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## All Things European: Citizenship and Identity in Search of Meaning

The pomp and circumstance surrounding the signing of the Treaty Establishing a Constitution for Europe [Constitutional Treaty]<sup>1</sup> was the finale of years of deliberation on the 'future of the Union.'<sup>2</sup> At the ceremony, references to '*fraternité européenne*,' '*solidarité européenne*'<sup>3</sup> and the 'values' of Europe<sup>4</sup> abounded. Certainly, the moment was a historical one, deserving praise. But what about the assumptions of the existence of a fraternal (sisterly?) 'us,' the Europeans? Our existence is implied throughout the Treaty as the basis for the latter's very existence. In other words, there is supposedly *something* that joins the states of and peoples in the European Union [EU or Union] in a common enterprise – at the very least, the values and objectives listed in the Constitutional Treaty. Rec. 4, for example, declares, 'thus 'United in diversity,' Europe offers them [us] the best chance of pursuing [...] the great venture which makes of it a special area of human hope.'

Granted, the passage just cited raises more questions than it answers. Since when does the EU equal Europe? Is the former the basis for the unity referred to? Or is there a deeper unity beyond the institutional? These are questions that have been raised repeatedly since the inception of what is now the Union. CT art. 1–1(1), in fact, gives one answer: the Constitutional Treaty reflects the 'the will of the citizens [...] of Europe.' Thus, European citizenship joins us. The information booklet for the public on the 'Constitution for Europe' gives another answer. It describes EU 'symbols' as 'important, since they enable Europeans to identify more with Europe' – the flag, in

<sup>1</sup> OJ 2004 C310. The Constitutional Treaty was signed on October 29, 2004. As of January 2005, only 2 of the 25 member states have ratified it.

<sup>2</sup> The Future of the European Union – Lacken Declaration (2001).

<sup>3</sup> José Manuel Barroso, Speech 04/478 (October 29, 2004).

<sup>4</sup> Romano Prodi, Speech 04/479 (October 29, 2004).

particular, is the symbol of 'Europe's unity and identity.'<sup>5</sup> So, we may have a European identity uniting us.

But what constitutes European citizenship? And European identity?<sup>6</sup> What kind of status and identity are they anyway? And why are they necessary? These are some of the questions to be examined here, in part by looking at the interaction of the two big ideas – both trotted out at regular intervals as tools of legitimization or explanation. After a historical overview, the present state of each will be presented (with due knowledge that European citizenship is easier to describe than an identity.)<sup>7</sup> Finally, some considerations for the future will be introduced.

The European Community, as an essentially economy-focused entity, initially paid no attention to identity or culture. Besides a mention of possible 'ever closer union among the peoples of Europe'<sup>8</sup> no thought was given to cultural interaction, let alone identity-issues. By the early 1970's, however, as integration spread beyond the economic sector, interest in culture as a sphere of Community interest had emerged. Parallel to the growth of interest in commercial cultural policy, it was recognized that, while '[e]in Bürgerbewusstsein [...] Voraussetzung [war], um eine Europäische Gemeinschaft zu bilden.', '[ein] Defizit an europäischer Identität der Bürger Europas'<sup>9</sup> was, instead, characteristic. Thus, a European identity was necessary to further integration.<sup>10</sup> That this question should arise increasingly insistently in the context of quickened integration should come as no surprise, since it goes to the heart of a conception of the Union, for two reasons. One, because if we consider Europeanization, or the increasing growth and depth of the EU, as an ongoing process rather than a concrete entity, one's concept of 'Europe' will

<sup>5</sup> A Constitution for Europe 11 (2004).

<sup>6</sup> Though one would do well to distinguish between types of European identity when assessing the effects of European integration, few scholars make this distinction. See Franz C. Mayer and Jan Palmowski: European Identities and the EU – The Ties that the Peoples of Europe, Vol. 42, Nr. 3, *JCMS*, 573, 575 (2004).

<sup>7</sup> 'Identity' serves here as shorthand for social identity, unless otherwise specified, understood according to the approach of social identity theory. See James E. Cameron: A Three-Factor Model of Social Identity. *Self and Identity*, Vol. 3, 2004.239 for an overview. 'Cultural identity,' a subset thereof, is used after Anthony D. Smith: National Identity and the Idea of European Unity. *International Affairs*, Vol. 68, 1992: 55, 58 – national identity is accordingly a kind of cultural identity.

<sup>8</sup> Treaty of Rome, Preamble (1957).

<sup>9</sup> Olaf Schwencke: Das Europa der Kulturen – Kulturpolitik in Europa, 162 (2001).

<sup>10</sup> Despite this recognition, the first mention of a 'European identity' in a Community document, in the Preamble of the Copenhagen Declaration on European Identity (1973), was in the context of external relations.

determine the path of development. This path is of some concern to all actors involved, from the member-states to the Commission. Two, because of the recognition of a need for legitimacy for the project – on the model of nation-states, a shared collective identity (a ‘European’ one) would seem to be a good means to the end envisaged.

Such internal identity concerns appeared for the first time in a Community instrument only in 1983, as part of the Stuttgart Solemn Declaration. A ‘*coopération plus étroite en matière culturelle, pour affirmer la conscience d’un héritage culturel commun en tant qu’élément de l’identité européenne*’<sup>11</sup> is a stated objective of the Declaration. One of these committees consequently set up to examine aspects of further integration dealt with the concept of a common European identity, as well as how such an identity could be developed. The resulting Adonnino Report<sup>12</sup> makes specific recommendations with regard to rights that are now considered fundamental to European citizenship – such as freedom of movement, right of establishment, right of residence –; as well as to citizens’ participation. It also recommends action in the spheres of education and commercial culture ‘which is essential to European identity and the Community’s image in the minds of its people.’<sup>13</sup> Thus, by the mid-80’s, the concept of European identity had been linked to citizenship, as well as to a wider Community role in cultural policy.<sup>14</sup>

A concern with the European citizen could, in fact, already been seen in the 1975 Tindemans Report.<sup>15</sup> There, two specific courses of action were suggested in the sphere of citizenship: one, an increase in and protection of fundamental rights and two, external signs of solidarity.<sup>16</sup> The second path is the one further developed by the Adonnino report ten years later through its suggestions on European identity. The big breakthrough, however, came in 1992, with the inclusion of TEC<sup>17</sup> arts. 17 (on citizenship) and 151 (on cul-

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<sup>11</sup> Stuttgart Solemn Declaration § 1.4.3 (1983). *EC Bulletin* 1983/6 (French).

<sup>12</sup> Also referred to by the title ‘A People’s Europe.’ *EC Bulletin*, Suppl. 7/85.

<sup>13</sup> *Id.*, at 21.

<sup>14</sup> This wider role can be seen in some of the Report’s suggestions: a flag, an anthem, money, stamps (‘which commemorate particularly important events in Community history’), ‘Europe Day,’ a European passport, school materials and institutions ‘appropriate’ for presenting ‘European achievements, and the common heritage’ and ‘the originality of European civilization in all its wealth and diversity.’

<sup>15</sup> Also referred to by the title ‘European Union.’ *EC Bulletin Suppl.* 1/76.

<sup>16</sup> *Id.*, at 26.

<sup>17</sup> (Consolidated) Treaty Establishing the European Community [TEC]. Article references are to the numbering system in effect since the Amsterdam Treaty.

ture) through the Maastricht Treaty.<sup>18</sup> This breakthrough, however, also brought a clear decision to disconnect cultural identity and citizenship – the fact of two separate articles shows as much. The determination seems to have been but momentary however, and is present only in the text of the Treaty itself, since the link of culture and citizenship seems to have become more central again in recent years.

