attempted to expressly include fundamental rights in the Union Treaty’s citizenship package.⁴ However, the latter were relegated to a common provision in Title I of the Union Treaty which, pursuant to Article L, does not come within the jurisdiction of the Court of Justice. Article F(2) undoubtedly commits the Union to respecting fundamental rights as guaranteed by the European Convention of Human Rights and Fundamental Freedoms (hereafter the European Convention) and the constitutional traditions common to the Member States, but no specific consequences seem to have been drawn from that commitment in the context of Union citizenship. Indeed this commitment has been specifically isolated from the status of citizenship introduced by the Union Treaty.

3. See Directives 90/364, 90/365 and 90/366, O.J. 1990, L 180/26–30, on a right of residence for economically inactive persons, retired persons and students, respectively.

4. See “Union Citizenship,” Contributions of the Commission to the Intergovernmental Conferences, SEC (91) 500, Bull. EC Suppl. 2/91; the Bindi Report on Union Citizenship to the European Parliament, PE Doc. A3–0300/91, 6 Nov. 1991; and Closa (1992), *supra* note 1, at 1153.

It is thus worthwhile examining whether Union citizenship is really intended to strengthen and enrich the subjective position of the individual in Community law on the basis of the Union's new constitutional text and its amendment of the EC Treaty. It is suggested that by analysing the relationship between Community citizenship and the protection of fundamental rights in the Community legal order, the real contribution which Community or Union citizenship has made, or could make, to the protection of the individual's subjective rights in Community law can be addressed. It is also hoped in this way to proceed beyond a mere recital of the rights listed in Article 8 EC and the immediate legal consequences which may flow from that provision to a deeper understanding of the purpose of citizenship in the Union, its relationship with fundamental rights in particular and ultimately the value, if any, of establishing an explicit constitutional status of citizenship in Community law. It is argued that the construction of a relationship between citizenship and fundamental rights could further the protection of individual rights at Community level. Such a relationship would detract from the orthodox enjoyment of citizenship rights on an exclusionary basis and perhaps from the present privileged position of Member State nationals. However, in the long run, by displacing nationality as the principal condition precedent for the enjoyment of these rights in the Community, it might promote a higher standard of rights in the Community than is possible under the present arrangement.

2. Citizenship rights in the context of Community law

The judicial and legislative development of citizenship-like rights around the nucleus of the Treaty provisions on free movement of persons has been the subject of widespread discussion.⁵ Jurisprudence of the Court of Justice which promoted the more human side of free movement such as, for example, the extension of the principle of equal treat-

5. See, in particular, Evans, "European Citizenship," 45 MLR (1982) 497; Evans, "European Citizenship – A Novel Concept in Community Law," 32 AJCL 679; and O'Leary, *supra* note 1.

ment with respect to social and tax advantages on the basis of Article 7(2) Regulation 1612/68,⁶ and legislative proposals to establish a general right of residence and to extend equal treatment to voting rights in local elections, were regarded as a judicial attempt to forge, at Community level, a series of rights for Member State nationals which were similar to those enjoyed at national level on the basis of citizenship. These judicial developments were accompanied by legislative proposals with regard to general rights of residence and limited voting rights.⁷ This incremental creation of a type of Community citizenship has now finally been established, in constitutional form, in Article 8 EC.⁸

The relationship between nationality and citizenship in the context of the free movement of persons and Community citizenship has also been widely discussed. Both the freedom of movement of persons and Article 8 EC are contingent on the possession of Member State nationality.⁹ Nationality of a Member State serves as the essential connecting factor which links an individual's case to the Community legal framework and which, in the context of Community citizenship, entitles the holder to a whole panoply of rights on the basis of Community law.

A coherent and complete distinction between citizenship and nationality is difficult, however, to maintain. Some authors regard nationality, on the one hand, as the international or external aspect of state membership.¹⁰ Citizenship, on the other hand, denotes the legal conse-

6. See O'Keefe, "Trends in the Free Movement of Persons within the European Communities" in O'Reilly (Ed.), *Human Rights and Constitutional Law. Essays in Honour of Brian Walsh*, (1992) pp. 263-291, at p. 267 et seq.; and Mancini, "The Free Movement of Workers in the Case-Law of the European Court of Justice" in O'Keefe and Curtin (Eds.), *Constitutional Adjudication in European Community and National Law, Essays in Honour of Mr. Justice T.F. O'Higgins*, (1992) pp. 67-77, at p. 67.

7. See generally O'Keefe (1993), *supra* note 1.

8. Note that Art. 8 EC refers to the establishment of *Union* citizenship, which is employed herein to refer to the rights of citizenship expressly enumerated in that provision. Community citizenship describes the more general development of citizenship-like rights in the Community before the adoption of Art. 8 EC and thereafter, regardless of the limited scope of that provision.

9. See, *inter alia*, Closa, "Citizenship of the Union and Nationality of Member States," in this volume; D'Oliveira, "Plural Nationality and European Union," in D'Oliveira (Ed.), *Plural Nationality, New Trends*, (1993); and O'Leary, "Nationality and Citizenship: A Tale of Two Uneasy Bedfellows" 12 YEL (1992) 353-384.

10. See O'Leary (1992), *supra* note 9, at 355; Rosas, "Nationality and Citizenship in a Changing European and World Order," in Suksi (Ed.), *Law Under Exogenous*

quences which attach to the existence of a special connection between a defined category of individuals and the State. These consequences are generally a series of rights, such as a right of residence, voting rights, a right of access to the judiciary and certain social services, and correlative duties, which in modern welfare States generally include the duty to pay tax or perform jury service, or in some States, the duty to perform military service. The exercise of these rights is primarily regulated by domestic law for domestic purposes. Confusion begins when the connection between the individual and the State on which the conferral of these citizenship rights is based is often, though not always, nationality.¹¹ In the Community context, for example, this attempted distinction between the internal and external aspects of membership is not watertight, given that a limited form of diplomatic protection ranks among the enumerated rights of Union citizenship (Article 8(c)).

Established models of citizenship and nationality may help to outline the contours of the status of citizenship developing at Community level. However, they also risk hindering the commitment of that status to the protection of individual rights and individual political participation. Nationality as the connecting factor between Community citizenship and integration protects Member States from untoward interference in the sphere of citizenship rights. Ultimately, it is Member States who determine who are their nationals and, therefore, who can enjoy the rights of Community citizenship. The existence of divergent Member State nationalities thus weakens Community citizenship from the outset, since equality across the board among citizens is unattainable.¹² This article will loosely treat citizenship as a form of membership entailing a series of rights and duties and will dwell on what Community citizenship

Influences, Turku, 1994; and Weis, *Nationality and Statelessness in International Law*, 2nd ed. (1979), at p.29.

11. See Koslowski, "Intra-E.U. Migration, Citizenship and Political Union," 32 *JCMS* (1994) 369–402, at 370–371. For a discussion of citizenship generally see Dawn, *Government in the United Kingdom. Accountability, Effectiveness and Citizenship*, (1990) at pp. 31–36; and Dahrendorf, "Citizenship and the Modern Social Conflict" in Holme and Elliot (Eds.), *1688–1988. Time for a New Constitution*, (1988) pp. 112–125.

12. See also Evans, "Union Citizenship and the Equality Principle," in Antola and Rosas (Eds.), *A Citizens' Europe – In Search of a New Civic Order*, SAGE Publications, forthcoming 1995.

could look like in future were an explicit relationship to be forged between it and the protection of fundamental rights.

3. Reclassifying the rights of Community citizenship

Let us first examine the rights of citizenship enumerated in Article 8 EC and the potential citizenship rights scattered elsewhere in the Union Treaty. Community citizenship roughly entails three categories of rights:¹³

(i) rights which the nationals of one Member State can enjoy while in another Member State on the basis of the application of Community law in that Member State;

(ii) rights which Member State nationals can assert against their own Member State on the basis of Community law; and

(iii) rights which Member State nationals derive directly from Community law and which they can assert against the Community or Union and the Member States.

In accordance with Article B TEU, central to each category should be the desire to protect and strengthen the subjective rights and interests of individual Member State nationals.

However, it is useful to remember that important anomalies exist with respect to the rights of Community citizenship. Not all freely moving Union citizens are in fact equal. In addition to the inherent differences resulting from the divergence of Member State nationality laws, Community citizenship tends to distinguish between market or consumer citizens and Union citizens. Only economically active Member State nationals can avail of the fairly extensive rights which have been developing on the basis of Article 7(2) Regulation 1612/68. The latter has not been extended to the beneficiaries of the general right of residence introduced by the 1990 Directives,¹⁴ a right which is now constitutionalized in Article 8(a) EC. Similarly, Mr. Cowan was entitled

13. This reclassification is incomplete as outlined herein. For a comprehensive analysis see O'Leary, (1995) *supra* note 1.

14. *Supra* note 3.

to equal treatment with regard to a French criminal injuries compensation scheme, since to exclude him might have interfered with his economic freedom to avail of services outside his domestic market.¹⁵ The principle of equal treatment has not been equally extended to students who fail to demonstrate that their principal status is that of economic actor,¹⁶ or to the non-economic aspect of Community citizenship rights – political participation beyond the municipal level.

The exclusivity of the rights in Article 8 EC, depends on which right is in question and indeed in which Member State the right is being asserted, although traditionally exclusion is one of the defining features of citizenship.¹⁷ Thus, apart from Member State nationals, nationals of the EEA countries¹⁸ and, in certain circumstances, third country nationals,¹⁹ all enjoy a right of residence, although its insertion in Article 8 EC suggests that this right is fundamental to the exclusive quality of Union citizenship. Similarly, in some Member States, third country nationals enjoy a right to vote in local elections on the basis of national legislation. Thus it is arguable that although Union citizenship is established on the basis of Member State nationality and excludes, *a priori*, third country nationals, this exclusion does not alter the nature of these rights, as it is clear that in some Member States the political rights of migrants (Community and non-Community alike) are regarded as fundamental to their social integration. Article 8 EC is simply a positive legal prescription that these rights form part of Union citizenship and as such that they are to be enjoyed by Member State nationals. Since the nature of the rights is not altered, what could be regarded as important about the rights of Union citizenship is the fact that they attempt to operate a distinction between privileged Member State nationals and non-Community nationals. Although with regard to the exercise of certain rights, such as a right of residence or voting rights, the exclusion of non-Community nationals is incomplete, and in other respects, such as the right of petition or recourse to the ombudsman, exclusion is not even envisaged.

15. Case 186/87, *Cowan*, [1989] ECR 195.

16. Case 197/86, *Brown*, [1988] ECR 3205.

17. See D'Oliveira (1993), *supra* note 1.

18. See Arts. 28, 31–35 and 36–39 EEA.

19. Art. 10 Regulation 1612/68.

3.1 *Rights which Member State nationals can enjoy while in another Member State and which they enjoy on the basis of the application of Community law in that Member State*

One of the fundamental steps initially taken by the Court of Justice as regards the development of Community law was the introduction of the principle of direct effect. It has proved an essential tool in ensuring that Community law is effectively enforced. However, it was placed not only in the hands of public authorities, but also in the hands of private individuals, who could thereby assert their individual rights under the four freedoms and whose rights had to be upheld by national courts.²⁰ It is impossible to regard this as the genesis of Community citizenship. Nor does it uniquely benefit Community nationals resident, established or providing services in a Member State other than their own. However, it was recognition, at an early stage, of the role of individual Member State nationals in the development and enforcement of Community law and of the need to provide a means for them to protect their rights. An essential and explicit aspect of the decision in *Van Gend en Loos* was the Court of Justice's determination to assert the rights of individuals even in the context of a provision of Community law, Article 12 EC, which was addressed to Member States. The Court was determined to effectively enforce the Member State's obligations, if only by allowing private individuals to assert the aims and objectives of Community law in the form of personal rights against their own Member States or other Member States: "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision interpreted by Articles 169 and 170 to the diligence of the Community and of the Member States."²¹

The *Van Duyn* case is also of interest. That decision has been criticized for the broad margin of discretion which it permitted national authorities in interpreting the public policy proviso in Article 48(3) EC and for its failure, as a result, to afford the individual rights of Ms. Van

20. See Case 26/62, *Van Gend en Loos*, [1963] ECR 1; and Case 6/64 *Costa v. ENEL*, [1964] ECR 593.

21. See Case 26/62, *loc. cit.*, at 13.

Duyn sufficient protection.²² Determined to extend the principle of direct effect to directives, the Court of Justice failed, in the instant case, to secure the individual rights of the applicant (the right not to be deported from a Member State on the basis of an activity which, when attributed to that Member State's own nationals did not give rise to repressive measures) while, on the other hand, it favoured the effective operation of Community law by exposing directives, subject to certain conditions, to the principle of direct effect. Mancini identifies the principal consideration of the Court in the case as the need to ensure respect for the rule of law so that the legitimate expectations of Community citizens could be fulfilled. He does not deny, however, the "federalizing" aspect of the decision, namely, the extension of direct effect to directives.²³

The citizenship-like rights which Member State nationals can claim while in another Member State essentially amount to an extension of the principle of equal treatment. The aforementioned category of social and tax advantages under Article 7(2) Regulation 1612/68 have been extended, for example, on an equal treatment basis not only to Community workers resident in a Member State other than their own, but also to their families. In addition, the advantages which they can enjoy thereunder have not been restricted to employment related benefits.²⁴ The rights relating to the free movement of students have also largely been developed on the basis of the principle of equal treatment for Community nationals who seek access to vocational training in another Member State.²⁵ Member States are obliged to fulfil the provisions which permit Community nationals resident in another Member State to vote and stand for election in local and European Parliament elections *under the same conditions as nationals of the state of residence* (Articles 8(b)(1) and (2)). This category of citizenship rights thus generally refers to rights which already existed at national level, but which are now to be

22. See Case 41/74, [1974] ECR 1337.

23. See Mancini, "The Making of a Constitution for Europe," 26 CML Rev. 595-614, at 601-603.

24. See generally O'Keefe, "Equal Rights for Migrants: the Concept of Social Advantages in Article 7(2), Regulation 1612/68," 5 YEL (1985) 93-123.

25. See principally, Case 293/83, *Gravier*, [1985] ECR 593.

extended to nationals from other Member States on the basis of equal treatment. Community law has not acted as the source of these rights but has simply extended the circumstances in which these rights are to be enjoyed and the beneficiaries who are to enjoy them.

To this extent we can see that Community citizenship is reduced to a limited extension of rights on a reciprocal basis to other Member State nationals. The preservation of Member State nationality as an essential precondition for the enjoyment of these reciprocally available rights emphasizes that the relationship between the individual Member State national and his or her Member State is still the basis for the enjoyment of rights in the Community context, even as regards Community citizenship.²⁶ The possibility for Community workers to assert their Community rights at national level and the possibility or obligation on national courts to refer questions to the Court of Justice when necessary, have been essential in securing the effective operation of the principle of equal treatment. This principle has served, in turn, to promote the effective operation of the four freedoms in Community law and the achievement of the Community's tasks in Articles 2 and 3 EC.