### *European Citizenship, or the Question of Instrumentality*

The concept of European citizenship, though present in Community discourse since 1969,<sup>19</sup> assumed a legal character only through the introduction, through Maastricht, of TEC arts. 17–22 (CT art. I-10). Three elements in particular were considered important in creating European citizenship: freedom of movement, political rights and 'identification with Europe.'<sup>20</sup> The first two of these aims are, in fact, reflected in the TEC articles: freedom of movement is guaranteed in art. 18(1); the right to vote in municipal and European Parliament elections in arts. 19(1), 190(4) and 19(2) respectively; the right to information regarding Union institutions in one of the official languages of the Union in art. 21 and a related right to access to documents in art. 255; the right to petition an Ombudsman or the European Parliament in arts. 21, 194 and 195. The right to diplomatic protection by any member-state in countries without representation by one's own state is included in art. 20.<sup>21</sup> However, the rights of Union citizens reach farther than those enumerated in these articles. As per art. 17(2), European citizens enjoy all rights 'conferred by the Treaty' – i.e. all rights through secondary law issued on the basis of the Treaty, or all those available under Union law, including those found in the (soon to be legally binding) European Charter,<sup>22</sup> as well as 'fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States' (TEU art. 6(2)).

Commentary on all elements of European citizenship, from the idea to its content and significance has covered a wide range, but can generally be

<sup>18</sup> Treaty on European Union [TEU].

<sup>19</sup> Third General Report on the Activities of the European Union 527 et seq. (1969).

<sup>20</sup> Stefan Kadelbach: Union Citizenship 9, *Jean Monnet Working Papers*, 9/03 (2003). Available at: <http://www.jeanmonnetprogram.org/papers/03/030901-04.pdf>. See also the Tindemans Report already discussed, *supra* note 15.

<sup>21</sup> In light of the requirements set out in CT art. III-127 there is hope that this right will soon become a meaningful one.

<sup>22</sup> But see Case T-54/99 *Maxmobil v. Commission* [2002] ECR II-313, where the Court of First Instance already referred to the Charter as a source of fundamental rights (para. 48).

grouped into two approaches: the first focuses on the rights and duties that accompany it; the second on its identity function. In particular, the former has assessed European citizenship in the context of fundamental rights; and found it a pale imitation of the some pre-existing notion of citizenship, one based, often unconsciously, on that of nation-states, as either a positive or negative example. In other words, an increased scope of rights to an expanded group of persons is urged, as well as the complete de-linkage of European citizenship from member-state nationality.<sup>23</sup> These assessments are, however, problematic. For one thing, even the assumption of European citizenship as a prerequisite for fundamental rights is precarious. A European citizen is an individual who holds the nationality of a member-state (TEC art. 17(1)). But, as Kadelbach discusses, 'holders of fundamental freedoms are all those upon whom the Community legal order has conferred such rights.'<sup>24</sup> For example, the right to free movement may be extended to nationals of non member-states<sup>25</sup> and denied European citizens;<sup>26</sup> the right to petition the European Parliament or the Ombudsman, for example, extends to all legal residents.<sup>27</sup> In the context of human rights more generally, instruments such as the Charter of Fundamental Rights and the ECHR extend rights to all individuals under the jurisdiction of the given state (except where stated otherwise). Thus, whatever human rights (as distinct from some citizenship rights) are afforded European citizens are extended to third-country nationals, both through the Community framework<sup>28</sup> and through regional and international instruments.<sup>29</sup> Also, the Amsterdam Treaty has added a number of rights based on criteria other than European

<sup>23</sup> See, e.g., Siofra O'Leary: *European Union Citizenship: the Options for Reform* 89 et seq. (1996); Jean Denis Mouton: *La Citoyenneté de l'Union: Passé, Présent et Avenir* 18 et seq. (1996); Helen Staples: *The Legal Status of Third Country Nationals Resident in the EU* 335 et seq. (1999).

<sup>24</sup> Kadelbach, *supra* note 20, at 7.

<sup>25</sup> See arts. 28, 31 and 36 of the EEA Treaty, OJ 1994 L1 for conditions applicable to EFTA member-states; and Case C-262/96 *Sema Sürül v Bundesanstalt für Arbeit* ECR [1999] ECR I-2685 for a discussion of the conditions that apply to Turkish nationals.

<sup>26</sup> See below.

<sup>27</sup> Curiously, a number of rights not exclusive to European citizens (right to good administration in art. II-101, right to access documents in art. II-102, right to petition the Ombudsman in art. II-103 and right to petition the European Parliament in art. II-104) have been kept under the heading of 'Citizens' Rights' in CT Part II, Title V; moreover, they are mixed in among rights truly limited to European citizens.

<sup>28</sup> E.g. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L180); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L303).

<sup>29</sup> E.g. the UDHR, ICCPR, ICESCR.

citizenship (see arts. 141, 153, 255, 286). Given that member-state nationality,<sup>30</sup> on the one hand, and human rights instruments, on the other, remain the main avenues of guaranteeing rights, the call for an extension of European citizenship in either of these directions<sup>31</sup> is an outcome of somewhat limited thinking – one based on existing realities, not on possibilities of development.

In light of the proliferation of legal statuses in Europe – e.g. (member-state) national, dual-national, European citizen, third-country national, resident, permanent resident – traditional notions of citizenship, based on the model of the nation-state, are not the standard against which to measure provisions on European citizenship.<sup>32</sup> The authors asserting that European citizenship does not go far enough seem to forget that the EU is not a nation-state, but an entity near the confluence of international, regional and national law. In terms of international law on nationality, the fact that member-states must provide diplomatic protection to each others' nationals is already an anomaly – despite the lack of guarantees for this right to individuals.<sup>33</sup> That they must mutually recognize decisions on the grant or removal of nationality<sup>34</sup> and that Community law may interfere in such matters<sup>35</sup> is even more unusual, since nationality has until recently served to determine membership in the political community of the modern welfare state. States have accordingly reserved to themselves the right to inspect grants of this status/legal relationship.<sup>36</sup> As such, nationality has not only been an important function of sovereignty, but also a sign of the national identity politics of the state.

<sup>30</sup> 'Nationality' is used here to define the bond between an individual and a state for purposes of international law; 'citizenship' determines the domestic content of that bond.

<sup>31</sup> See e.g. Álvaro Castro Oliveira: The Position of Resident Third-Country Nationals. In Massimo La Torre (ed.): *European Citizenship: an Institutional Challenge*. 1998. 185, 196. Compare CT art. III-265(2), which foresees a right to travel for third-country nationals, independent of European citizenship.

<sup>32</sup> See (Third) Report from the Commission on Citizenship of the Union, COM (2001) 506 final, at 7.

<sup>33</sup> See Kadelbach, *supra* note 20, at 28 et seq.

<sup>34</sup> See Case 369/90 *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria* [1992] ECR I-4239; and *Chen and Others v. Secretary of State for the Home Department* [2004] ECR not yet reported. See also TEU Declaration No. 2 on Nationality of a Member State (1992). The extension of the nationality of the Federal Republic of Germany to former East-German nationals is a concrete example.

<sup>35</sup> See Case C-192/99 *The Queen v. Secretary of State for the Home Department, ex parte Manjit Kaur* [2001] ECR I-1237, para. 19.

<sup>36</sup> See *Liechtenstein v. Guatemala* (Judgment, Second Phase), 1955 ICJ Rep. 4, 23 (1955).