3.2 Rights which Member State nationals can assert against their own Member State on the basis of Community law

Perhaps more surprising is that Member State nationals have increasingly been able to assert rights against their own Member States on the basis of Community law. This category of rights encroaches more visibly on the competence of Member States with regard to their internal treatment of their own nationals. On the whole, it is true that the Court has held that Community law cannot interfere with situations which are purely internal to a Member State.²⁷ Situations which are, in principle, internal to a Member State may thus give rise to cases whereby a Member State's own nationals receive less favourable treatment in their State

26. See also Evans (1995), *op. cit.* note 12.

27. See, *inter alia*, Case 175/78, *Saunders*, [1979] ECR 1129; Case 298/84, *Iorio*, [1986] ECR 247; Joined Cases C-297/88 and C-197/89, *Dzodzi*, [1990] ECR I-3763; and Case C-60/91, *Morais*, [1992] ECR I-2085.

of origin than nationals of other Member States who have travelled to that Member State and have therefore availed of the free movement provisions and “activated” the application of Community law.²⁸ However, the Court of Justice does not permit reverse discrimination and does not consider it outside the scope of Community law if the discrimination in question compromises one of the Community’s objectives. In such a situation Member State nationals may assert rights, which they derive from Community law (such as a right to reside), against their own Member States.²⁹

However, Community law only intervenes in these situations when its own objectives are being interfered with, which may cast doubt on the extent to which it is committed to protecting the rights of the individuals in question. The essential objective being protected in these cases is the *effet utile* of Community law. In protecting this category of individual rights the Community seeks to protect its economic objectives which have thus far been geared towards market integration. To the extent that the Court of Justice has redressed reverse discrimination it has generally done so with respect to persons who have availed of the free movement provisions and who now wish to work in their Member State of origin.³⁰ This limitation of the Community right of residence in one’s Member State of origin to persons in search of employment following Community migration seems incompatible with basic notions of citizenship and with the constitutional right of residence established in Article 8 EC.

3.3 *Rights which Member State nationals derive directly from Community or Union law and which they can assert against the Community or Union*

Member State nationals may also claim a number of rights on the basis of Article 8 EC which derive from the Community legal order itself.

28. See e.g. Joined Cases 35 and 36/82, *Morson and Jhanjan*, [1982] ECR 3723.

29. See Case 115/78, *Knoors v. Staatssecretaris van Economische Zaken*, [1979] ECR 399; and generally Joined Cases 154–155/87, *Wolf and Dorchain*, [1988] ECR 3897.

30. See Case 115/78, *Knoors*.

These rights are somewhat limited, however, to a right of petition,³¹ recourse to an ombudsman³² and the right to vote in European Parliament elections.³³ With reference to education, vocational training, culture, public health and consumer protection, the Treaty simply refers to the establishment of cooperation with and between the Member States. Students and teachers may be encouraged to migrate, but it is unlikely that they could rely on any substantive legal rights on the basis of the broadly phrased provisions of Article 126 EC. The effect of Community law is thus mostly felt by Member State nationals internally in their own Member State, or when resident in another Member State, via directives and national implementing legislation, and Community law therefore affects the relationship which the individual traditionally enjoys with his or her own Member State of origin or residence and does not generally give rise to a direct relationship between Member State nationals and the Community or Union. Member State nationals also derive protection of their fundamental rights from Community or Union law. Although these rights are not restricted in Article F(2) to Community nationals, they may in effect only be enjoyed by them since they are protected within the scope of Community law and are regarded therefore as by-products of the four freedoms.

This situation is further eloquently reflected in the provisions for judicial review and access to the Court of Justice in Community law. Articles 169, 170 only permit the Commission or Member States to seek a declaration that the actions of Member States or Community institutions are in breach of the Treaty's provisions. Where a direct individual right exists to seek judicial review of Community acts the circumstances for its exercises have been extremely limited and the plaintiff in such cases must demonstrate "direct and individual concern."³⁴ A similar condition applies with regard to the Union Treaty's provision for a right

31. Art. 138(d).

32. Art. 138(e). For a more detailed discussion of these non-judicial mechanisms for the protection of individual rights see Marias, "Mechanisms of Protection of Union Citizens' Rights," in Antola and Rosas (Eds.), *op. cit.*, note 12.

33. This right derives directly from Art. 138 EC and should not be confused with the extension of electoral rights on the basis of residence pursuant to Art. 8 EC.

34. Art. 173(4) EC.

of petition. Neither may individuals sue a Member State directly before the Court of Justice. Rather, the direct relationship between Community citizens and Member States is emphasized in the Article 177 EC reference procedure available to national courts and tribunals, which has been promoted as the appropriate medium for individual complaints to reach the Court of Justice. Yet even this means of protection could be interpreted not simply as a means to protect the rights which Member State nationals derive from Community law. Article 177 EC has been designed to intimately involve national judiciaries in the administration of Community law and to transform it therefore into part of the internal law of each Member State.³⁵

The Union Treaty provided both Member States and Community institutions with a ripe opportunity to enhance the Community's democratic commitment to the judicial vindication of individual rights by Community citizens. This opportunity was disregarded and the access of Community citizens to the Court of Justice has not been amplified. Emphasis was instead placed on introducing sanctions against Member States which fail to fulfil their Treaty obligations.

4. The protection of fundamental rights in the context of Community law

De Witte has cogently argued that "Constitutions are not mere copies of a universalist ideal, they also reflect the idiosyncratic choices and preferences of the constituents and are the highest legal expression of the country's value system."³⁶ The protection of any single fundamental right in concrete circumstances thus involves a legislative or judicial definition of the balance to be struck between the interests of the individual and the interests of society. This balance may vary from one Member State to the next and may vary over time. Furthermore, the term "rights" is not value free and can "sometimes [be] used in its strict

35. See Weiler, "A Quiet Revolution. The European Court of Justice and its Interlocutors," 26 *Comparative Political Studies* (1994), 510–534, at 518–519.

36. See De Witte, "Community Law and National Constitutional Values," (1991/2) *LIEI* 1–22, at 7.

sense of the right-holder being *entitled* to something with a correlative duty in another. Sometimes 'right' is used to indicate an *immunity* from having a legal status altered. Sometimes it indicates a *privilege* to do something. Sometimes it refers to a *power* to create a legal relationship."³⁷ The content and protection of a particular right may vary depending on the perspective of "right" which a particular political and legal system chooses and will thus depend on the legal context within which the right is to be protected. Hervey, for example, discusses the tensions involved in classifying sex equality or non-discrimination as a fundamental personal human right in Community law, since sex equality provisions refer both to fundamental personal rights and to the creation of an equal playing field in a competitive market.³⁸

The absence in Community law of an enumerated or codified bill of rights is regarded as one of the Treaty's most visible lacunae.³⁹ Indeed, the original reference to the Community's adherence to fundamental rights by the Court of Justice came as a consequence of national judicial opposition to the supremacy of Community law in the absence of such a codified bill of rights.⁴⁰ The Court of Justice initially avoided specifying a definitive list of the fundamental rights protected in the Community and referred simply to international treaties and the constitutional traditions common to the Member States as sources of inspiration for the protection of fundamental rights in the Community.⁴¹ Having regard to these chosen sources of inspiration, a rough list of fundamental rights to which the Community adheres would include rights to due process, personal security and autonomy, limited rights to political participation, equality and, more controversially, a right to

37. See Shestack, "The Jurisprudence of Human Rights" in Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, (1984) pp. 70-71, 77-99 and 70-71.

38. See Hervey, "Legal Issues Concerning the Barber Protocol," in O'Keefe and Twomey (Eds.) op. cit. note 1, pp.329-337 at p.336. See also Fernández Martín, "El Principio de Tutela Judicial Efectiva de los Derechos Subjetivos Derivados del Derecho Comunitario. Evolución y Alcance," 21 Rev.Inst. Eur. (1994), 845-894, at 854-856, for a practical illustration of the point.

39. See, *inter alia*, Mancini, "Il contributo della Corta di Giustizia allo sviluppo della democrazia nella Comunità," (1992) Riv. Dir. Eur., 713-725, at 714.