In fact, considering that most citizenship rights are traditionally and in accordance with international law restricted to nationals,<sup>37</sup> the development of European citizenship has been spirited – and atypical of international practice. For example, the political community – circumscribed by state borders – is no longer linked to the territory in which rights may be exercised. Instead, the territory of rights spreads far beyond the territory of the community. Thus, member-state nationals enjoy a number of citizenship rights (free movement and residence, non-discrimination, etc.) throughout the Union that used to be limited to the territory of the state only. As a corollary, it is not only nationals who enjoy certain rights in the territory of the member-state, but a much larger group, extending, through the Long-Term Residence Directive<sup>38</sup> to third-country nationals legally resident in a member-state.<sup>39</sup> The citizenship-nationality link that formed the basis of the nation-state has thus been broken. Because of this development – and in a nod of good-bye to sovereignty – it is not the members of the given political community (the member-state nationals) that determine the content of the scope of applicable rights, but a supra-state entity, namely the EU.

The fact of citizenship rights, as such, with an extended geographical reach beyond the state is thus distinctly new. Moreover, despite early pessimism,<sup>40</sup> the effects of European citizenship have not been so insignificant. For one thing, in *Martínez Sala*<sup>41</sup> the Court determined that 'a national of a Member State lawfully residing in the territory of another Member State [...] comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship' (para. 61). In other words, the mere (legal) presence of

<sup>37</sup> There is likely an 'international minimum standard' of non-discriminatory treatment that must be afforded to non-nationals, subsumed into the general body of international human rights law. Richard B. Lillich: *The Human Rights of Aliens. Contemporary International Law*, 49–56 (1984). However, the 'sartorial tastes of the State involved' still determine the extent of non-national protection. *Id.*, at 122. Accordingly, some European states have extended social and local voting rights to non-nationals, others haven't.

<sup>38</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2003 L16).

<sup>39</sup> A whole thread of literature on European citizenship focuses on its possible development as a means of granting citizenship rights through member-state residence, not nationality. See Norbert Reich: *Union Citizenship – Metaphor or Source of Rights?* Vol. 7, Nr. 1, 2001. 4, 15. *European Law Journal*, 4, 15 et seq. (2001).

<sup>40</sup> See, inter alia, Hans Ulrich Jessurun d'Oliveira: *European Citizenship: Its Meaning, Its Potential*. In Renaud Dehousse (ed.): *Europe After Maastricht: An Ever Closer Union?* 126, 147 (1995); Catherine Barnard, Article 13: *Through the Looking Glass of Union Citizenship*. In David O'Keefe and Patrick Twomey (eds.): *Legal Issues of the Amsterdam Treaty*. 1999. 375.

<sup>41</sup> Case C-85/96 *Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691.

a European citizen in another member state is enough for Community law to apply: the scope of national legislation in which Community law principles may enter has been expanded significantly.<sup>42</sup> With regard to rights, it is worth considering that there are no other regions in the world where the right to free movement beyond and between state borders or the right to equal treatment with nationals of other states exists.<sup>43</sup> In a number of decisions, moreover, the ECJ has given both principles wide interpretations.<sup>44</sup> In the recent *Chen* case, the Court determined that the (third-country national) mother of a minor child holding the nationality of Ireland – born in the member state exactly so both could reside in the UK – had a right to residence in the UK, on the basis of the child’s right to free movement and to residence under TEC art. 18, in conjunction with Council Directive 90/364.<sup>45</sup> The case is noteworthy not only because of the extended chain of entitlements, but also because the child’s right residence in the UK is clearly based only on its European citizenship (see paras. 26–27).

With regard to equal treatment, in *Bickel and Franz*<sup>46</sup>, for example, the Court determined that the right of minority individuals in a given state to use their language in criminal proceedings must be extended to non-nationals speaking the same language, on the basis of the principles of free movement and non-discrimination. The opinion of Advocate General Jacobs in that case makes the basis of the decision clear: ‘[t]he notion of citizenship of the Union implies a commonality of rights and obligations uniting Union citizens by

<sup>42</sup> See also Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department* [2001] ECR I-7091 (‘since [...] Union citizenship has been introduced into the EC Treaty [...] Article 18(1) EC has conferred a right, for every citizen, to move and reside freely within the territory of the Member States,’ para. 81).

<sup>43</sup> But see discussion of possible exceptions below. (The relevant directives repealed by Directive 2004/38/EC, discussed below, also included a whole litany of limitations and conditions.)

<sup>44</sup> In the context of freedom of movement, see Case C-348/96 *Criminal Proceedings against Donatella Calfa* [2000] ECR I-11; Case C-413/99 *Baumbast*, supra note 42. See also the Advocate General’s opinion in Case C-224/02, *Heikki Antero Pusa v. Osuuspankkien Keskinäinen Vakuutusyhtiö* (not yet reported), para. 22 (‘subject to the limits set out in Article 18 itself, no unjustified burden may be imposed on any citizen of the European Union seeking to exercise the right to freedom of movement or residence.’) But see Case C-378/97 *Criminal Proceedings against Wijsenbeek* [1999] ECR I-6207. In the context of the principle of non-discrimination, see Case C-281/98 *Angonese v. Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139 (extending the prohibition to private actors).

<sup>45</sup> Case C-200/02 *Chen and Others*, supra note 34.

<sup>46</sup> Case C-274/96 *Criminal Proceedings against Bickel and Franz* [1998] ECR I-7637.



a common bond transcending Member State nationality' (para. 23).<sup>47</sup> This reasoning has, moreover, been extended to the realm of social rights. Specifically, in the *Grzelczyk* case<sup>48</sup> the Court determined that a member-state could not refuse student benefits to a student who is a national of another member-state solely on this basis, since such action constitutes discrimination under art. 12. The decision is interesting also because the Court specifically states (in paras. 34–36) that the introduction of European citizenship makes this outcome possible. In other words, a conscious choice was made here to expand the scope of European citizenship.<sup>49</sup>

Moreover, the possibility that nationality will give way 'to the residence principle in relation to Union citizens' is certainly present.<sup>50</sup> In a significant step in this direction, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,<sup>51</sup> first suggested by the Commission's Third Report on Citizenship of the Union, clarifies and adds to the rights of European citizens with regard to residence in another member state. As rec. 1 states, 'citizenship of the Union confers on every citizen of the Union the primary and individual right to move and reside freely within the territory of the Member States.' Yet, his right – encompassed by one of the fundamental freedoms – has been attached to a number of limitations, financial, administrative and legal, and differentiated by categories, such as 'worker' or 'student'.<sup>52</sup> Under the terms of this instrument, however, European citizens – as such – have the clear right to exit their member state (art. 4) and enter another (art. 5) with valid

<sup>47</sup> Opinion of Advocate General Jacobs [1998] ECR I-7637. The Advocate General also distinguishes the case from Case 137/84 *Ministère Public v. Robert Heinrich Maria Mutsch* [1985] ECR 2681, where the right to use a given language in court proceedings emanated from a specific Regulation.

<sup>48</sup> Case 184/99 *Rudy Grzelczyk v. le Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR 6193.

<sup>49</sup> See also discussion of case law on citizenship in Catherine Jacqueson: Union Citizenship and the Court of Justice: Something New Under the Sun? *European Law Review*, Vol. 27, Nr. 3, 2002. 260, 268. A comparison with Advocate General Alber's opinion in the case at issue, where he attempts to subsume Mr. Grzelczyk into the category of 'workers' and relies only hesitantly on art. 17 rights shows the more traditional route the Court could have taken.

<sup>50</sup> Kadelbach, *supra* note 20, at 33.

<sup>51</sup> OJ 2004 L229.

<sup>52</sup> Family members (as per art. 2(2)), whether European citizens or not, also enjoy the rights enumerated. In fact, the right of family members, once acquired indirectly through the European citizen, are in many cases retained even after the family ties have been broken (see art. 12). (The status of family members has been the subject of a number of ECJ decisions, most notably Case C-413/99 *Baumbast*, *supra* note 42.)

identity cards only. The right, while not new, is now clearly granted European citizens in a piece of legislation. Alas, it is still not absolute, since possible restrictions on the grounds of public-policy, security and health remain (see art. 27–29); still, the potential scope of such restrictions have been considerably curtailed, while a number of procedural safeguards (including redress procedures) have been added (see arts. 30–33).

As per arts. 6 and 7 moreover, individuals have the right to residence in other member states: without any conditions for a period of three months and on the basis of strictly limited conditions (and administrative formalities, as per art. 8) for periods extending beyond three months. Individuals are, furthermore, entitled to permanent residence in any member state in which they have legally resided for 'a continuous period of five years' (art. 16(1), but see shorter period, as per art. 17). As the Preamble states, this right 'would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion' (rec. 17). In other words, permanent residence is a means to the end of identification with European citizenship (and hence, the development of solidarity among European citizens.) Respect for 'integration' into host member-state society (see Preamble recs. 23 and 24) as the basis for protection against expulsion, in turn, reflects a concern with identification with another member-state. As per art. 28(1), any expulsion decision must take into account not just length of residence, state of health, economic and family ties, but also 'social and cultural integration into the host Member State and the extent of his/her links with the country of origin.' It seems that the possibility of attachment by European citizens to more than one member-state (culture and society) is acknowledged.

And what about obligations? Strictly speaking, we still cannot speak of the direct ones – but there are counterparts to obligations, suggesting that European citizenship may soon come with duties. One example of such a counterpart is that, as a consequence of the European arrest warrant introduced in 2002,<sup>53</sup> the principle of international law whereby states may refuse the extradition of their own nationals (enshrined in a number of Constitutions, e.g. art. 16(2) of the German *Grundgesetz*) – in light of the personal jurisdiction of states over their nationals – has been invalidated in the context of the Union. Thus, European citizens must now be surrendered to another member-state, upon request, with only few exceptions. Though a number of conventions relating to extradition had been in place among member-

<sup>53</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L190).

states,<sup>54</sup> the new practice (as of January 1, 2004), based on the principle of 'mutual recognition' (see Framework Decision art. 1(1)), has limited the grounds for refusal of surrender to the grounds listed in arts. 3 and 4. All grounds are of an administrative and judicial nature; and are independent of traditional sovereignty concerns. Only Preamble rec. 12 makes any reference to the application of the 'constitutional rules' of member-states, but curtails these to a very limited area. That said, courts are thus far proving quite creative in finding reasons to refuse surrender.<sup>55</sup>

The Constitutional Treaty, in turn, refers to citizenship and citizens in almost mantra-like fashion (e.g., arts. I-1, I-3(2), I-10, I-45-I-47, all of Title V of Part II and all of Title II of Part III.) No surprise, perhaps, considering it is presented (like all constitutions) as a document in the name of the people of the respective political entity. (That in the case of the EU the document also expresses the will of the member states does not mean diminished importance in this respect.) The newly central place of the citizen can be glimpsed most clearly in the articles declaring the Union a 'representative' and 'participatory' democracy (arts. I-46 and I-47, respectively). Though the process of citizenship – or an activist conception thereof, in addition to the identity-linked function discussed below – was of central concern from the introduction of the citizen into European law, there is a change of focus here. TEC art. 191 had opened up the possibility of a European politico-legal space – and the eventual emergence of a European *demos* – through its reference to 'political parties at European level.' The activist concern referred to above was present in the language declaring that such parties contribute to 'expressing the political will of the citizens of the Union' while an identity function was present in their role in 'forming a European awareness.' Still, not much happened until the Nice Treaty (2001), when a paragraph was added allowing for the drafting of regulations governing such parties. The requisite regulation was quickly adopted,<sup>56</sup> but has not resulted in significant development – parties 'continue to suffer from a series of 'deficit-gaps' which make it abun-

<sup>54</sup> In particular, European Convention on Extradition (1957) and Protocols; Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union (OJ C78); Convention of 27 September 1996 relating to extradition between the Member States of the European Union (OJ C313).

<sup>55</sup> See, i.e., Le tribunal de Pau émet une interprétation restrictive du mandat d'arrêt européen. *Le Monde*, June 2, 2004.

<sup>56</sup> Regulation 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding (OJ 2003 L297).

dantly clear that formal-legal developments [...] need to be paralleled by forms of structural and psycho-emotional linkage with European citizens.<sup>57</sup>

The Constitutional Treaty attempts to make a few of these changes, however small. One, the stress on the Union as not only representative, but also participatory in character announces a more direct link between itself and individuals. The best example for this is the only new citizenship right introduced, under art. I-47(4): the right to initiate Commission law-preparation, through the procedure of a 'citizens' initiative.' The other paragraphs of that article suggest a generally more inclusive approach, with references to 'dialogue' with 'civil society' and 'representative associations' – though these do not have the legal underpinning of European laws the citizens' initiative does. Another change is the repeated emphasis in art. I-46 on the ways in which the Union is 'representative' and 'accountable,' as well as the newly added 'right to participate' listed in paragraph three.<sup>58</sup> Thus, political parties are now only one means of representation, not the means to 'integration' – in fact, they are now a means to 'European political awareness,' not 'European awareness,' generally speaking. One can, of course, read these modifications as a downgrading of the role of the political parties introduced by the Maastricht Treaty. In light of the stellar symbolic rise of the European citizen – now one of the two pillars of the European constitutional enterprise – however, they are better read as normalization. In other words, European political parties are (hoped to be) no longer the anomalies they were upon their introduction.

Despite the symbolic role of the European citizen in the Constitutional Treaty, her rights and obligations have seen no significant change. Still, further development has come in indirect guise, and somewhat surprisingly, through the domestic law of member-states. Germany, for example, now allows nationals of other member-states to keep their original nationality at naturalization, on the condition of reciprocity, while third-country nationals must give theirs up (special circumstances notwithstanding), as per AusIG §87(2).<sup>59</sup> In Italy (as well as a number of other member-states) European citizens have access to Italian nationality after a shorter period of residence (four years) than third-country nationals (ten years), as per Legge 5 febbraio 1992,

<sup>57</sup> Stephen Day and Jo Shaw: *Transnational Political Parties*. In Richard Bellamy, Dario Castiglione and Jo Shaw (eds.): *Making European Citizens: Strategies for Civic Inclusion*. 2005, forthcoming.

<sup>58</sup> Compare art. II-72, which includes no such right. In fact, the placement of the right in Part III and its omission among the 'fundamental rights' is striking. (The active and passive voting rights included in arts. II-99 and II-100 cover slightly more limited ground.)

<sup>59</sup> See also StAG §§ 4(3) and 29, in conjunction with AusIG § 87.

no. 91, art. 9(1)(d).<sup>60</sup> The legal effects can spread beyond laws of nationality, however. In Hungary, for example, the proposed Minority Rights Act submitted to Parliament in March 2004 (amending and revising the 1993 Act),<sup>61</sup> extends personal application to European citizens, among others (§28).<sup>62</sup> It is indeed the case that 'EU nationalities are less exclusive in relation to each other than they are to outside nationalities'<sup>63</sup> – on the basis of both European and domestic law.