40. See Mancini, *supra* note 23, at 611.

41. See the second *Nold* Case 4/73, [1974] ECR 507, at para 13.

enjoy certain minimum economic and social benefits. The Court of Justice has similarly referred to aspects of free movement, such as access to employment, as a fundamental right in the context of the Community.⁴² The fundamental nature of this market-orientated right can best be explained if one remembers that the Court of Justice is generally obliged to interpret "the law" with reference to the achievement of the Community's tasks in Articles 2 and 3 EC, amongst which establishment of the free movement of persons is considered fundamental. Community fundamental rights have generally been relied upon by individuals to determine the compliance of Community legislation and of the actions of Community institutions with fundamental rights. Their availability against the action of Member States has proved far more controversial and is limited to instances when the Member State is implementing Community law (for example, *Wachauf*), or acting pursuant to one of the derogations permitted by Community law (*Rutili* or *ERT*).

During the intergovernmental negotiations, the European Parliament strongly argued that a notion of Community citizenship could not succeed without reference to fundamental rights, since the latter are an essential part of the former.⁴³ Opinions, however, are divided. Some commentators suggest that including a catalogue of fundamental rights within the concept of citizenship would not have added significantly to the status of Member State nationals, whose rights are consistently guaranteed at national level.⁴⁴ Furthermore, extending citizenship rights to Member State nationals is said to be one thing, but potentially widening the category of beneficiaries to non-Member State nationals by establishing citizenship on a fundamental rights basis is another.⁴⁵

It could also be argued that fundamental rights incorporate a set of inalienable higher rights which are inherent in the human person, whereas citizenship generally refers to the civil and political rights of

42. See Case 222/86, *UNECTEF v. Heylens*, [1987] ECR 4098, at 4117, para 14.

43. See the Bindi Report loc. cit., at p. 4.

44. See Closa, "Citizenship of the Union and Nationality of the Member States," in O'Keefe and Twomey (Eds.), op. cit. *supra* note 1, pp. 109-119, at pp. 111-112.

45. See Verhoeven, *supra* note 1, at 188-189.

certain individuals to participate in a given society. However, the inclusion of such a reference to fundamental rights could have preserved the coherency and integrity of the *Community's* concept of citizenship as a means of protecting individual rights and could have guaranteed increased judicial protection in areas of law which can and do increasingly come within the ambit of the Community and therefore the Court of Justice, given its duties under Article 164 EC. By not including fundamental rights in the Community notion of citizenship the Member States have lost the opportunity, perhaps deliberately, to allow citizenship to evolve as a higher standard for the protection of individual rights. This higher standard was one of the purposes which Lenaerts suggested for the development of a Community catalogue of fundamental rights, which was to include a status of Community citizenship.⁴⁶

Not to include fundamental rights in the concept of citizenship is also to ignore the fundamental jurisdictional conflict which exists between the Community and national legal orders as regards who is now competent to protect what rights, in what circumstances and to what extent. This conflict was at the heart of the Court's decision in *Internationale Handelsgesellschaft*, where it held that respect for fundamental rights "must be ensured within the framework of the structure and objectives of the Community."⁴⁷

The protection of fundamental rights in the Community is not simply a question of the Community versus the Member State. However, some Member States are increasingly willing to debate whether the Court of Justice alone is competent to determine what is considered "fundamental" and when Community standards should be enforced.⁴⁸ This brings us back to one of the original reasons for the reference to fundamental rights in the first place – preservation of the supremacy of Community

46. See Lenaerts, "Fundamental Rights to be Included in a Community Catalogue," 16 EL Rev. (1991) 367–390, at 376.

47. See Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, at 1134.

48. The German Federal Constitutional Court already appears to have done so in its decision on the Union Treaty. Baciogalupo, "La Constitucionalidad del Tratado de la Unión Europea en Alemania (La Sentencia del Tribunal Constitucional Federal de 12 octubre de 1993), D-21 *Gaceta Juridica de la CE y de la Competencia* (1994), 7–45.

law. In an ideal world the protection of fundamental rights and citizenship rights would be inspired by the objective of protecting the individual. However, the Community's protection of fundamental rights is complicated by the fact that there are still limits on when it may substitute the competence of Member States in this field, given that the transfer of competences between them is "within limited fields."⁴⁹ Community law derogations and justifications are recognition that a national measure infringes Community law, but that "at the present stage of development" the legislature and judiciary feel that they must permit Member States a margin of appreciation in difficult areas, since political consensus for further integration in that particular field may be lacking.

One of the results of this complicated division of competences is that the Court of Justice, when faced with a decision on fundamental or individual rights may have to solve a different equation than that which faces national courts in a similar internal case. The balance which it strikes in defining the fundamental right at stake must take into account not only the interests of the individual and the Member State, but also those of the supranational legal order in which the Member State is located.

It is arguable that this partial integration aspect of the Community's legal and political order is also reflected in the limited category of citizenship rights in Article 8 EC, the relegation of fundamental rights to a *prima facie* unjusticiable provision, and in the failure to draw a direct link between the two. In the absence of an explicit political and constitutional step forward, which was not forthcoming in the last round of intergovernmental negotiations, the Court of Justice cannot alone undertake further promotion of individual rights.⁵⁰ To advance on *ERT* and further incorporate Community fundamental rights standards with respect to the action of Member States requires a degree of political integration which the Community has not yet reached,⁵¹ or as

49. See De Witte, *supra* note 36, at 3.

50. See Curtin, "Prospects for a European Social Policy" in Betten, (Ed.), *The Future of European Social Policy*, (1991), at p. 165; and Mancini (1989), *supra* note 23, at 614.

51. See Lenaerts (1991), *supra* note 46, at 373.

is perhaps evident from the Union Treaty, which Member State governments are not yet willing to admit.

This self-constraint may thus be understandable and commendable in terms of safeguarding the legitimacy of the Court's judicial function but it has not been practised uniformly by the Court of Justice. It is not unknown for the Court to fill a gap in Community law which has been left by the Community legislature. In *Commission v. Council* (Chernobyl),⁵² it effectively amended the text of Article 173 EC, extending *locus standi* to the European Parliament in order to allow it to defend its own prerogatives, just after the Member States had omitted to do so when negotiating the Single European Act. The Court held that this gap "cannot prevail over the *fundamental* interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities."⁵³ Similarly, it has been keen to minimize the adverse effects on the effective operation of Community law caused by a lack of uniformity between Member States as regards procedural rules.⁵⁴ These cases emphasize the key role which the structures and objectives of Community law play in determining some of the rights or interests which are regarded by the Court of Justice as fundamental in the Community legal order.

Although the Court of Justice has over the years been developing an unenumerated bill of rights, it is clear from cases like *Grogan* that it is not yet willing to endanger or sacrifice the relationship of cooperation which it has developed with national courts and on which the reference procedure in Article 177 EC heavily depends. However, precisely because the Court is now faced with the resolution of more sensitive cases, commentators argue that it must develop "a consistent and principled justification for both the development and limitation of its 'human rights role.'"⁵⁵ Yet the legitimacy of the Court's role, like the future

52. Case C-70/88, [1990] ECR I-2041.

53. See Case C-70/88, loc. cit., at para 26 (emphasis added).

54. See variously Case 106/77, *Simmenthal*, [1978] ECR 629; Case C-213/89 *Factor-tame*, [1990] ECR I-2433; and Joined Cases C-6 and 9/90, *Francovich*, [1992] ECR I-5357; and Fernández Martín, *supra* note 38.

55. See De Burca, "Fundamental Human Rights and the Reach of Community Law" 13 *Oxford Journal of Legal Studies* (1993), 283-319, at 304.

development of citizenship, depends on the legal and political order which is being constructed around it. An opportunity was presented to the Member States in the course of the intergovernmental conferences to reassess the “socio-legal contract” on which their legal and political relationship in the Community is based.⁵⁶ One important aspect of the revision of the Treaty could have been clarification of the scope and content of the protection of fundamental rights by and in the Community, or the adoption of an explicit stance as regards its relationship with the European Convention.⁵⁷ This opportunity has been wasted and reference to fundamental rights has curiously been confined to Article F(2) and other unjusticiable provisions of the third pillar.⁵⁸ In addition, although Union citizenship is intended to strengthen and develop the rights of the individual, the intergovernmental conference did not venture far beyond the existing legal position, as we saw in section 3. As it stands, citizenship could be regarded as a cosmetic exercise, comforting Member State nationals with their privileged legal position while attempting to foreclose any judicial expansion of their constitutional rights. The failure to recognize an explicit link between fundamental rights and the scope and operation of Community citizenship is further striking evidence of this attempt at foreclosure.

5. The relationship between fundamental rights in Community law and Community citizenship

Section 3 addressed the present scope and content of Union citizenship. On the whole, Union citizenship has been confined to a reciprocal extension of limited rights on an equal treatment basis. Furthermore, the preservation of nationality as the condition precedent for the enjoy-

56. See also Weiler, “Journey to an Unknown Destination: A Retrospective and Prospective of the Court of Justice in the Area of Political Integration,” 31 *JCMS* (1993), 417–446 at 439.

57. See De Witte, *supra* note 36, at 18: “the new Constitution of the European Union might help to solve some of the structural value conflicts indicated above by increasing the democratic character of Community decision-making and by codifying the fundamental rights guarantees.”

58. Arts. J.1.2. and K.2.1. of the Union Treaty.

ment of citizenship rights has ensured that the relationship of nationals with their Member States remains the basis for the enjoyment of rights in the Community integration process. This is further emphasized by the survival of reverse discrimination and the general exclusion of situations internal to a Member State from the scope of Community law. The Community does not intrude on the state/national relationship in such cases. Where it does intervene it does so to protect the fundamental Community objectives of market integration rather than to protect individual rights *per se*. The category of rights which derive directly from Community law are limited and of limited importance and even when Member State nationals assert their fundamental rights against the Community or Member States they do so as Community workers, established persons, providers or recipients of services, or citizens. In other words, on the basis of their Member State nationality. Community citizenship does not forge a direct relationship between the Community and its citizens. Indeed its dependence on Member State nationality makes such a relationship impossible and it is difficult to envisage how the Member States and Community institutions intended to bring decision-making closer to Community citizens as Article A of the Union Treaty suggests.

Although the Court of Justice has styled the Community as a *sui generis* international organization (*Van Gend en Loos*) the subjects of Community law are not primarily individual Member State nationals. Thus, the revision of Article 2 EC refers to economic activities, non-inflationary growth, economic performance, employment and social protection, the raising of the standard of living and economic and social cohesion and solidarity between Member States as the Community's tasks. Similarly, the principle of subsidiarity is designed to address the exercise of decision-making authority by the supranational and national orders. The Commission and Heads of State of the Member States have defined it principally in terms of comparative effectiveness⁵⁹ and minimal consideration has been paid to the levels of decision-making

59. Commission Communication to the Council and European Parliament on Subsidiarity, Bull. EC 10/1992; and Annex to the Conclusions of the Presidency of the European Council at Edinburgh 11–12 Dec. 1992.

closest to Community citizens, or how best to represent their interests.⁶⁰ The predominantly state-oriented objectives and structures of Community law, as well as the preservation of nationality as a condition precedent, make it difficult therefore to forge a socio-legal contract between the Community and its citizens. In time such a contract might be the basis for a stronger constitutional assembly which could promote the adoption of and function within the parameters of a democratically chosen bill of rights. The reluctance to move in such a direction is reflected in the Union Treaty, where the right to participate in European elections does not “reproduce the constitutional link between citizens and the exercise of sovereignty characteristic of the concept of citizenship” given the European Parliament’s lack of legislative competence.⁶¹

Furthermore, as Weiler points out, although the Council is a Community institution which is designed to represent and coordinate national interests, the manner in which it operates permits Member State executives to gain legislative power while escaping effective national parliamentary control. In this way, it extends the Community’s democratic deficit from the supranational to the national level. Given these limitations on a direct relationship between the Community and Member State nationals, the extent to which the Court of Justice can protect individual rights has been limited and, in the absence of the necessary political and constitutional steps forward, its protection will remain deliberately limited by the Member States, as Articles F(2) and L demonstrate. However, even in the absence of an enumerated bill of rights and stronger constitutional assembly, the Community’s integration process will be seriously endangered unless the question of legitimacy is addressed.

This section attempts therefore to move the discussion of Community

60. See also Neuwahl, “A Europe Close to its Citizens: Subsidiarity, Transparency and Democracy,” in Antola and Rosas (Eds.), *op. cit.* note 12.

61. See Ciosa (1992), *supra* note 1, at 1144. Note, however, that the Court of Justice regards as fundamental “the democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly.” See Case 138/79, *Roquette*, [1980] ECR 3360, and more recently, Case C-300/89, *Commission v. Council*, [1991] ECR I-2267.

citizenship beyond the rights enumerated in Article 8 EC. It tries to explain the value and potential of Community citizenship in terms of a possible relationship with the protection of fundamental rights in Community law. Such a relationship is difficult to construct given (a) the inherent opposition which could be said to exist between these two categories of rights; (b) the manner in which fundamental rights are protected in the Community; and (c) the reduction of Community citizenship to a small number of limited civil/political rights. Despite these difficulties, it is argued that the future of Community citizenship is partly, if not wholly, dependent on the establishment of such a relationship and on a consequent identification of the primary objective of the Community in this sphere as the protection of individual rights.

5.1 The differences between fundamental rights and citizenship

A contrast or opposition appears to exist between these two categories of rights. Union citizenship, like national citizenship, distinguishes between the legal rights and legal position of its members (in this instance Member State nationals) and those of other persons living in the Community (Article 8). This has a number of consequences. First of all, a commitment to protect fundamental rights does not seem to fit easily within such a package. Citizenship refers to persons said to belong to a certain privileged category on the basis of specific conditions, such as, perhaps, the possession of nationality or the existence of a certain bond of allegiance. Furthermore, citizenship is a multi-dimensional concept which is not necessarily free from ideological overtones. Despite the introduction of political rights in Article 8 EC, the economic content of Community citizenship still predominates. The extent to which equality has been achieved at Community level is therefore doubtful, not only with respect to third country nationals, but also as between economically active and inactive Community citizens themselves.

Fundamental rights, on the other hand, refer to the person as such and although they may be subject to limitations, these limitations generally refer to the terms of exercise of the right rather than the right itself,

or to whom it belongs.⁶² Fundamental rights derive from the inherent dignity of the human person, regardless of his or her state of membership.⁶³

However, the protection of fundamental rights in the Community legal order is in fact limited to situations and individuals “who are parties to legal relationships under Community law” – such as economically active Member State nationals and their dependants.⁶⁴ In general, therefore, the Community legal order only protects the fundamental rights of those persons who would also come within the scope of Article 8 EC – Member State nationals. The Community legal order is not enhanced by the fact that the fundamental rights of non-EC nationals are not protected when they come within situations which derive from Community law, such as refugees or asylum seekers under the Schengen and Dublin Conventions.⁶⁵ Indeed, it has been argued that this limitation of rights with reference to nationality prejudices the deeper values inherent in the “community” vision of integration, (community in the sense of a community of States and peoples sharing values and aspirations and sharing competence in a select number of fields): “Nationality as a referent for interpersonal relations, and the human alienating effect of *Us* and *Them* are brought back again, simply transferred from their previous intra-Community context to the new inter-Community one. We may have made little progress if the *Us* becomes European (instead of German or French or British) and the *Them* becomes those outside

62. In the context of Community law see in this regard, Case 44/79, *Hauer*, [1979] ECR 3727, at para 23.

63. See the Universal Declaration of Human Rights, preambular para 1; and the International Covenant on Human Rights, preambular para 1.