As for the realm of possibilities, Nic Shuibhne, for example, argues in the context of extended language rights that '[t]o fulfill the idea of citizenship in real terms, the expansion of associated rights must reflect the integrity of various identity-forming characteristics.'<sup>64</sup> The way is thus open for the ECJ to interpret European citizenship as a 'whole' concept, its rights capable of reflecting and protecting existing identities. The Court has, in fact, delivered a number of decisions protecting some element of individual identity, albeit always indirectly. In the *García Avello* case,<sup>65</sup> for example, the Court determined that a member-state could not refuse an application to change the surnames of resident dual member-state nationals 'in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State.' The reasoning of the Court was based on a reaffirmation that 'citizenship of the Union is destined to be the fundamental status of nationals of the Member States' (para. 22); through this status, nationals of the member-states in the same situation may, within the scope *ratione materiae* of the EC Treaty, enjoy the same treatment in law irrespective of their nationality (para. 23).<sup>66</sup>

On this basis, the Court could have found that the principle of non-discrimination required dual-nationals to be treated in accordance with the law of

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<sup>60</sup> The common practice in Italy of sub-dividing foreigners into *comunitari* and *extra-comunitari* (generally on the basis of skin color and/or accent, rather than nationality) is a less obvious example of indirect effects.

<sup>61</sup> 1993. évi LXXVII. törvény a nemzeti és etnikai kisebbségek jogairól. *Magyar Közlöny*, 1993/5273.

<sup>62</sup> T/9126 számú törvényjavaslat a kisebbségi önkormányzati képviselők választásáról, valamint a nemzeti és etnikai kisebbségekre vonatkozó egyes törvények módosításáról.

<sup>63</sup> Mayer and Palmowski, *supra* note 6, at 591.

<sup>64</sup> Niamh Nic Shuibhne: EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights Nr. 45, 2002.

<sup>65</sup> Case C-148/02 *Carlos García Avello v. État Belge* [2003] not yet reported.

<sup>66</sup> See also Case 388/01 *Commission v. Italy (Museum Entry)* [2003] ECR 721 (advantageous entry rates for province/town residents only is discriminatory to nationals of other member-states.) (The Court's reliance on the free movement principle, not European citizenship, to bring the matter within the scope of Community law is also noteworthy.)

the state in which they reside, instead of determining that the law of another member-state could be imported into the state of residence. However, the Court decided that the situation of a dual-national was different from that of a national, due to possible administrative difficulties (paras. 36–37). The final result, then, is a boost for individual cultural identity, on the basis of bureaucracy.<sup>67</sup> But what if the Court had gone a different route? What if, as Advocate General Jacobs argued back in 1993,<sup>68</sup> the Court had decided that an inability to use one's name, in accordance with one's own tradition, in another member state constituted a loss of 'dignity, moral integrity and sense of personal identity'<sup>69</sup> and that such treatment, in itself, constituted discrimination when compared to the nationals of the given member-state, whose names were respected? Or, that such treatment could be a hindrance to freedom of movement, since individuals presumably do not enjoy their personal identity being tampered with, and may consider such a possibility when deciding whether to exercise this particular freedom?

In this connection, the inadequacies of rights protection at the Community level come to the fore. Despite the ECJ's announcement of a role for human rights in Community jurisprudence as far back as 1974,<sup>70</sup> it took 26 more years for a Charter of Fundamental Rights to be drawn up. Though the inclusion of this Charter in the Constitutional Treaty, in Part II, gives the former binding legal force and thereby places fundamental rights squarely at the heart of Community jurisprudence – and despite the foreseeable Union accession to the ECHR (see CT art. I-7, in conjunction with ECJ Opinion 2/94),<sup>71</sup> problems remain, particularly in the area of cultural rights and in the closely related question of minority rights.<sup>72</sup> Both topics are too complex

<sup>67</sup> See also Case 168/91 *Christos Konstantinidis v. Stadt Altensteig Standesamt* [1993] ECR I 1191 (finding that the individual was entitled to a given transliteration of his name, on the basis of the 'inconvenience' diverse spellings may cause and the effect they may have on freedom of establishment.)

<sup>68</sup> See also the ECtHR decision *Burghartz v. Switzerland* (Judgment of 22 February 1994), Series A No 280-B 28, para. 24; and ICCPR art. 24(2).

<sup>69</sup> Para. 39 of Advocate General Jacobs' opinion in Case 168/91, *supra* note 67.

<sup>70</sup> Case 4/73 *Nold v. Commission* [1974] ECR 491 (identifying 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories' and the common constitutional traditions of member-states – whatever these may be – as the source of fundamental rights principles; para. 13).

<sup>71</sup> Opinion 2/94 *European Convention* [1996] I-1759.

<sup>72</sup> See Gaetano Pentassuglia: The EU and the Protection of Minorities: The Case of Eastern Europe, *European Law Journal*, Vol. 12, Nr. 3, 2001, 3. for an early evaluation, as well as the contributions in Gabriel N. Toggenburg (ed.): *Minority Protection and the Enlarged European Union: The Way Forward*. 2004, for a thorough examination.

fully to present here, so only a few words will do for our purposes. In the context of the former, Community (or, for that matter ECHR) law has little relevance – there is no such right – despite the abundance of general references to 'Union [...] respect' for 'cultural, religious and linguistic diversity'.<sup>73</sup> As for minority rights, a reference to respect for 'the rights of persons belonging to minorities' did, finally, find a place among the values of the Union (CT art. I-2), but is not truly followed up on later in the treaty.<sup>74</sup> One could perhaps forgive the Union for not addressing these matters for reasons of competence and political prudence if it weren't for the constant pre-occupation with and instrumentalization of all kinds of identity: for an entity that increasingly affects the cultural policies of its member-states and urges increased cross-cultural interaction – while considering 'diversity' a value and an objective – a disregard for such questions is out of place.

In fact, the Commission and Parliament have been active in the areas of both cultural and minority rights, without much result.<sup>75</sup> During the preparation of the text on Union citizenship in 1992, for example, the Commission proposed an article stating that '[e]very Union citizen shall have the right to cultural expression and the obligation to respect cultural expression in others'.<sup>76</sup> The necessity of such an article was explained by the principle of the dignity and diversity of individuals and was regarded as a corollary of Community competence in cultural matters. In other words, the Commission tried to link a right to cultural expression both to European citizenship and to the Community's newly-gained cultural functions.

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<sup>73</sup> CT art. II-82. See also arts. I-3(3) and III-280. There are, however, references to language rights in Community law. See Case 137/84 *Mutsch*, supra note 47; TEC art. 21.

<sup>74</sup> E.g. bases of discrimination to be combated by European measures (art. III-124) do not include language and membership in a national minority, among others, though these are prohibited grounds of discrimination under art. II-81. Or, while regions have a constitutionally protected place in the EU system (art. I-5(1)), as well as a place in its structure through the Committee for the Regions, minorities have no such protection. A proposal for a Committee of National and Ethnic Minorities was distinctly rejected during the Convention process. See CONV 580/03 (Contribution of József Szájer, February 26, 2003).

<sup>75</sup> See also: Call for proposals for European Commission backing involving actions in favour of promoting and safeguarding regional or minority languages and cultures, OJ 1995 C322; Support from the European Commission for measures to promote and safeguard regional and minority languages and cultures, OJ 2000 C266. See also Parliament Resolution on Linguistic and Cultural Minorities in the European Community, OJ 1994 C61.

<sup>76</sup> *EC Bulletin Suppl.* 2/91, 85, 86.