64. See Case 106/77, *loc. cit.*, at para. 15.

65. The preamble of the Schengen Implementation Agreement provides that “the aim pursued by the Contracting Parties coincides with that objective” (i.e. the creation of an area without frontier controls). In addition, the Dublin Asylum Convention (Bull. EC. 6–1990) refers to “the joint objective of an area without internal frontiers in which the free movement of persons shall, in particular, be ensured” and states that the measures it adopts with respect to asylum are “in pursuit of this objective.” For a rejection of “second class” Community citizens see also Garth, “Migrant Workers and Rights of Mobility in the EC and the US – A Study of Law, Community and Citizenship in the Welfare State,” in Cappelletti, Secombe and Weiler (Eds.), *Integration Through Law: Europe and the American Federal Experience*, Vol. 1 Book 3, (1986), at p. 123.

the Community or those inside who do not enjoy the privileges of citizenship."⁶⁶

Thus, although citizenship and the protection of fundamental rights seem to entail a fundamental contradiction, the operation of both in Community law can partly be attributed to emphasizing the privileged position of Community as distinct from non-Community nationals.

The weaker decisions of the Court of Justice in this sphere are well documented.⁶⁷ However, the Court of Justice is hardly alone to blame for the exclusive manner in which fundamental rights and citizenship can be exploited at Community level. It cannot legitimately, in the absence of a clear constitutional provision, exercise jurisdiction over matters which do not come within its competence, such as, the general legal protection of third country nationals.

Individuals must first demonstrate the necessary nexus with the Community legal order, which essentially confines beneficiaries to Member State nationals and their families. Those who do establish that nexus, however, can claim no direct relationship between their fundamental rights and their status of Community citizenship. It is said that "[P]art of the Community ethos lies in the important curtailing effect resulting from the manner in which the Community forces individuals and States to confront and become tolerant of the Other."⁶⁸ But unless a connection is established between fundamental rights and citizenship, we suggest that Community law will have failed to effectively address the individual as the beneficiary of rights and the nature and content of the rights in question, as well as their enforcement, may be significantly weakened.

5.2 *The manner in which fundamental rights are protected in Community law*

The establishment of a connection between the Community's commitment to fundamental rights and Community citizenship could promote

66. See Weiler, "Problems of Legitimacy in Post 1992 Europe," 46 *Aussenwirtschaft* (1991), 411-437, at 433-436.

67. Case 12/86, *Demirel*, [1987] ECR 3719.

68. See Weiler, "Taking rights seriously, seriously", this volume.

the protection of individual rights as one of the central objectives of Community law⁶⁹ and might help to displace nationality as the single most important condition for the full enjoyment of Community citizenship. That, however, is precisely what some Member States fear and could be why the express reference to fundamental rights in the Union Treaty was safely housed in Article F(2). With regard to reverse discrimination and the distinction between Community cases and cases internal to Member States, D'Oliveira has argued that "whether or not the Community legal system is brought in cannot depend, at any rate not exclusively, on some sort of catalogue of contacts or factual points of reference. It depends partly, perhaps even predominantly, on the very teleology and dynamics of the Community legal system."⁷⁰ This may not point to the displacement of nationality as the basis for the enjoyment of Community rights, but if Community citizens are to be taken seriously, (to use a popular phrase), it may support reliance on alternative criteria such as residence, or on greater effective protection of individual rights. In this section we further examine the manner in which fundamental rights are protected in Community law and suggest the consequences which these methods of protection have for the effective protection of individual rights.

5.2.1 *Fundamental rights as general principles*

Does the classification of fundamental rights as general principles of Community law (Article F(2), *Stauder*) favour their operation as genuine subjective rights? General principles of Community law are the juridification of rights and do not constitute the rights themselves. They are, as Dausés said, a definition of the structural foundations of the legal order.⁷¹ Loosely translated, for example, the principle of propor-

69. Which seems consistent with the Community's sanctions in the form of withholding benefits from third countries which fail to protect fundamental rights, see the Select Committee of the House of Lords, *Human Rights Re-Examined*, 3rd report, Session 92-93, at p. 35.

70. See D'Oliveira, "Is Reverse Discrimination Still Permissible Under the Single European Act?" in *Forty Years On: The Evolution of Postwar Private International Law in Europe*, (1990), pp. 71-86, at p. 75.

71. Dausés, "The protection of fundamental rights in the Community legal order," 10 *EL Rev.* (1985), 398-419, at 406.

tionality seeks to achieve a reasonable relationship between the ends chosen by the legislature and the objective to be achieved. It attempts to locate the correct balance in the legislative and judicial process between the individual interest and the general interest, the balance which best suits the social and legal objectives of the constitutional order in which it is based.

Since the Community's tasks and the means to achieve them (Articles 2 and 3 EC) primarily address the Member States and seek broad objectives of economic and now limited political cohesion, it is difficult to imagine circumstances in which an individual interest will proportionally outweigh a Community measure claimed to infringe the fundamental rights to which the Community adheres. Thus in the *Hauer* case, the Community's general prohibition on the planting of new vines was justified by the objectives of general interest pursued by the Community and did not infringe the substance of the plaintiff's right to property "in the form in which it is recognized and protected in the Community legal order."⁷² In the *Heylens* case the Community's fundamental principle of free movement coincided with the claims of the plaintiff and the Court classified free access to employment as a fundamental right for which national authorities were required to give effective protection "under the best possible conditions."⁷³ However, the purpose and origin of this need to effectively protect individual rights was also the need to safeguard the effectiveness of Community law, (defined in *Simmenthal* as part of "the very essence of Community law")⁷⁴ and the cohesion of the Community's free movement policies. The effect of this classification of fundamental rights as general principles is further reflected in the immediate connection consistently made in Community law between general principles and the structure and objectives of Community law.⁷⁵

72. See Case 44/79, loc. cit., at para 30.

73. Case 222/86, loc. cit., at para 18.

74. Case 106/77, loc. cit., at 644.

75. See Case 11/70, loc. cit.; Case 44/79 loc. cit. at para 14; Case 5/88 *Wachauf*, [1989] ECR 2609, at para 18; and Mancini, *Safeguarding Fundamental Rights: The Role of the Court of Justice of the European Communities*, Bologna, John Hopkins University, Occasional Paper No. 62, March 1992: "[T]he Court does not have to go looking for maximum, minimum or average standards. The yardstick by which it mea-

The Court of Justice has developed the principles of supremacy and direct effect to attain the objectives laid down in the Treaty and to resolve material conflicts which emerged as a result of the integration of the national and supranational legal orders. The rights of individual Member State nationals have been protected within the context of the promotion of those objectives.

5.2.2 Legal certainty and the protection of fundamental rights

Furthermore, in the absence of a codified bill of rights, the Court of Justice has tended to develop the Community's adherence to fundamental rights incrementally on the basis of unenumerated general principles. There is thus little legal certainty as regards whether a right is considered fundamental in the Community. As Barrington has pointed out: "the judicial branch reacts to external stimuli. What it decides depends on the cases which come before it, but it cannot control the cases which come before it. The legislature or the executive may have a policy to achieve defined objectives. They may work to create situations in which their policies can be brought to fruition. The judiciary has no such choice. It must deal with the cases which come before it."⁷⁶ Thus, although the Community's protection of fundamental rights has been considerably expanded over the years, the jurisprudence of the Court of Justice is nevertheless fragmentary, given that the Court is generally obliged to rely on cases reaching it via references from national courts.⁷⁷ The latter are not always eager to expose national issues which touch fundamental rights to the Community judicial arena where the Court of Justice and Community law are preminent.⁷⁸ Given, for example, the outcome in the *Grogan* case, it is not clear whether the

sure the approaches adopted by the various systems derives from the spirit of the Treaty and from the requirements of a Community which is in the process of being built up."

76. See Barrington, "The Emergence of a Constitutional Court" in O'Reilly (Ed.), *op. cit.* note 6, pp. 251–261, at p. 253.

77. See De Burca, *supra* note 55, at 318.

78. See e.g. the uneasiness of the Irish Supreme Court as regards the Art. 177 EC reference in *Society for the Protection of the Unborn Child v. Grogan*, [1990] 1 CMLR 689.

right to information is protected as a corollary of the free provision of services, or to what extent freedom of expression is protected in the context of Community law. The Court of Justice must await another reference from a national court in order to clarify these aspects of Community law.

Neither is there any certainty about the content of the fundamental rights protected in Community law. This was one of the Commission's principal considerations when it advocated formal adherence by the Community to the European Human Rights Convention.⁷⁹ Thus, a right to property may fall within the Court of Justice's fundamental rights catalogue with reference to the constitutional traditions common to the Member States, but the Member States protect that right in several different manners, to several different degrees and with several different objectives in mind.⁸⁰

What did the Court mean in *Hauer* that the plaintiff's right to property was not infringed "in the form in which it is recognized and protected in the Community legal order"? When assessing the interaction of common constitutional traditions with the structure and objectives of the Community's legal order, the Court is not confronted with a value free task: "It [the Single Market programme] is . . . a highly politicized choice of ethos, of ideology and of political culture: The culture of the Market . . . [T]he success of the Single Market . . . prizes market efficiency and European wide neutrality of competition over other competing values."⁸¹ Given this ideological framework, the protection of a right to property, as *Hauer* demonstrated, will be subjected by the Court to the Community principles of market efficiency and competition. Although these principles may seem to favour the right to property, the Court's "first loyalty [will be] to the concept of Community integration. If a conflict arose it might give a different emphasis to the conflict between the interests of the Community on the one hand,

79. See "Accession of the Communities to the European Convention on Human Rights," Bull. EC Suppl. 2/79, at para 5; Cf. Capotorti, "A propos de l'adhésion éventuelle des Communautés à la Convention Européenne de droits de l'homme" in *Das Europa der Zweiten Generation, Gedachtnisschrift für Christoph Sasse*, (1981) Vol. 1.

80. See e.g. the text of the constitutional provisions cited in Case 44/79, loc. cit., at para 20.

81. See Weiler (1991), *supra* note 66, at 430-431.

and the protection of the individual on the other, than the balance that might be adopted by another tribunal, a human rights tribunal.’⁸²

This does not, it must be added, automatically condemn the decisions of the Court of Justice. In general, the values which it reflects are those which have developed over the years in the Member States. Furthermore, when striking a balance between the protection of fundamental rights and the requirements of the general interest, national courts also refer to the values inherent in their own constitutional orders. But is there not an essential difference between the Community and national legal orders in this context. National courts operate within the context of political and constitutional systems which are not marked by the same democratic or representative deficit as the Community. In the end, the difference boils down to the availability, even if limited, of national political consensus, representation and accountability at national level and the yawning gap which persists and which the Member States maintain, between the Community institutions, the Council included, and Community citizens. The position of the Court of Justice is sensitive, to say the least and it is possible that its more suspect decisions are the result of undue deference to Member State sensibilities rather than to a lack of commitment to the protection of individual rights. This situation is further aggravated by the fact that the decisions of the Court of Justice, unlike the decisions of national courts, are not subject to review by any higher authority.

5.2.3 The Community's teleology and the protection of fundamental rights

It is difficult to deny that the protection of fundamental rights in the Community is not influenced by the legal system in which those rights are developed. Phelan has animatedly argued that “by reference to its economic and federal teleology of Community objectives, [the Court] has evolved certain legal techniques applicable to human rights which will point the Community in new normative directions. These tech-

82. See Jacobs, *The European Convention on Human Rights, Two New Directions; EEC.: U.K.*, (1980), at p. 17.

niques . . . are used to control the three dimensions of conflict between state and federal competences, between a moral and economic ideal of what is fundamental, and between different legal doctrines of justification.”⁸³ The author’s criticism of the need to recharacterize the rights with which it deals, in order to bring them within the mainly economic parameters of Community law may be well-founded. This does not automatically imply, however, that what is fundamental in the Community legal order differs from what is fundamental in the Member States, nor that the Court’s technique will necessarily point the Community’s protection of fundamental rights in different normative directions.

What should be subject to criticism is not that in a case like *Grogan* the Court held that abortion is a service and that the Advocate General went further in holding that the Member State could act as it did only within the context of a justifiable restriction of Community law in the public interest. The latter technique was precisely a means to protect a justifiable national objective. For the Court to ensure that such an objective does not unduly restrict other important fundamental rights which come within the Community’s field of activity does not imply that it arrogates the role of the national courts. As regards the protection of fundamental rights it was surely more objectionable for the Court of Justice to deny any jurisdiction with respect to the fundamental rights aspect of the case on the specious grounds that the legal relationship in question was not based on economic criteria.

The problem is not therefore the involvement of Community law in sensitive cases. Rather it is the uncertain jurisdiction of the Court of Justice, its over-deference in some cases to national courts and the fact that the objectives and legal principles it employs have not yet been freed from the economic and structural limitations which oblige it, on occasion, to determine the fundamental rights balance with the limits of Articles 2 and 3 EC in mind. These limitations could interfere with what should be the essential commitment of a Community based on the rule of law to the protection of individual rights. The development of

83. See Phelan, “The Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union,” 55 MLR (1992) 670–689, at 670.

a relationship between citizenship and fundamental rights is precisely a vehicle which could help to move the Community beyond the market-oriented objectives which some authors have found so objectionable to a series of higher rights and objectives. Furthermore, if the quest for greater Political Union is to legitimately proceed it must surely be located within such a framework of consensus and shared values and expectations.

6. Fundamental rights and Community citizenship: the legitimacy factor

The fundamental rights protected in the Community can usefully be divided into two categories for the purposes of this article. The first category refers to the subjective aspects of fundamental rights – rights which the legal order confers on the individual as a means to protect his rights and interests generally, such as freedom of expression or freedom of religion. The second focuses on rights or principles which enshrine values of a more objective nature. The latter can be regarded as the means by which the political and legal order seeks to safeguard its legitimacy and essentially its authority over the lives of individuals and the legal and political conditions in which they live.⁸⁴ An example might be the right of access to the courts, the right to equal treatment, or the right to have one's legitimate expectations upheld.