### *Identity Conundrums*

We are thus back to the question of identity and citizenship. As discussed, the last aim of the European citizenship project in 1992 was an 'identification with Europe': the symbolic aspect of citizenship already identified by the Tindemans Report. Though there is no reference to this aim in the actual articles of any treaty – is it any wonder? – the concern is certainly behind many Community acts.<sup>77</sup> As Prodi stated a few years ago:

"We have created a customs union [...] built an economic and monetary union [...] laid the foundations of a political union [...]. [W]e need now [...] a union of hearts and minds, underpinned by a strong shared sentiment of a common destiny – a sense of common European citizenship. We come from different countries [...] speak different languages [...] have different historical and cultural traditions. And we must preserve them. But we are seeking a shared identity – a new European soul."<sup>78</sup>

This statement fits well with the view, expressed in art. 17(2), that European citizenship is a process rather than a thing ready-made.<sup>79</sup> Whatever its contents then, European citizenship is a concept oriented toward a sometime, future conception of 'common destiny.' This has been reiterated in the Constitutional Treaty also (Preamble, rec. 3.) But a sense of common destiny is an element of collective identity. How can it also be the basis for it? The underlying reasoning is thus a tad circular: 'while identification with a „European” consciousness can be said to derive from some sort of shared loyalty, this affinity is equally necessary for its continued fabrication.'<sup>80</sup> This is something the Commission seems to have recognized. In a 2004 Communication on cultural and educational policies – which suspiciously abounds with references to European citizenship<sup>81</sup> – a strengthened sense of 'shared European cultural val-

<sup>77</sup> See Siofra O'Leary: *The Evolving Concept of Community Citizenship*, 1996, chap. 1 for a survey of considerations taken into account during the preparation of the citizenship articles. See also the link drawn between culture and citizenship in the context of the Kaléidoscope programme, Decision No. 716/96/EC of the European Parliament and of the Council of 29 March 1996 establishing a programme to support artistic and cultural activities having a European dimension (OJ 1996 L99).

<sup>78</sup> Romano Prodi, addressing the European Parliament (September 14, 1999.) *EU Bulletin*, 9/1999 § 2.2.1.

<sup>79</sup> See also Making Citizenship Work: Fostering European Culture and Diversity Through Programmes for Youth, Culture, Audiovisual and Civic Participation, Communication from the Commission, COM(2004)154 final, 2.

<sup>80</sup> Nic Shuibhne, *supra* note 64, at 130.

<sup>81</sup> Communication 154, *supra* note 79, at 2–7.



ues<sup>82</sup> is the hoped-for basis for a 'developing European identity,'<sup>83</sup> which could, in turn, provide a deeper basis for citizenship than exists at present. Thus, it is hoped that a discovery of existing commonalities, coupled with a sense of participation in the European project will be enough to make European citizenship matter. The claimed representative and participatory nature of the Union is, in turn, to help the formation of 'political awareness,' in part through political parties at the European level – which could affect the European identity that informs citizenship. Seemingly a two-pronged attack on perceived indifference to the European project, then – but what if the cycle never takes off?

Unsurprisingly, the symbolic element of European citizenship has also captured the imagination of many commentators who also seem to agree that law can be a means to creating identification, and constitutes the second main line of commentary.<sup>84</sup> Again, the example of the nation-state is not far in the background here;<sup>85</sup> though the authors in question generally assume they are going past the national, since they rely on core values rather than a common culture as the basis for the collective identity to be developed.<sup>86</sup> An 'overlapping consensus that results in a political conception of justice, shared through a political community'<sup>87</sup> does not, however, create a shared identity. For one thing, there is not yet a European political community – despite elections to the European parliament, European political parties and European citizenship, few EU citizens see themselves as joined in a shared political space;<sup>88</sup>

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<sup>82</sup> Id., at 9.

<sup>83</sup> Id., at 5. (Emphasis in original.)

<sup>84</sup> See Jürgen Habermas: Citizenship and National Identity: Some Reflections on the Future of Europe. In Ronald Beiner (ed.): *Theorizing Citizenship*, 1995. 255; Neil MacCormick: Democracy, Subsidiarity and Citizenship in the "European Commonwealth" *Law and Philosophy*, Vol. 16, 1997. 333, 342. See also Carlo Gamblerale: European Citizenship and Political Identity, *Space and Polity* Vol. 1, Nr. 37, 1997. Percy B. Lehning: European Citizenship: Towards a European Identity? *Law and Philosophy*, Vol. 20, 2001. 239.

<sup>85</sup> Or, in some cases, it is clearly stated: 'the concept of liberal democratic citizenship developed for a nation-state, should be extended.' Lehning, id., at 257.

<sup>86</sup> E.g. Habermas, supra note 84; Deirdre Curtin: *Postnational Democracy: The European Union in Search of a Political Philosophy*, 1997.

<sup>87</sup> See Lehning, supra note 84, at 250.

<sup>88</sup> In other words, there is not yet a European *demos*. See Ulrich K. Preuß: Prospects of a Constitution for Europe, *Constellations*, Vol. 3, 1995. 209, 214. Lehning, supra note 84, at 275; J.H.H. Weiler: The Constitution of Europe 346–347 (1999); see also *Brunner and Others v. the European Union Treaty (Maastricht)*, Bundesverfassungsgericht (2 October 1993) 1 CMLR 57 (1994). The reference in CT art. I-46 to the 'formation of European political awareness' is perhaps a sign that even Brussels recognizes its present nonexistence.

the member-state remains the container instead.<sup>89</sup> (A feeling of shared political conceptions is likely just as far away, as the acrimonious debate over the place of 'Christianity' in the Preamble of the Constitutional Treaty showed.) Moreover, even if such a political community existed, no institutional identity can, at present, compete with cultural or regional identities: the former does not inspire the emotive connection of the latter. The ability of cultural identity to order individuals' perception of reality through values, beliefs and traditions just doesn't extend in the case of a political identity through a wide-enough area to be able to encompass all that the former does – my identity as a citizen may thus be important when voting in elections, but irrelevant when deciding which book to buy, what to eat or how to act at a wedding. In case of conflict between various levels of such a 'concentric circles'<sup>90</sup> approach then, it is not clear that the Community would win out over the member-state. Even if it could, why would the attachment to this particular family of values be stronger than to another? In other words, why the EU and not Greenpeace?

Finally – moving from the realm of theory to that of reality – such a social contract-based polity is no longer possible: the founding documents of the Community (and the Union) have not been voted on by the majority of European citizens. Even the Constitutional Convention was far from a participatory process, or one that created any (real) public discussion. Query whether the referendums announced in a number of member-states will replace the missing discussion. Even if they will, however, it will be a matter of *post factum* consideration – the terms have been set, after all. A continuous top-down determination of what shared political and social values are to be simply does not (necessarily) resonate with individuals, however. In that sense, the Constitutional Treaty is a sign of more of the same, despite the changes of arts. I-46 and 47 – there is not even the possibility of Habermasian constitutional patriotism, unless one can identify with the process of late night bargaining that has emerged as an essentially European procedure. This is especially true if touted values seem to be guided (and even trumped) by pseudo-economic considerations: for the nationals of the new member-states, for example, the Community's proclamation of the principles of

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<sup>89</sup> See, e.g. Chris Rumford: European Civil Society or Transnational Social Space?, *European Journal of Social Theory*, Vol. 6, Nr. 1, 2003. 25, 33. arguing that European civil society is only one 'in-the-making'.

<sup>90</sup> Joseph Weiler: European Citizenship: Identity and Differentity. In La Torre, 1, *supra* note 31, at 17.

equality and dignity mean very little in light of the old member states' free movement policies, however temporary.

For these reasons, Prodi's reliance only on 'the core values we all share: peace and stability; freedom and democracy; tolerance and respect for human rights; and solidarity and social justice'<sup>91</sup> as the basis for the 'soul' the Community is searching for is likely not sufficient. In fact, any attempt at manufacturing one shared feeling of belonging, to a single European entity, on any basis, is likely to fail when faced with the 'axiomatically integrated' identities of most individuals today.<sup>92</sup> Simply put, if a monolithic collective (especially national) identity was difficult to create in the 19<sup>th</sup> century, the technologies that have emerged since that time would make such a project near-impossible today. A shared consciousness between different nationalities, peoples and groups could emerge, instead, from geographical proximity, collective history and experiences, common values and ambitions. As such, identification with the European project may be promoted, given a stable economic basis, through cooperation, solidarity, education, cultural and social ties – something the Commission seems to have grasped since 1992. In this sense, the Community is not only re-interpreting the function of nationality through the extension of citizenship rights beyond the nation-state community, but also transforming the role of a political entity in creating and guiding collective identity: traditional national identity creating policies can no longer be the model.

One manner in which European citizenship has, perhaps, fulfilled the hope for identification envisaged is that outlined by Mayer and Palmowski. Namely, it allows European citizens to live in any other member state, as equals with the nationals of those states. As such, European citizenship – the 'fundamental status of nationals of members states'<sup>93</sup> – goes a long way in giving concrete form to the myriad ways in which integration has affected the lives of individuals. In other words, Franz or Antonella can now say it is because they are European citizens that they can take an Easyjet or SkyEurope flight to Budapest to look for a job, or just sit around coffee houses, rather than because Directive XXXX/ZZ/EC says so. European citizenship is, as the authors above state, the '*sine qua non* for a meaningful European iden-

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<sup>91</sup> *Enlargement Weekly* February 11, 2002.

<sup>92</sup> Yasemin Soysal: Changing Boundaries of Participation in European Public Spheres. In Klaus Eder and Bernhard Giesen (eds.): *European Citizenship*, 159, 169, 2001.

<sup>93</sup> Rec. 3 of Directive 2004/38/EC, discussed in text.

city.<sup>94</sup> Whether identification as a European citizen will result in a sense of European identity is another question, however.

In fact, some sense of a European identity does seem to have emerged among individuals. Eurobarometer surveys, for example, regularly ask respondents about Europeaness: as of spring 2003, 57% of those asked in the old member-states felt to some degree European (3% felt exclusively European, 7% first European then their own nationality, 47% first their nationality then European).<sup>95</sup> In the new member-states, the run down was almost the same: 58% felt European to some degree (3% felt exclusively European, 8% felt European first then their own nationality, 47% first their own nationality then European).<sup>96</sup> In a more in-depth study, on the basis of surveys in ten cities (in six states), attitudes toward European identity were seen as compatible with national and regional identities and were 'associated to state-related identity.'<sup>97</sup> In other words, 'nation and Europe serve as complementing rather than competing sources'<sup>98</sup> for collective identity. The multi-level identity referred to by Prodi, and recognized by an increasing number of theorists as the way forward, may thus be in the making.<sup>99</sup> As for the quality of this European identity, a series of studies have shown that both civic and cultural aspects are present in its composition – and that there are significant differences by member-state, region, level of education and gender.<sup>100</sup> Furthermore, the official symbolism constructed by the Commission has had some effect, as individuals tend to associate the European flag, anthem and pass-

<sup>94</sup> Mayer and Palmowski, *supra* note 6, 592.

<sup>95</sup> Standard Eurobarometer 60 (Autumn 2003, Full Report) 27. Available at: [http://europa.eu.int/comm/public\\_opinion/](http://europa.eu.int/comm/public_opinion/)

<sup>96</sup> Candidate Countries Eurobarometer (Autumn 2003, Full Report) 71–72. Available at *id.*

<sup>97</sup> María Ros et al.: Who Do You Think You Are? Regional, National and European Identities in Interaction, Research Briefing Two 4 (July 2004). Available at: <http://www.sociology-ed.ac.uk/youth/docs/Briefing%202.pdf>. (Last visited January 20, 2005).

<sup>98</sup> Daniel Fuss: The Meaning of Nationality and European Identity Among Youths from Different Nations 13. Paper for the Workshop 'Political Cultures and European Integration' (European Consortium for Political Research, 2003).

<sup>99</sup> See, e.g. Rainer Bauböck: Citizenship and National Identities in the European Union, Jean Monnet Working Papers 4/97. Available at: <http://www.jeanmonnetprogram.org/papers/97/97-04-.html>; David O'Keefe and Antonio Bavasso: Fundamental Rights and the European Citizen. In La Torre 251, *supra* note 31, at 264–265; Preuß, *supra* note 88.

<sup>100</sup> Michael Bruter: On What Citizens Mean by Feeling 'European': Perceptions of News, Symbols and Borderless-ness. *Journal of Ethnic and Migration Studies*, Vol. 30, Nr. 1, 2004, 21, 36. See also the survey quoted above, where association with Europe emerged through: an automatic mechanism ('the country is in Europe,' nationals 'have EU passport'), identification based on pride ('in a common European culture' or 'shared political attitudes') and/or personal experience (travel, family, etc.) Ros et al., *supra* note 97, 3.

port, as well as the Euro with 'values of peace, harmony, co-operation', at the same time as perceiving the European project as 'non-national'.<sup>101</sup> Also worth noting, in light of persistent fears of a 'Fortress Europe,' is that European-ness tends to be seen through the lens of the disappearance of borders (both literal and symbolic) within Europe and their increased salience toward the rest of the world.<sup>102</sup>

### *Final Considerations*

So far so good – European citizenship has extended the reach of a number of citizenship rights beyond the nation-state, while the concept of a European identity, in whatever form, is an effort at supporting the development of a collective identity for an emerging political community. Moreover, the identity being developed is not the homogenous one of the nation-state, but one that relies on cultural diversity. Still, there seems to have been a recognition – albeit unsaid – that the extension of ever-more rights to an ever-larger group of people is not enough to engender the loyalty hoped for. As Weiler notes, 'citizenship is as much a state of consciousness and self-understanding and only in smallish part is translatable to positive law.'<sup>103</sup> In fact, rights and identity may, in the case of European citizenship, be at odds. In other words, if the (increasing) rights of European citizenship are extended to an ever larger group and are thereby rendered less and less exclusive, the border between 'ins' and 'outs' – a boundary necessary in some form or another to any concept of citizenship – becomes increasingly blurry. European citizenship then becomes a framework for certain rights in the spirit of international human rights and loses its link to a given political (or social, cultural) community. This may be a positive outcome from the view of rights: but one needs to recognize that their basis in a European citizenship that individuals identify with may be lost.

In fact, as already discussed, the Commission has come to see some developing European cultural identity as a prerequisite for a European citizenship that means more to individuals than it does presently. However, the instrumental development of a European culture that would 'challenge or even displace'<sup>104</sup> national identities – something the Commission aimed for a time – has been abandoned. Still, 'culture building' as a 'political objective' has not gone away in Com-

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<sup>101</sup> Bruter, id., at 30.

<sup>102</sup> Id., at 33.

<sup>103</sup> Weiler, supra note 90, at 4.

<sup>104</sup> Cris Shore: *Building Europe: The Cultural Politics of European Integration*. 2000. 21.

munity discourse.<sup>105</sup> Attempts at using the banner of culture to 'galvanize and mould public opinion'<sup>106</sup> in times of increased skepticism about the European project continue, since 'as political leaders recognize, the credibility of the European Union hinges on the development of a more tangible and coherent sense of shared identity among the peoples of Europe whose interests the Union aims to serve.'<sup>107</sup> The methods have changed, however, to the diversity-embracing, bottom-up formula we increasingly find post-Maastricht. The character of this bottom-up identity, emerging through increased interaction among individuals and groups and relying, in its very existence, on diversity is something wholly new; as is the laid-back role of the entity that aims to harness this collective cultural identity.