These two categories of fundamental rights are intrinsically different but the purpose behind them is essentially the same: to give individuals the means to safeguard their rights and to ensure that the legal and political order in which they live respects those rights. With reference to the objective category of fundamental rights the Court of Justice has tried to validate and legitimize the authority of Community law and the emergence of a new legal order which alters, to an extent, the relationship between the Member States and their nationals and which can rely

84. See generally Díez-Picazo, "Una Constitución sin Declaración de Derechos? (Reflexiones constitucionales sobre los derechos fundamentales en la Comunidad Europea)" 32 *Revista Española de Derecho Constitucional* (1991) 135–155; and Ferrajoli, "Cittadinanza e Diritti Fondamentali" IX *Teoria Politica* (1993) 63–76.

on the principles of supremacy and direct effect. As Weiler has suggested "even if the protection of human rights *per se* need not be indispensable to fashioning a federal-type constitution, it was critical to the acceptance by courts in the Member States of the other elements of constitution-building."⁸⁵

This strong "objective values" approach as a means to assert the legitimacy of the Community legal order is perhaps inevitable, since any assertion of jurisdiction by the Court, or any assumption of competence by the Community institutions, implies a reduction in the exclusive sphere of action of the Member States. Furthermore, it is not novel for a legal and political order to rely on the protection of fundamental rights as one of the pillars of its constitutional construction, legal legitimacy and political power.⁸⁶ What is particular to the Community context is that in relying on fundamental rights as a means of introducing an objective legitimizing scale of values into Community law, the protection of subjective rights in concrete cases may have been neglected in favour of reaffirmation of the legitimacy of the Community legal order, protection of its primarily economic concerns and constant reappraisal of the division between Community and national competences. This neglect may also be reflected in the limited scope of Union citizenship, in the failure to link that set of rights to an effective fundamental rights framework and in the marked absence of what Habermas calls, "those discursive processes of opinion – and will-formation through which the sovereignty of the people can be exercised,"⁸⁷ namely, representative parliamentary and political processes. The Court of Justice itself has recognized "the fundamental democratic principle that people should take part in the exercise of power through the intermediary of a representative assembly"⁸⁸ and has linked this aspect of democratic legitimacy with the rights of access of individuals to judicial proceedings which it vindicated in *Van Gend en Loos*.⁸⁹

85. See Weiler, "The Transformation of Europe" 100 *Yale Law Journal* (1991), 2403–2483, at 2418.

86. See on this subject Habermas, "Human Rights and Popular Sovereignty: The Liberal and Republican Versions," 7 *Ratio Juris* (1994), 1–13, at 1–2.

87. *Idem*, at 13.

88. See Case 138/79, *S.A. Roquette Frere v. Council*, [1980] ECR 3360, at para 33.

89. See also Mancini and Keeling, "Democracy and the European Court of Justice," 57 *MLR* (1994) 175–191, at 184.

This fundamental principle of democracy has not flourished at Community level given (a) the limited representative role of the European Parliament and (b) the accumulation of decision-making in Community matters in the hands of the Council and the lack of accountability to national parliaments.

It is perhaps here that the possible relationship between citizenship and fundamental rights may best be unfolded. In establishing Community citizenship, the Member States have cleverly recognized that given the functions of government which the Community is increasingly shouldering, the persons subject to that government, namely Member State nationals, had to be accorded some visible non-economic rights. Otherwise the Community could have been charged with disregarding the fundamental principles of democracy and the rule of law. Recognition of fundamental rights is an essential aspect of the foundational pact between government and the governed and the legal and political value of fundamental rights is also their potentially integratory and legitimizing function in a given legal order.⁹⁰ Fundamental rights and popular sovereignty coincide where the former dictate the conditions in which the "forms of communication necessary for politically autonomous law-making can be legally institutionalized."⁹¹

Article F(2) reaffirms the commitment of the Union to fundamental rights, while Article 8 EC attempts to add a political gloss to the Community's previously market or consumer citizenship which was based on the fulfilment of certain economic objectives dictated by the integration of the market. Fundamental rights were first cited in the Community when the Court found that it had to affirm the supremacy of Community law in the face of Member State opposition. To legitimize its extensive involvement in socially sensitive fields of activity the Community can no longer refer to the supremacy of Community law and to the original socio-legal contract and transfer of sovereignty with its Member States. The Community must now demonstrate some sort of social and political consensus amongst its members and a reaffirmation of fundamental rights and the establishment of citizenship may be the

90. See also Lenaerts (1991), *supra* note 46, at 368.

91. Habermas, *supra* note 86, at 13.

tools being used to forge such a consensus, or the appearance of such. The absence of any relationship between Community citizens and a European Community polity is an obstacle to the development of such a consensus. It might also explain the weak character of some of the rights of citizenship discussed in Section 3.

In this regard, it is useful to draw a distinction between the need for formal legitimacy and the need for social legitimacy in a given legal order.⁹² Formal legitimacy "implies that all the requirements of the law are observed in the creation of the institution or system." This condition seems to be fulfilled in the Community where the Treaties and now the Union Treaty have been approved either directly by European citizens or by their national parliaments. Social legitimacy, however, "connotes a broad empirically determined societal acceptance of the system . . . legitimacy occurs when the government displays a commitment to, and actively guarantees values that are part of the general political culture, such as justice, freedom and general welfare." This is the unclear aspect of the European bargain. Although integration between Member States may lessen the democratic input of individual Member State nationals, since they become smaller fish in a bigger pond, the success of integration does not just depend on increasing the input of the European Parliament. Enhancing the legitimacy of the Community and, therefore, improving the ultimate success of the integration process, also depend on achieving some level of shared aspirations and social values between the Community's members.

Developing a type of Community citizenship may indeed have been correctly identified as a means to redress, (or perhaps divert attention from), the democratic deficit in the Community and to develop a degree of social consensus sufficient to justify continued integration. However, if Community citizenship is confined to a reciprocal extension of limited civil and political rights on an equal treatment basis, it will not succeed in moving the Community far beyond its present commitment to market integration. In its present form it merely pays lip service to the ideal of greater social legitimacy and consensus amongst the Community's members. By relating it to fundamental rights and effectively

92. Weiler (1991), *supra* note 66, at 415 et seq.

promoting it as a fundamental objective of Community law, the rights of individual members of the Community might indeed receive more effective protection.

Citizenship was established and fundamental rights are protected at state level not merely as instruments to achieve some form of economic integration and hybrid confederation of States. They developed on the basis of common values and interests and were means to protect individual rights and permit individual participation and access to the political and legal system. This is the third aspect of citizenship. Beyond its extension of political rights and rights of economic participation, citizenship also refers to the formation of some sort of identity based on shared values and expectations.⁹³ In the process of forming such an identity citizenship developed in many states in the wake of revolution and conflict. It has been established in the Community in Article 8 EC, however, without reference to the individuals who are now said to enjoy this status. Given the ideological charge of citizenship, the substance of this article – the construction of a relationship between fundamental rights and Community citizenship to promote more effective protection of individual rights – is not without its dangers and its difficulties. The meaning and content of citizenship may be used by different sectors to promote different interests. It is suggested, however, that it may be more dangerous to allow the Community's hegemony of economic interests to develop without recognition of the important consequences which such a hegemony may have for the rights and interests of individual members of the Community.

7. Conclusions

This article argues that the protection and furtherance of individual rights should be the central objective of both Community citizenship and the adherence to fundamental rights in Community law. Both categories of rights have been weakened by the failure to recognize this

93. See Nauta, "Changing Conceptions of Citizenship," 12 *Praxis International* (1992), 20–33, at 29.

essential purpose of the protection of individual rights in and against the national and supranational legal orders. Community citizenship should be relied on in future to establish a more direct legal and political relationship between the Community and its citizens and as a vehicle to represent their interests. Fundamental rights should also be enforced in conformity with the Court's powerful principle of effective judicial protection. Otherwise, both categories of rights will merely be a means to pay lip service to the involvement of Community citizens in European integration and will be used to cover up for the lack of accountability and legitimacy in the Community's political and legislative processes.

Fundamental rights and citizenship could be a means to redefine a European polity and, on that basis, to assert greater social legitimacy as Community integration proceeds. However, if the protection of the individual within the categories of rights outlined above is not increasingly identified as the fundamental element of the Community's social contract with Member States and their nationals, it is difficult to see how its social legitimacy can be enhanced. The process of integration to date has opted for market efficiency and competition, ideologies which at national level have been fiercely debated and which have had marked social, political and even historical consequences. To proceed, even at this stage of integration, without deepening the social legitimacy of the Community would be a grave error. To ignore the essential role which individual Member State nationals should play in defining the content and limits of this new European polity on which the future of the Communities and Union so much depends would be even graver. The construction of a relationship between the protection of fundamental rights in Community law and Community citizenship could provide some solutions.