It is easy to imagine the ideal outcome of this new approach. As Smith discusses, a number of shared legal and political traditions/experiences, as well as cultural and religious heritages exist across Europe. 'Not all Europeans share in all of them [...] But at one time or another all Europe's communities have participated in at least *some* [...] to some degree.'<sup>108</sup> Such traditions are exactly what the Commission likely hopes individuals will discover. Along with the more rational shared constitutional values that Prodi mentioned, we could easily be looking at the basis for a European identity that respected existing cultural (including national) identities, while leaving open the possibility of emerging new ones.<sup>109</sup> In this sense, cultural identity would be regarded as the process it really is. At the same time, assuming certain other supra-national rights were added – consumer or environmental rights, for example, extended to all individuals<sup>110</sup> – a stronger civic basis for identification with the Union may emerge than exists presently. Perfect, no? Sure, if one is trying to re-create a more tolerant form of the national identity that came with the pairing of nationality and citizenship. But the EU is not a nation-state; and we are not in 1830.

An acceptance that citizenship – and accordingly European citizenship – can be multi-layered, and unhinged from the nation-state would serve com-

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<sup>105</sup> Id., at 15–26.

<sup>106</sup> Id., at 222.

<sup>107</sup> Id.

<sup>108</sup> Smith, *supra* note 7, at 70. These include humanism, romanticism and classicism in the arts; empiricism and rationalism in philosophy and the sciences; democracy, fascism and communism in politics; as well as Roman law and Judeo-Christian ethics. (There seems to be no assumption that some of these could serve as much to divide as to unite.)

<sup>109</sup> See also Bauböck, *supra* note 99, at 5.4.

<sup>110</sup> E.g. compare the language in CT art. II-97 with §18 of the Hungarian Constitution.

mentators as well as politicians well. Calls for (or accusations of) an 'overarching' European identity, somehow serving to cover other collective identities, <sup>111</sup> assume that the former will be like national identities – necessarily linked to a political community, partaking of the same characteristics and covering the same ground.<sup>112</sup> In a similar vein, a European identity based on diversity is not 'intellectual gymnastics',<sup>113</sup> but a recognition that no other basis for a European identity can exist.

As Waldron has discussed, cultures merge into each other – there is no clear boundary.<sup>114</sup> This is as true in temporal terms as in geographic ones. Thus, it is not some 'past' set in stone that provides the basis for any collective identity, but rather interpretations of it, as they function for the present and future.<sup>115</sup> How individuals view their heritages today is what determines how they feel about a given cultural identity, not the elements of the common culture. Thus, individuals may well decide that only some of the elements of the 'European experience' or perhaps none at all matter to them; or, that they have a great deal in common with neighboring countries and very little with those farthest from them. The 'European experience' is unlikely to be unified, but instead one influenced by existing identities and interpretations of the past. Accordingly, what or who is European for one may not be for another. This means that it is not only those with a 'European background',<sup>116</sup> what ever that is, that may or may not develop a sense of European identity. But it also means that some groups will have a more inclusive view of the European than others.

Cross-cutting identities, along with the multi-level identification discussed by the theorists of cosmopolitan citizenship will thus be an element of any European identity. However, it is more likely that national, European, as well as a multitude of cultural and other identities will (continue to) co-exist – and at times clash – than that one homogenous and over-arching iden-

<sup>111</sup> Shore, supra note 104, at 225. See also Soledad García and Helen Wallace: *European Identity and the Search for Legitimacy*. 1993. 172.

<sup>112</sup> See, e.g. Barber, who argues that '[t]he boundaries of Europe and its relationship with its putative citizens is shaped by the past' and that, accordingly, the Community is involved in an 'attempt to stimulate nationalist sentiment at a European level.' N.W. Barber: Citizenship, Nationalism and the European Union, *European Law Review*, Vol. 27, Nr. 3, 2002. 241, 256–257.

<sup>113</sup> Shore, supra note 104, at 126.

<sup>114</sup> Jeremy Waldron: Minority Cultures and the Cosmopolitan Alternative, *University of Michigan Journal of Law Reform*, Vol. 25, 1992. 751, 777–778.

<sup>115</sup> See Vikings? Such Friendly Folk, Say Textbooks, *The Observer* (April 13, 2003) for what can go wrong when new interpretations are introduced.

<sup>116</sup> Barber, supra note 112, at 258.

tity will encompass others. In fact, some dimensions of national and regional self-understanding will likely become more 'European', others less: the disappearance of national currency has not, for example, made member-states less national, but has certainly given a more European dimension to their economies. In other words, not only is any European identity unlikely to be homogenous geographically, it is also likely to vary in intensity depending on which element of cultural identity one examines. For these reasons, any emerging European identity will be less exclusive than traditional cultural identities, or the homogenous European identity the Commission flirted with for a period; and it is unlikely to be similar to existing national identities.

In fact, European identity may not even serve the legitimating function the Commission hopes for. In this context, Bruter's distinction between the 'cultural' and 'civic' nature of European political identity – the former expressing belonging to a particular group, the latter identification with a political structure (the EU) – is crucial.<sup>117</sup> For the citizens of the new member-states, for example, Union membership did not mean a sudden discovery of being European (because they were now European citizens); instead, it was an institutional confirmation of something many had felt all along. In fact, those asked generally express much stronger attachment to the idea of 'Europe' than to the EU, as institution.<sup>118</sup> And, even if theorists are unsure of the existence of a European identity, member-states have certainly determined that there is some commonality. No member state has attempted, for example, to assimilate the nationals of other member-states. Certainly, there are enough non-national European citizens residing in certain regions of certain member states to have a potential effect on identities. Unsaid though it remains, there seems to be a presumption that other European citizens are enough like 'us' not to be a threat to 'our' national or regional identity. (The contrast with the integration requirements for third-country nationals only confirms this point.) But who is to say that a bottom-up European identity will mesh with the one the Community could utilize to gain legitimacy for certain policies? Individuals may develop a European identity and still determine that Brussels should not govern certain matters. For example, one can feel European without agreeing that other European citizens should have

<sup>117</sup> Bruter, *supra* note 100, at 22.

<sup>118</sup> In 2003 only 44% of respondents had a 'very' (8%) or 'fairly' (36%) positive image of the European Union. (32% were neutral, while 19% had a 'very' or 'fairly' negative one. Eurobarometer 60, *supra* note 95, at 35. At the same time, 58% of respondents felt an attachment to 'Europe'. But see Bruter, *supra* note 100, at 37.



equal placement on organ donation lists as co-nationals – indeed the case under Community law.

The danger then, from the Community's (soon Union's) point of view at least, is that, along with the reconfiguration of citizenship rights and the citizenship-nationality link that has occurred, the rights-identity duality of citizenship will also come undone, leaving the EU in a vacuum between two non-existent pillars. On the other hand, a return to the pre-Maastricht attempt to emulate nation-building from an earlier time<sup>119</sup> is also not an answer. Forcing on individuals the idea that there are commonalities to be discovered and that these latter are justification enough for given policies – a kind of cultural consciousness-spreading exercise – is unlikely to have positive results.<sup>120</sup> The Community thus walks a fine line between instrumentalizing culture and identity for its own purposes and supporting them in the hopes that individuals will find meaningful commonalities.<sup>121</sup>

No political entity, however, can function without legitimacy in the eyes of the individuals that belong to it; so that European citizenship needs to develop in both the area of rights and that of identity. An emerging European identity – the multi-layered, fluctuating one already described – may help make European citizenship 'matter', but cannot substitute for missing political allegiance.

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<sup>119</sup> According to certain theorists, this period continues. See Shore, *supra* note 104.

<sup>120</sup> For plans along these lines, see *A People's Europe: Communication from the Commission to the European Parliament*, COM (1988) 331 final.

<sup>121</sup> The language of Communication 154, *supra* note 79, offers hints of both approaches.